

Lessons in Access to Justice: Racialized Youths in Ontario's Safe Schools

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Lessons in Access to Justice: Racialized Youths in Ontario's Safe Schools

Abstract

Access to justice is often equated with access to institutionalized dispute resolution processes, and the objective barriers that hinder such access—costs and delay most particularly—are commonly identified as the primary objects of reform efforts. In sharp contrast, when interviews and focus groups were conducted with racialized youths in Toronto regarding their experiences of access to justice in the context of school disciplinary matters, accounts of access to dispute resolution processes being impeded by costs and delay did not figure prominently. The interviews and focus groups revealed that many racialized youths scarcely ever considered accessing institutionalized dispute resolution processes largely because they lacked information that would enable them to "name" a potential legal problem, believed that "blaming" a powerful state actor was futile or would provoke retaliation, and had a deep skepticism regarding the ability of the legal system to dispense justice when "claims" are made. For the youths, understanding (as opposed to stereotyping), mutual respect, second chances, and the rule of law were the key features of access to justice.

Keywords

Discrimination in juvenile justice administration; School discipline--Law and legislation; Equality before the law; Toronto; Ontario. Safe Schools Act

Lessons in Access to Justice: Racialized Youths and Ontario's Safe Schools

JANET E. MOSHER *

Access to justice is often equated with access to institutionalized dispute resolution processes, and the objective barriers that hinder such access—costs and delay most particularly—are commonly identified as the primary objects of reform efforts. In sharp contrast, when interviews and focus groups were conducted with racialized youths in Toronto regarding their experiences of access to justice in the context of school disciplinary matters, accounts of access to dispute resolution processes being impeded by costs and delay did not figure prominently. The interviews and focus groups revealed that many racialized youths scarcely ever considered accessing institutionalized dispute resolution processes largely because they lacked information that would enable them to “name” a potential legal problem, believed that “blaming” a powerful state actor was futile or would provoke retaliation, and had a deep skepticism regarding the ability of the legal system to dispense justice when “claims” are made. For the youths, understanding (as opposed to stereotyping), mutual respect, second chances, and the rule of law were the key features of access to justice.

On assimile souvent l'accès à la justice à l'accès aux processus institutionnalisés de résolution des différends. En outre, on désigne communément les barrières objectives qui entravent cet accès – le plus particulièrement, les coûts et les délais – comme les principaux objets des efforts de réforme. En opposition flagrante, lorsqu'on avait organisé à Toronto des entrevues et des groupes de discussion auprès de jeunes appartenant à diverses ethnies au sujet de leur expérience avec l'accès à la justice dans le contexte de problèmes disciplinaires à l'école, les récits d'accès aux processus de résolution des différends bloqués par les coûts et les délais ne figuraient pas de manière prédominante. Les entrevues et les groupes de discussion ont révélé que de nombreux jeunes appartenant à diverses ethnies ont rarement même songé à accéder à des processus institutionnalisés de résolution de différends, surtout parce qu'ils n'avaient pas l'information qui leur permettrait de « nommer » un problème juridique potentiel, qu'ils étaient persuadés que critiquer un joueur gouvernemental puissant était futile ou provoquerait des représailles, et qu'ils éprouaient un scepticisme profondément ancré concernant la capacité du système juridique à administrer la justice en présence de « revendications » formulées. Pour les jeunes, la compréhension (plutôt que le recours à des stéréotypes), le respect mutuel, les secondes chances et le rôle du droit représentaient les principaux traits de l'accès à la justice.

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THE CONCEPTUAL TERRAIN OF ACCESS TO JUSTICE is highly variegated and cuts a large swath, from the ability to access formal dispute resolution processes to substantive conceptions of social justice. Legal professionals and access to justice reform projects often tend to the former, focusing on “access,” rather than “justice.” As such, access to institutionalized dispute resolution processes (*i.e.*, courts and other adjudicative bodies) is often approached as though it were the end in itself, and the objective barriers that hinder access to these processes—costs and delay most particularly—are targeted as the primary objects of reform efforts.¹ More efficient access to institutionalized dispute resolution processes thus becomes both the means and measure of enhanced access to justice.

But what visions of “access to justice” are held by those outside the legal profession—those who, within the accounts of access to justice told by legal professionals, are its subjects? How central is access to institutionalized dispute resolution processes to their conceptions of access to justice and what, in their experience, impedes their access to justice? “Community-Based Conceptions of Access to Justice,” a joint undertaking of the Canadian Bar Association Law for the Future Fund and the Law Commission of Canada, set out to explore these

1. Certainly not all legal professionals share a single conception of access to justice, but I argue that the strong association between access to dispute resolution and access to justice is the dominant conception.

questions.² One of the particular initiatives undertaken was based at York University. “Youth in Focus, Friends in Trouble: Justice, Access to Justice for Low-Income Marginalized Youths,” a research collaboration between York researchers and Friends in Trouble (FIT),³ a Toronto-based peer-mentoring project, sought to understand youths’ conceptions and experiences of access to justice in relation to two distinct but increasingly inter-related state systems: education and criminal justice.⁴

The vast majority of the youths who participated in the study identified as “Black” and virtually all were racialized.⁵ Most lived in the Jane-Finch area of Toronto—an area that has been widely represented in the media as rife with guns and gangs, low-income housing, poverty, and a raft of other social ills.⁶

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2. Funding for the project from the Canadian Bar Association Law for the Future Fund and the (now former) Law Commission of Canada is gratefully acknowledged. I am also grateful to the Law Commission of Canada for the opportunity to have been one of its Virtual Scholars, working in the area of access to justice.
 3. FIT is a non-profit organization that brings together youths from different communities, primarily in northwest Toronto (Jane-Finch), to work towards the common goal of making a difference in their lives. FIT was founded in 2004 by Jamal Clarke, a young leader in the Jane-Finch community in Toronto. The group is composed entirely of youths, and is built upon a framework of youth helping youth and leading by positive example.
 4. Professor Shelley Gavigan was the principal investigator on the project. Professor Frederick Zemans of Osgoode Hall Law School; Professor Carl James, Faculty of Education, York University; Glenn Stuart, then Director of the Community Legal Aid and Services Program (CLASP) at Osgoode Hall Law School; Salman Rana, a graduate of Osgoode Hall Law School; and I were co-investigators. Leanne Taylor, a graduate student in education, facilitated the focus groups and conducted the interviews. Lori Thomas, Steven Smith, and Ilana Luther provided invaluable assistance at various points in the project. While this paper is very much the result of our collective effort, any errors are my responsibility alone. In this paper, I focus on the access to justice themes that emerged in relation to the youths’ experiences of school and school discipline. The youths also spoke at length about their communities, their relationship with the police, and the nature and quality of their education. Some of the youths also spoke about their experiences with lawyers, judges, and the criminal justice system.
 5. I use the term “racialized” to denote the widespread practice in which a socially constructed “race” is ascribed to those who are identified as “non-white,” and in which those who are “white” are assumed not to have a “race,” or to have a “race” that is the norm or the referent point from which all others are ascribed deviant status. While those who are racialized differ from each other in many respects, all who are racialized experience racism. See “Women’s Experience of Racism” Fact Sheet, online: Canadian Research Institute for the Advancement of Women <http://www.criaw-icref.ca/indexframe_e.htm>.
 6. For more information about the Jane-Finch Community see “The Jane/Finch Hood,”

The youths who participated in the project spoke at some length about their communities. While most acknowledged that there were problems (many of which they attributed to the pervasive stereotyping that underpinned policing, schooling, and virtually all of their social encounters), they frequently spoke of the positive elements of their communities and challenged the accuracy of the media representations. As one youth explained:

Mainly Jane and Finch might be known as a bad area, but that's just judging a book by its cover. You're just hearing and you're seeing and you're judging. They hear Jane and Finch, whatever, whatever. And they see a bunch of guys in one of these neighbourhoods, so automatically they think gang. Or automatically they think we're out there doing something bad with some drugs or smoking or doing something illegal.⁷ (Interviewee 1)

While we were interested in exploring issues commonly associated with access to justice, including the barriers encountered by those seeking to access institutionalized dispute resolution processes, we were also interested to learn, from the youths' points of view, what access to justice means to them and what gets in the way of its realization. In this latter regard, we were particularly influenced by the challenge posed to the legal profession by Janice Gross Stein and Adam Cook. In a paper prepared for the Law Society of Upper Canada's Access to Justice for a New Century: The Way Forward symposium, Stein and Cook argue that while access barriers like cost and delay account to some degree for public disengagement from the legal system, the deeper source of disengagement is to be found in the lack of a shared language—indeed a profound lack of engaged dialogue about the meaning—of justice.⁸ In their view, to increase access to justice, the legal profession must move beyond the proliferation of efficiency-seeking reforms to the judicial system. Stein and Cook contend that the bar should commit itself to the creation, through civic dialogue, of a shared language—a legal vernacular—of justice that both derives from, and enables, the active participation of citizens in the creation and dispensation of law. In order to create such a vernacular, Stein and Cook propose that we “move outside

online: CBC News: the fifth estate <<http://www.cbc.ca/fifth/lostinthestruggle/hood.html>>. See also “What is Jane-Finch?,” online: <<http://jane-finch.com/about.htm>>.

7. The excerpts from the focus groups and interviews have not been edited.
8. Janice Gross Stein & Adam Cook, “Speaking the Language of Justice: A New Legal Vernacular” in Julia Bass, W.A. Bogart & Frederick Zemans, eds., *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 163.

the framework of the law and engage broadly within the community on issues of social justice.”⁹

Our approach to engaging youths in conversations about justice was to ground the dialogue in experiences of school, school discipline, and related criminal justice matters. Our decision to ground the dialogue in these issues was informed by the insights of scholars such as Marc Galanter and Ursula Franklin, as well as Stein and Cook.¹⁰ The work of these scholars highlights how shifts in social context alter the terrain of access to justice, and displace the “frontier” of justice. One of the critically important shifts in social context which the youths who participated in our research project experienced was the educational reforms and associated practices designed to “get tough” on school violence that were introduced in Ontario in 2000. These reforms expanded the number of infractions which could lead to discipline, enhanced surveillance to identify potential violations, enlarged the power of teachers and principals to mete out discipline, and significantly increased the penalties attached to infractions. These changes resulted in a significant increase in the number of youths suspended and expelled from schools in Ontario. Importantly, from the youths’ point of view—a viewpoint supported by a sizeable body of research—these policies and practices had a disproportionate impact upon racialized students.¹¹

The youths in our project were strongly of the view that they experienced unfair and discriminatory treatment in relation to school disciplinary matters. They also recounted facing discrimination in their interactions with police officers, whose presence in schools and involvement in school disciplinary matters increased significantly after the introduction of the aforementioned reforms. According to the youths in our study, many teachers, principals, and police officers wrongly assumed that they were “bad” and up to no good, both at school

9. *Ibid.* at 174.

10. Marc Galanter, “Access to Justice as a Moving Frontier” in Bass, Bogart & Zemans, *supra* note 8, 147 [Galanter, “Access to Justice”]; Ursula Franklin, *The Ursula Franklin Reader: Pacifism As a Map* (Toronto: Between the Lines, 2006); and Stein & Cook, *supra* note 8.

11. See Ken Bhattacharjee, “The Ontario *Safe Schools Act*: School Discipline and Discrimination,” online: Ontario Human Rights Commission <http://www.ohrc.on.ca/en/resources/discussion_consultation/SafeSchoolsConsultRepENG/pdf>. Note that the research points to a discriminatory impact on both racialized students and students with disabilities. The youths in our project spoke about experiences of differential treatment based on race; none identified as having a disability.

and when they hung out with their friends in their neighbourhoods; that they were more interested in gangs and criminal activities than learning in school; and that they were not, and could not be, good students. The youths felt that such assumptions contributed to frequent disciplinary action and crippled their ability to get through school, let alone to do well.

Stein and Cook's analysis of the limited relevance of enhanced efficiencies for access to justice strongly resonated with the experiences and views of the youths who participated in the project. While some project participants did experience the frustrations posed by costs and delays, these experiences were relatively infrequent, in large measure because the youths rarely accessed institutionalized dispute resolution processes. Of the youths we interviewed, only one had engaged formal legal procedures to challenge school discipline. To the extent that they did speak to issues of costs and delay, it was exclusively in relation to instances where they had been pulled into the legal system as accused persons in criminal proceedings (in matters related both to school and beyond).

For the youths, a central justice concern was the "get tough" approach itself, the stereotyping underlying its unfair application, and the stereotyping that shaped their experiences of school. The youths' experiences and perceptions of unfairness in the application of school discipline were replicated, often in a more extreme form, in their interactions with the police. These were the experiences of injustice that mattered most in their everyday lives, and neither the law nor its institutions were seen as facilitating access to justice. Rather, for the youths, law was regarded as inextricably connected to power, and thus to the powerful. In their accounts, the law is simply what the powerful authority figures in their lives—the police officers and school administrators—command at any given moment. This lesson regarding law and power is repeated for them over and over again in their interactions with both school and criminal justice personnel. The law is not something that generates entitlements or protections; rather, it is invoked by those with power against those without. The youths describe a reality in which there is no rule of law—a reality in which the law does not operate to check state power or apply equally to all. Predictably, these experiences and understandings of the way law works lead to a deep skepticism regarding the ability of the legal system to dispense justice.¹² They also contrib-

12. Macdonald makes a similar observation regarding low income people and their distrust of the legal system. See generally Roderick A. Macdonald, "Access to Justice and Law Reform" (1990)

ute to a fear that if challenged, conventional authority can, and will, retaliate.

Another access to justice issue identified by the youths is the lack of access to relevant and timely information. So, for example, the youths have little idea of the scope of the legislative authority of their principals (*e.g.*, when a suspension was mandatory, what mitigating factors were to be considered), or of the procedures to challenge a disciplinary decision. This void of legal information contributes to the pervasive sense among the youths that power is unchecked by law.

While many of the youths saw access to information about what the law requires and of the rights it ostensibly confers as useful, others saw this as useless, and occasionally harmful. This view regarding the disutility of legal information was tied to their experiences of the seemingly unbounded—if not unlawful—power of state authorities. For them, powerful authority figures are unconstrained by law, and the ability to invoke knowledge of legal rights in an encounter with the police or school authorities does not alter the power dynamic in the relationship. Indeed, some project participants reported negative, even abusive, responses from the police when they asserted the rights that they had been told the law conferred upon them.

Given the youths' lack of information necessary to "name" a potential legal problem, their sense of futility, if not fear, of "blaming" a powerful state actor, and their lack of confidence in the legal system to dispense justice, it is hardly surprising that issues of costs and delay scarcely appear in the youths' accounts

10 Windsor Y.B. Access Just. 287 [Macdonald, "Access"]. See also Constance Backhouse, "What is Access to Justice?" in Bass, Bogart & Zemans, *supra* note 8, 113. Backhouse argues that variables such as Aboriginality, racialization, gender, disability, class, and sexual identity may impact upon one's ability to obtain justice (at 114). She reminds us of the historical exclusion of many groups from participation in the legal system and the continuing under-representation of many groups. This exclusion has, as Backhouse argues, "grave implications for access to justice. ... Groups that are disproportionately absent from our legislatures, legal profession and courts have less access to knowledge about their legal rights, and reduced capacity to redress complaints" (at 121-22). She also notes that members of these groups are often reticent to proceed and "distrust the capacity of our adjudicative tribunals and courts to recognize racist practices, and to implement remedies that would begin to rectify the situation" (at 123). The National Council of Welfare also notes that many poor people "have a strong sense of alienation from the 'justice' system, which they do not relate to and do not find just at all." See National Council of Welfare, *Legal Aid and the Poor* (Ottawa: Minister of Supply and Services Canada, 1995) at 31. See also Ian Morrison & Janet Mosher, "Barriers to Access to Civil Justice for Disadvantaged Groups" in Ontario Law Reform Commission, *Rethinking Civil Justice: Research Studies for the Civil Justice Review*, vol. 2 (Toronto: Queen's Printer, 1996) 637.

of access to justice. Costs and delay, the twin Trojan horses that access to justice reformers seek to slay, have little meaningful connection to justice for the youths who participated in our project. Stein and Cook suggest that “as the frontier of justice moves, so new language about its meaning develops. As citizens look for meaningful ways to engage around issues that matter to them in everyday living, the challenge is to move closer to the frontier of justice in the language that we as citizens speak every day.”¹³ What, one may ask, is the language of justice spoken by the youths? Understanding, mutual respect, and second chances—this is their language of justice.

I. METHODOLOGY

For the project, youths participated in both focus groups and individual interviews.¹⁴ These discussions occurred over roughly a one-year time span, from July 2006 to June 2007. Focus groups were held with six groups, ranging in size from four to seven youths (thirty-four youths in total participated). The youths ranged in age from sixteen to their mid-twenties, and while most were still in high school, a few had graduated or left school. While most groups were predominantly composed of young males, one group was constructed to include only female participants. The groups were facilitated by a doctoral student, Leanne Taylor, and in some instances, co-facilitated by a member of FIT or another community-based organization. As noted, most of the groups consisted of youths who lived near the intersection of Jane and Finch streets in Toronto, although two were conducted in other low-income neighbourhoods. A guide was developed for the facilitator identifying the key discussion points for the groups, but the specific discussion was very much directed by the youths who were participating. A lawyer or senior law student from Osgoode Hall Law School’s student legal aid clinic, CLASP,¹⁵ attended each of the focus groups.

13. See Stein & Cook, *supra* note 8 at 175.

14. FIT played a key role in recruiting participants. The organization disseminated information about the project and invited youths to participate. The research team approached a few other organizations about the project, and they also facilitated recruitment. Focus group participants were invited to take part in the interviews. Several youths also participated in a hip-hop workshop facilitated by Salman Rana, where they created raps about their experiences of school, school discipline, and the police.

15. CLASP works with organizations in the Jane-Finch community to provide legal representation and public legal education to community members and advance law reform initiatives.

The role of the lawyer/law student was to provide a community legal education function: embedded within the focus groups, the lawyer/law student was able to interject when necessary to correct misconceptions about what the law does or does not require, answer questions about the law, and provide a legal context for the discussion when necessary.

In addition to the focus groups, one-on-one semi-structured qualitative interviews were conducted with thirteen youths, many of whom had also participated in the focus groups. Again, the interviewer worked from a guide, which mapped out the broad areas to be covered.¹⁶ The guides for both the interviews and the focus groups directed the conversations to several issues commonly associated with access to justice (access to legal representation and to information about legal rights and procedures), to the youths' experiences of school, school discipline, and related criminal justice matters, and to their conceptions of access to justice.

As noted above and developed more fully below, school is a central site for the youths' experiences of justice/injustice. For not only do the youths spend a significant portion of time at school, it is also the key locus of their education. In view of this, our research focused on the lessons the youths learned about justice and law at school, particularly in the context of the reforms and practices designed to "get tough" not simply on violence, but also disorder.

II. CONTEXTUALIZING ACCESS TO JUSTICE

It is helpful to begin with the visual image of the pyramid of disputing developed several years ago by Galanter.¹⁷ The base of the pyramid is constituted by the sea of potential disputes in society; at the pinnacle is court-based adjudication. As one moves upwards towards court-based adjudication, a series of transformations are required to reach the pinnacle: a claim must be "named," another person or entity "blamed," and a formal legal "claim" initiated. In the lexicon of Felstiner,

16. The focus groups and interviews were transcribed and reviewed by all members of the research team to identify key themes. These themes were then discussed with our community partners to see whether and how these themes resonated with their understanding of the youths and their experiences.

17. Marc Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society" (1983) 31 *UCLA L. Rev.* 4 at 11ff.

Abel, and Sarat, a social encounter goes through a transformative process of naming, blaming, and claiming as it forms into a legal dispute.¹⁸ Each of these steps must be taken before a dispute enters into the formal legal arena. The visual image of the pyramid, with the steep angles of its sides, and the sharp contrast between the base and pinnacle, captures the reality that vast numbers of disputes fall off in the early stages of the dispute transformation process, and only a very small percentage are ever, in fact, adjudicated by courts or tribunals. Even though most disputes are never formally adjudicated, the dominant conception of access to justice—the legal professional account—locates virtually all significant access to justice issues near the top of the disputing pyramid. As noted earlier, in this conception, “justice” receives little, if any, attention. Not only is justice conflated with access to law, but even within the realm of law, the focus is narrowed to the formal processes of institutionalized dispute resolution, and more particularly the courts.¹⁹ In this approach, attention is directed to the “barriers” that impede access to the courts. As Roderick A. Macdonald has argued so persuasively, even among potential barriers it has been the “objective” barriers, and most commonly the twin Trojan horses of costs and delay that have been portrayed as the critical impediments to access to justice.²⁰ As such, these impediments have been the focus of massive reform efforts that seek to make the courts more efficient through simplified procedures, judicial case management, plain language initiatives, costs regimes, legal aid plans, the licensure and regulation of paralegals, and the proliferation of court-annexed alternative dispute resolution processes.²¹

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18. William L.F. Felstiner, Richard L. Abel & Austin Sarat, “The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...” (1980-81) 15 *Law & Soc’y Rev.* 631.
 19. See Macdonald, “Access,” *supra* note 12; Deborah Rhode, “Access to Justice” (2000-01) 69 *Fordham L. Rev.* 1785 [Rhode, “Justice”]; and Deborah Rhode, “Access to Justice: Connecting Principles to Practice” (2003-04) 17 *Geo. J. Legal Ethics* 369 [Rhode, “Principles”].
 20. See Macdonald, “Access,” *ibid.* at 298-99ff; Roderick A. Macdonald, “Access to Justice in Canada Today: Scope, Scale, Ambitions” in Bass, Bogart, & Zemans, *supra* note 8, 19 at 27-28 [Macdonald, “Canada Today”]. Subjective barriers that are rarely addressed include the absence of a sense of oneself as a bearer of rights and fear of the justice system.
 21. See Macdonald, “Canada Today,” *ibid.* See also Bill 14, *An Act to promote access to justice by amending or repealing various Acts and by enacting the Legislation Act, 2006*, 2nd Sess., 38th Leg., Ontario, 2006 (assented to 19 October 2006), S.O. 2006, c. 21; Hon. Coulter A. Osborne, *Civil Justice Reform Report: Summary of Findings & Recommendations* (Ontario: Government of Ontario, 2007); and Ministry of the Attorney General, *Civil Justice Review: Supplemental and Final Report* (Ontario: Ontario Civil Justice Review, 1996).

In an excellent review for the Law Society of Upper Canada, Macdonald describes multiple “waves” in access to justice thinking, the wave metaphor having originally been developed by Cappelletti and Garth in their highly influential “Florence Access-to-Justice Project.”²² Macdonald describes five waves, which he situates historically: the 1960s were characterized by concern about costs, delay, and complexity with attention to access to courts and lawyers; the 1970s, by attention to questions of the design of court procedures and structures; the 1980s, by a shift away from a purely proceduralist conception of access to justice to one that attended to substantive law, with particular regard to equality of outcomes; the 1990s, by a shift in focus from adjudication to alternative dispute resolution processes, to methods to prevent legal problems, and to processes for public participation in law-making; and the twenty-first century, by a recognition that access to justice is interwoven with other facets of life, including health, social services, and employment. While this topography is extremely helpful in conveying the diverse conceptualizations of access to justice, the wave metaphor suggests a gathering of momentum and volume until, after reaching its peak, each wave recedes and is replaced by yet another. Understood in this way, the metaphor fails to accurately reflect the persistent focus on access to institutionalized dispute resolution in the successive waves of access to justice thinking. Indeed, while such a focus perhaps characterized the first conceptualization of access to justice, it has not receded; rather, it has continued to dominate access to justice thinking and reform projects.²³

Within this instrumentalist paradigm, success is equated with efficiency or value for money. While history has shown that the operationalization of this instrumentalist conception is fraught with conceptual difficulties and significant implementation hurdles (the costs of state-funded access, in particular), it is nevertheless important to expose the narrowness of this construction and all that is lost when access to justice is understood in this way.²⁴ The narrow focus on access to formal dispute resolution processes leaves unexamined as an access to justice problematic the early stages of the formation of a dispute—naming

22. Macdonald, “Canada Today,” *ibid.*; Mauro Cappelletti & Bryant Garth, eds., *Access to Justice: A World Survey*, vol. 1 (Milan: Sijthoff, 1978).

23. For an excellent overview of the contributions of the access to justice movement, see generally Mauro Cappelletti, “Access to Justice as a Theoretical Approach to Law and a Practical Programme for Reform” (1992) 109 S.A.L.J. 22.

24. Rhode, “Justice,” *supra* note 19; Rhode, “Principles,” *supra* note 19.

and blaming. Moreover, it renders irrelevant access to the multiple other sites where law is created, contested, and dispensed (such as the legislative realm and the multiple state and non-state sites of regulation, for example). Significantly, as others have observed, within this skewed conception of access to justice, the ends and means are conflated; access, arguably the means to achieve “justice,” is taken as the end itself.²⁵

Stein and Cook have argued that while public disengagement with the legal system may partly be explained by the impediments to access to formalized dispute resolution processes, the reason for the disengagement runs much deeper, residing in a lack of shared understanding, indeed a lack of shared conversation, about justice:

When there are no commonly *believed* and articulated principles of justice that infuse our system, and that are intelligible to citizens, it becomes much easier to focus on the efficiency of our legal institutions as an end rather than simply as a means ... What is the pressing need for a more accessible legal system that pushes to the forefront an ongoing and intelligible conversation about justice and its meanings?

The ability of any legal system to command voluntary adherence depends ultimately on its legitimacy. And this legitimacy is a product of citizens’ ability to access, influence, and engage the law as theirs. This ability has been almost lost in our legal system. To recapture this legitimacy, we must redefine and rearticulate the roles and norms of our legal system to reflect shared understandings of the meaning of justice. We cannot improve access to what we do not understand and articulate. It is our concept of justice that provides the defining principle in functional legal frameworks, but our concepts of justice are often fundamentally contested. Even more important, they are unarticulated.²⁶

Returning to the image of the pyramid, Stein and Cook’s analysis suggests that we need to refocus our gaze from the pyramid’s pinnacle to its base—to the sea of potential disputes that arise in everyday life, not only those that match existing legal doctrine, but also those “unvindicated and unremedied troubles”²⁷ that citizens experience. This, Galanter suggests, is the “hidden but truly dynamic dimension of access to justice.”²⁸

25. Stein & Cook, *supra* note 8; Nicola Lacey, “Government as Manager, Citizen as Consumer: The Case of the Criminal Justice Act 1991” (1994) 57 *Mod. L. Rev.* 534. Macdonald also develops this point in Macdonald, “Access,” *supra* note 12.

26. Stein & Cook, *ibid.* at 166 [emphasis in original].

27. Galanter, “Access to Justice,” *supra* note 10 at 154.

28. *Ibid.*

In exploring this sea of “unremedied troubles” and its implications for justice, Ursula Franklin has implored us to consider the impact of modern technologies upon access to justice. For Franklin, technology is a concept that captures “the way things are done around here,” a form of social structuring which defines legitimate practitioners, authoritative “knowers,”²⁹ and the content of social practices.³⁰ Franklin argues that it is the “aspect of actual or potential control, embedded in new technologies, that raises many of the novel issues of access to justice.”³¹ Her work resonates with that of theorists of regulation, who seek to examine the tools of governance that are used to shape, guide, and control human behaviour. As such, Franklin’s work provides a conceptual framework through which reforms to Ontario’s school disciplinary regime can be viewed. Indeed, when considered in that light, it can be argued that such reforms, and the discourse of “zero tolerance” and promises to “get tough” on school violence which accompanied them, constituted a new technology—a new way in which things were to be done and understood, a new mode of governance—that was to reign in Ontario’s schools.

III. ONTARIO’S SAFE SCHOOLS REGIME

In Ontario’s provincial election of 1999, the Progressive Conservative Party, led by Mike Harris, campaigned on a platform that included a promise of “zero tolerance” for bad behaviour in Ontario’s public schools.³² Once re-elected, the Conservative government moved, in April 2000, to introduce the *Code of Conduct* for all schools, setting out expected standards of behaviour for students and providing for mandatory consequences for the failure to comply with these standards.³³

The *Safe Schools Act 2000* (the Act), which received royal assent on 23 June 2000 and became effective on 1 September 2001, revised the *Education Act* to add new disciplinary infractions, enlarge the disciplinary power of teachers and

29. By “knowers,” I mean those whose claims, interpretations, and explanations are widely accepted and usually unquestioned.

30. Franklin, *supra* note 10.

31. *Ibid.* at 184.

32. Bhattacharjee, *supra* note 11 at 6-7.

33. *Ibid.* Ontario, Ministry of Education, *Ontario Schools: Code of Conduct* (Toronto: Queen’s Printer, 2000) at 10 [Code of Conduct].

principals, and create several infractions for which suspension or expulsion would be mandatory.³⁴ The Act also required school boards to establish policies and guidelines addressing the conduct of persons in schools within each board's jurisdiction (boards, in turn, could direct the principal of a school to establish a local code of conduct). The Act also gave boards the authority to expand the list of infractions for which suspension or expulsion would be mandatory, and determine additional infractions for which discipline would be discretionary.³⁵

Prior to these reforms, the power to expel a student rested with school boards and could be imposed only if conduct was so "refractory" that the student's presence was "injurious to other pupils or persons."³⁶ By contrast, the Act reforms gave principals the power to expel a student for up to a year (a "limited expulsion").³⁷ Pursuant to the reforms, expulsion became mandatory for particular offences such as possessing a weapon, committing a physical assault causing bodily harm requiring treatment by a medical practitioner, and giving alcohol to a minor.³⁸ The power to impose a suspension, formerly only delegated to principals, was extended to teachers, who could impose a suspension of one day (principals could suspend students for up to twenty days).³⁹ As with expulsions, the legislation created a list of offences for which suspensions were mandatory. Such offences included uttering a threat to inflict serious bodily harm, possessing alcohol or illegal drugs, and swearing at a teacher or at another person in a position of authority.⁴⁰ The provincial *Code of Conduct* mandated police in-

34. The full title of the Act is *An Act to increase respect and responsibility, to set standards for safe learning and safe teaching in schools and to amend the Teaching Profession Act*, S.O. 2000, c. 12. Further reforms were implemented on 1 February 2008 (S.O. 2007, c.14) and are discussed later in the article. Unless noted otherwise, references to the *Education Act* in the text and notes refer to that Act as it existed prior to the 2008 reforms.

35. *Education Act*, R.S.O. 1990, c.E.2, ss. 302(1), 303(1), 306(1), 307, 309(1)8.

36. See Bhattacharjee, *supra* note 11 at 9.

37. *Education Act*, *supra* note 35, s. 309(14). Note that suspensions are for a fixed and relatively limited period of time and a student is entitled to return after the fixed period has passed. "Full expulsions" (which could only be imposed by a school board) precluded a student from attending any public school in the province until he or she had attended and met requirements of a strict discipline program. "Limited expulsions," expelling a student from a particular school, could be imposed by principals for a period of twenty-one days to one year.

38. *Ibid.*, s. 309(1).

39. *Ibid.*, ss. 306(2)-(8).

40. *Ibid.*, s. 306(1).

volvement, in accordance with police/school protocols, for most of these infractions.⁴¹

Notwithstanding the use of the term “mandatory” in the legislation, certain provisions in the statute and regulations authorized consideration of mitigating factors that could render a suspension or expulsion non-mandatory.⁴² The three mitigating factors to be considered were whether the pupil had the ability to control his or her behaviour, whether the pupil had the ability to understand the foreseeable consequences of his or her behaviour, and whether the pupil’s continuing presence in the school created an unacceptable risk to the safety of any person.⁴³

The Act provided that the minister could require boards to establish and maintain specific programs, courses, and services for those students who were suspended or expelled.⁴⁴ While the minister did not implement this requirement, a few programs of this sort were created. The ministry did, however, create a handful of programs, as contemplated by the legislation, for students who were subject to a full expulsion—that is, expelled by a board from all schools until they attended and met requirements of a strict discipline program.⁴⁵

A quick overview of the policies adopted by the Toronto District School Board (TDSB) provides an illustration of the potential scope of board policies, and fills in part of the necessary background context for our research project. The TDSB adopted a Code of Conduct and an Appropriate Dress policy on 10 April 2002. The latter policy required every school within the board to establish a dress code, noting that an appropriate dress policy “should lead to a safer and more respectful learning and teaching environments.”⁴⁶ As detailed more fully

41. Code of Conduct, *supra* note 33 at 10.

42. *Education Act*, *supra* note 35, ss. 306(5), 309(3).

43. O. Reg. 37/01, s. 2; O. Reg. 106/01, s. 1.

44. *Education Act*, *supra* note 35, ss. 312(1), (2).

45. O. Reg. 37/01, s. 3(1).

46. Toronto District School Board, Policy P.042 SCH, “Appropriate Dress” (10 April 2002) at 1, online: <<http://www.tdsb.on.ca/ppf/uploads/files/live/98/204.pdf>>. Pursuant to the dress code policy, inappropriate dress “refers to a standard of attire which does not meet the school community standards of decency and shall include language and/or representations on attire that indicates gang affiliation, that depicts violence, profanity, racial or gender discrimination or discrimination of any kind whatsoever, or that otherwise demeans an identifiable individual or group” (at 4). See also Toronto District School Board, Policy P.044 SCH,

below, the regulation of dress—including authorized vendors of uniform components and the way the uniform was to be worn—was a recurring source of friction, if not discipline, for many of the youths in our study.

As permitted by the Act, the TDSB Code of Conduct enlarged the number of infractions for which suspension was mandatory and created several infractions for which suspension or expulsion was discretionary. In the first category, in addition to the conduct proscribed by the Act, suspensions were made mandatory for sexual or racial harassment (a minimum three day suspension and possible police involvement); the inappropriate use of electronic communications/media (up to a twenty day suspension and possible police involvement); fighting (a one day minimum and possible police involvement); and bullying, intimidating, or threatening (a three day minimum and possible police involvement). The TDSB also exercised its power to create discretionary suspensions (including for persistent truancy, persistent opposition to authority, habitual neglect of duty, conduct injurious to the moral tone of the school, and the use of tobacco) and expulsions (many of these categories overlapped with those where suspension was mandatory). Moreover, the TDSB Safe Schools Manual made clear that even if a mitigating factor existed, such that a suspension or expulsion would not be mandatory under the Act, the discretion nevertheless existed to suspend or expel. The Manual also set out factors that principals were required to take into account in selecting the most appropriate type and duration of penalty, including the nature and circumstances of the act, the degree of harm to the victim and school community, and the history of offences.⁴⁷

While the Act provided that in determining the length of a mandatory suspension or expulsion a principal was to consider the pupil's history and factors prescribed by regulation or otherwise considered appropriate, the TDSB Code of Conduct nevertheless stipulated minimum suspensions for numerous offences.⁴⁸

It is also important to briefly note two other TDSB policies: the Police-School Board Protocol⁴⁹ and the Video Surveillance Policy⁵⁰. The former detailed

"Code of Conduct" (10 April 2002), online: <<http://www.tdsb.on.ca/ppf/uploads/files/live/98/206.pdf>> [TDSB, "Code of Conduct"].

47. Bhattacharjee, *supra* note 11 at 14-15.

48. *Education Act*, *supra* note 35, ss. 306(9), 309(19); TDSB, "Code of Conduct," *supra* note 46.

49. Toronto District School Board, Operational Procedure PR.698 SCH, "Police-School Board Protocol" (1 April 2003, revised 21 November 2006), online: <<http://www.tdsb.on.ca/ppf/>

a protocol for a co-operative working relationship between schools and the police, and required schools to report all criminal offences to the police. The protocol reflected an increasingly close working relationship between schools and the police, an approach which has continued to expand in recent years, most recently with the decision to place police officers within several of Toronto's public schools. The Video Surveillance Policy, designed to facilitate the use of cameras in schools, signalled but one of an increasing array of tools (hall monitors being another) for the detection of infractions.

While the Act provided generally for a right of notice to parents (or to a pupil if eighteen years of age or older) of a suspension or expulsion, the content and timing of notices were left to be determined by local school boards.⁵¹ The Act also set out the right of a parent or guardian (or youth if eighteen years of age or older) to initiate a "review" of a decision to suspend for longer than one day, and a further right of appeal to the school board, whose decision was final.⁵² Reviews were to be held in accordance with procedures established by school board policy.⁵³ While the Act also created a right to appeal an expulsion, school board policy again determined the nature of the proceedings on appeal (as well as the procedures on board expulsion).⁵⁴

uploads/files/live/98/1215.pdf>. Note that among the changes to the Police-School Board Protocol in November 2006 was the addition to the statement of principles of the recognition, by the parties, of the "multicultural make-up and diversity of our school communities" and the recognition of a right to a "safe and caring" school environment (formerly a right to a "safe and positive" environment).

50. Toronto District School Board, Operational Procedure PR.694 SCH, "Video Surveillance" (5 November, 2005), online: <<http://www.tdsb.on.ca/ppf/uploads/files/live/100/1075.pdf>>.
51. *Education Act*, *supra* note 35, ss. 306(10), 309(5), 309(20). Note that pursuant to the revisions in force as of February 2008, the Act now specifies that all reasonable efforts must be made to provide notice to a parent or guardian within twenty-four hours and that the notice must include the reason for the discipline, the duration, information regarding programming while under suspension or expulsion, information about the right to appeal, and a copy of board policies and guidelines (see s. 308).
52. *Ibid.*, ss. 308(1)-(7).
53. *Ibid.*, s. 308(2).
54. *Ibid.*, ss. 302(6), 308(5), 309(10), 311(2). Subsection 302(6) provides that "a board shall establish policies and guidelines governing a review or appeal of a decision to suspend a pupil and governing, with respect to expulsions, a principal's inquiry, an expulsion hearing and an appeal of a decision to expel a pupil, and the policies and guidelines must address such matters and include such requirements as the Minister may specify." Subsection 302(7) states

The TDSB specified its procedures governing reviews and appeals in its Safe Schools Manual, a document which to my knowledge was not, and is not, readily accessible to the public.⁵⁵ The Manual expressly referenced the need to ensure procedural fairness, including the provision of reasonable notice to the student of the rule involved, an opportunity for the student to be heard, and the right of the student to know the case against him or her.

Not surprisingly, given that the reforms entailed a profusion of expanded infractions, increased disciplinary authority for principals, increased surveillance, the implementation of mandatory consequences, and the pervasive use of the language of “zero tolerance,” the number of suspensions and expulsions increased dramatically after they were implemented.⁵⁶ In 2000-01 (prior to the reforms), there were 113,778 students suspended; by 2003-04, the number rose markedly to 152,626 students. In total, 229,394 suspensions were meted out in the 2003-04 school year (there were 27,425 students who were suspended three or more times). Of the students suspended in 2003-04, 46 per cent were elementary school students. Not only had the numbers increased, but there was an astoundingly large variance in the rate of suspensions, from 0.5 per cent of students in some school boards to as high as 36 per cent in others. Expulsions similarly increased from 106 in 2000-01 to 1,909 in 2003-04. The data clearly showed a higher rate of suspension and expulsion for boys (about three times that of girls) and for students enrolled in northern and rural schools.

From the outset of the new disciplinary regime, concern was expressed based on experiences from other jurisdictions regarding the disproportionate impact the reforms would have on racialized students and students with disabilities. Once the reforms were implemented, reports of disproportionate impact quickly began to materialize and mounting concern led to an investigation by the Ontario Human Rights Commission. In a report prepared for the Commission after an extensive review of scholarly and stakeholder perspectives, human

that “[a] board may establish different policies and guidelines under this section for different circumstances, for different locations and for different classes of persons.”

55. I rely on the description of the Safe Schools Manual from Bhattacharjee, *supra* note 11, as I did not have access to a copy.
56. All statistics cited in this paragraph are from the following news release: Ministry of Education, News Release, “McGuinty Government Releases Data on School Discipline” (23 November 2005), online: Government of Ontario Newswire <http://ogov.newswire.ca/ontario/GPOE/2005/11/23/c8925.html?lmatch=&Lang=_e.html>.

rights consultant Ken Bhattacharjee concluded “that in the Greater Toronto Area (GTA) and other parts of Ontario there is a strong perception, which is supported by some independent evidence, that the Act and school board policies are having a disproportionate impact on racial minority students, particularly Black students, and students with disabilities.”⁵⁷ The Commission subsequently filed a formal complaint against the TDSB in July 2005, in which it was alleged that the Act and TDSB discipline policies were having a disproportionate impact on racial minority students and students with disabilities, and that the Board had failed to meet its duty to accommodate in the application of discipline, in part because it had provided inadequate alternative education services for suspended or expelled students.⁵⁸ Ultimately, in February 2006, the TDSB entered into a settlement with the Commission in which it accepted that there existed “a widespread perception that the application of Ontario’s school disciplinary legislation, regulations and policies can have a discriminatory effect on students from racialized communities and students with disabilities and further exacerbate their already disadvantaged position in society.”⁵⁹ To address this problem, the TDSB undertook to implement various ameliorative measures such as determining a method to collect data on race in relation to suspensions and expulsions; rewriting the grid of consequences for infractions to ensure that the use of discretion and the consideration of mitigation factors were emphasized; providing appropriate training on racial stereotyping and profiling, anti-racism, and cross-cultural differences; and actively recruiting teachers and administrators who are members of racialized groups.⁶⁰

Roots of Youth Violence, a recent and comprehensive review of youth violence undertaken by former Chief Justice and Attorney General Roy McMurtry, and former Speaker of the Legislature Alvin Curling, echoes and endorses the above noted conclusions of Bhattacharjee. The authors note that “many youth have been suspended or expelled from school without a full consideration of their circumstances and without adequate supports to maintain their learning or oc-

57. Bhattacharjee, *supra* note 11 at i.

58. Ontario Human Rights Commission, “Backgrounder - Human Rights Settlement Reached with Toronto District School Board” (14 November 2005), online: <<http://www.ohrc.on.ca/en/resources/news/Nov142005Backgrounder>>.

59. *Ibid.* at para. 1.

60. *Ibid.*

copy their time in positive ways.”⁶¹ Both of these observations are roundly supported by the youths in our project. McMurtry and Curling conclude that based on the Ontario Human Rights Commission’s findings and the views of “almost everyone we spoke to, the safe schools provisions have had a disproportionate impact on racialized students and students with disabilities.”⁶² As detailed more fully below, experiences of the discriminatory impact of the legislation and policies upon racialized youths, and black males in particular, were described repeatedly in the interviews and focus groups for our project. Youths felt they were singled out because of their race in particular, but also because of their dress and neighbourhood (arguably markers for race).⁶³ Ruck and Wortley, in their study, found that racial minority students, particularly black students, were “much more likely than White students to perceive discrimination with respect to teacher treatment, school suspension, use of police by school authorities, and police treatment at school.”⁶⁴ Similarly, Bhattacharjee notes that virtually all the interviewees in his review “identified discrimination—direct and systemic—as the main reason why the application of discipline in schools has a disproportionate impact on racial minority students and students with disabilities.”⁶⁵

The review of McMurtry and Curling, like that of Bhattacharjee, also points to the long-term impacts of the safe schools policies: loss of educational opportunities, increased risk of dropping out, increased risk of incarceration, and negative psychological impacts. As they observe,

[f]or students who were already facing socio-economic barriers, learning disabilities, racism, isolation and other factors, and living in disadvantaged neighbourhoods, the punitive and exclusionary nature of the safe schools provisions became another factor that harmed their development as individuals and promoted alienation, disengagement and a lack of hope for the future.⁶⁶

61. Hon. Roy McMurtry & Alvin Curling, *Roots of Youth Violence*, vol. 1 (Toronto: Queen’s Printer, 2008) at 52.

62. *Ibid.*

63. For a full discussion of race as a marker, see Frances Henry & Carol Tator, *Racial Profiling: Challenging the Myth of a “Few Bad Apples”* (Toronto: University of Toronto Press, 2006).

64. Martin D. Ruck & Scot Wortley, “Racial and Ethnic Minority High School Students’ Perceptions of School Disciplinary Practices: A Look at Some Canadian Findings” (2002) 31 *Journal of Youth and Adolescence* 185 at 185.

65. Bhattacharjee, *supra* note 11 at viii.

66. McMurtry & Curling, *supra* note 61 at 55. Similarly, a panel convened to examine school

McMurtry and Curling sharply condemned the fact that until reforms were introduced in 2008, boards had no obligation to provide suspended students with learning programs or lesson plans.⁶⁷ Their observation that the lack of programming during suspension increased the likelihood of students dropping out and having increased interaction with the criminal justice system is borne out by the experiences of our project participants. The makings of what has been described in the United States as the “school to prison pipeline” were evident: increased involvement of police in school disciplinary matters, the increased scope of surveillance, and the lack of programming for suspended students each opened the way to the heightened involvement of youths in the criminal justice system.⁶⁸

IV. SAFE SCHOOLS AND ACCESS TO JUSTICE

The reforms to the *Education Act* in 2000 and related school board policies mirrored the government’s approach in other areas, including the regulation of street based economic activity (e.g., *Safe Streets Act*)⁶⁹ and of social assistance programs (e.g., *Social Assistance Reform Act*).⁷⁰ The state sought to “get tough” and “crack down” on various forms of “disorder,” with promises of “zero tolerance” for transgressions. While many commentators have described the neo-liberal state as one characterized by the retraction of the role of the state, others have noted its dual character—what Peck has described as a simultaneous rolling back and rolling out of state functions.⁷¹ While the rolling back of the state’s role has

violence in the wake of the shooting death of fourteen year-old Jordan Manners in a Toronto high school concluded that the safe schools culture has “deeply hurt this City’s most disenfranchised,” and describes the effect of this style of discipline on marginalized communities as devastating. See School Community Safety Advisory Panel, *The Road to Health: A Final Report on School Safety* (Toronto: Toronto District School Board, 2008) at 4.

67. McMurtry & Curling, *ibid.* at 55.

68. There is a vast American literature on this, and both the American Civil Liberties Union and the National Association for the Advancement of Colored People have actively taken up this issue. See e.g. NAACP Legal and Defense Educational Fund, “Dismantling the School-to-Prison Pipeline,” online: <http://www.naacpldf.org/content/pdf/pipeline/Dismantling_the_School_to_Prison_Pipeline.pdf>.

69. *Safe Streets Act, 1999*, S.O.1999, c.8.

70. *Social Assistance Reform Act, 1997*, S.O. 1997, c.25. See also Joe Hermer & Janet Mosher, *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax: Fernwood Publishing, 2002).

71. Jamie Peck, “Neoliberalizing States: Thin Policies/Hard Outcomes” (2001) 25 *Progress in Human Geography* 445 at 447.

been evidenced by a retreat from social programs, the rolling out is evident in the expansion and dispersion of the realm of crime and disorder as a legitimate object of state intervention across a broad array of social activity. Wacquant views this latter phenomenon as evidence of the state's "iron fist" being deployed "to check the disorders generated by the diffusion of social insecurity."⁷² Areas such as immigration, public welfare policy, and education are now increasingly viewed and acted upon, not as problems of public policy, but as problems of safety, security, and crime.⁷³ In the school context, the net of social regulation and state authority was enlarged and its objective was redefined as detecting and punishing crime, or the forms of disorder understood to be precursors to crime. As noted earlier, the overall effect of the reforms has been to increase the scope of behaviour that attracts punitive consequences and to ramp up punishment. These effects, together with their discriminatory application, shaped the social context of the youths we interviewed.⁷⁴

V. YOUTHS' EXPERIENCES AND ACCESS TO JUSTICE

A. REGULATORY SWEEP

While some of the youths with whom we spoke had certainly been involved in fights or other more serious infractions at school, most reported getting into trouble over what they regarded as minor matters: having an attitude, being loud, being late, being in the halls, and being dressed inappropriately, especially in terms of whether they were wearing their uniforms properly. As described later, youths frequently had no idea of the details of the legal regime governing school discipline, or any idea of whether the consequences imposed were guided by law. While some of the behaviours described below may well have warranted a mandatory suspension under the Act, many would fall under the

72. Loïc Wacquant, "The Penalisation of Poverty and the Rise of Neo-Liberalism" (2001) 9 Eur. J. Crim. Pol'y & Research 401 at 402.

73. Jael Silliman & Anannya Bhattacharjee, eds., *Policing the National Body: Sex, Race and Criminalization* (Cambridge: South End Press, 2002).

74. I say "overall effect" because, as stated above, the resort to suspensions varied widely among school boards. Moreover, as we have no comparative data, it is often not possible to conclude that any particular action/inaction experienced by the youths is tied directly to the Safe Schools reforms and practices. Rather, we can only report what the youths told us of their experiences in school at a time when these policies and practices were in place.

TDSB Code of Conduct that created discretionary suspensions for, *inter alia*, persistent opposition to authority, habitual neglect of duty, conduct injurious to the moral tone of the school, and the use of tobacco. One youth described being sent to the principal's office regularly (as often as three times a day) over what she was wearing under her uniform. She described this interaction with her teacher as an example of how things would unfold:

[Teacher said], "You're not wearing uniform." I said, "Oh my God miss, I am wearing a uniform." She goes, "No, that's not the proper shirt under." And I go, "All my proper white shirts are in the laundry." She goes, "Buy more white shirts" and I go, "Can't tell me to buy Are you going to give me money to buy it? 'Cause you're telling me to go buy more white shirts, like you think it's easy. Like I just wake up and say I'm going to go buy more white shirts and it's there. And she's like, "Well I don't care, go to the office. I don't make the rules." So, I go, "Yeah you don't, but I think the rules are stupid." (Interviewee 2)

Others also expressed real frustration over the cost of uniforms, and the requirement that they buy their uniforms from one particular distributor. In one focus group this conversation unfolded between three youths and the facilitator:

Youth: It's expensive, the pants is \$50 bucks, the shirt is \$30 bucks and you have to buy more than one You are not going to wear the same shirt every day or the same pants every day, but two pants, two shirts ... it costs.

Facilitator: That's hard for most households ...

Youth: You can go to the store and see pants for \$10, but when they tell you to go to McCarthy's you see the pants for \$50 There is no difference, it just says McCarthy on it. ...

Facilitator: What happens when you don't wear your uniform to school?

Youth: They send you to the office and the office sends you home.

Youth: If you are not known If I was to have no uniform and send me upstairs, they'll send me home, they will never give me a uniform shirt, but if someone else was to come, like another innocent looking person, and ask, "can I borrow a uniform shirt?", they would give him a nice uniform shirt ... I don't complain ... I just say, yeah, I'll go home. (Focus Group B)⁷⁵

75. Note that for some of the focus groups, a second person attended to take notes in order to identify the contributions to the discussion by particular participants who in the transcripts are given a number. Where a second person was not able to attend, the transcripts only indicate whether the speaker was the facilitator or a youth participating in the group.

Repeatedly the youths complained that for often the smallest thing (*i.e.*, improper uniforms, asking to go to the washroom during class, being in the hall), discipline—often a suspension—was imposed:

Interviewer: And how [have] things been going for you in school so far?

Interviewee: Not so good, but okay.

Interviewer: What's not so good about it?

Interviewee: There's this one principal in the school. Like, I don't know, I think he has a thing against the black students in the school 'cause like ... he's kicking out mostly everybody for like ... the littlest things...

Interviewer: What sorts of things, have you had any contact with him?

Interviewee: Yeah. Like coming to school late and stuff, and like me reaching to my classes late and stuff, but I can't help it 'cause I have a younger brother at home and I have to get him ready for school.

Interviewer: How old is he?

Interviewee: He's 10, I make him breakfast, and dress him, whatever. Then I walk him like half way then I get on the bus and go to school and when I get there or whatever, you know, teachers complain and they always send me down to that one principal and when I reach there or whatever, he always has a bone to pick with me. (Interviewee 10)

For most of the youths, cameras and hall monitors were common in their schools and they clearly experienced the increased scrutiny of their conduct as a result. The intensity of the scrutiny and the consequences of breaking the rules led one youth to draw an explicit parallel between school and the criminal justice system:

Just make school a school. Don't make students feel like school is worse. Like, oh my God, you're a criminal, you're going to get booked for this. Make school a school. Make them feel like really, really like education ... 'Cause suspending kids, you don't get an education staying at home and watching TV or playing music or whatever it is that you do at home. Even if they give you homework to do, [there's a] 90 per cent chance that you're not going to understand what's on it, 'cause some things are in class what you bring home to clean up on it, but if you didn't go to school you're not going to be able to do the work the teacher just gives you out of nowhere like ... go home and do? (Interviewee 2)

B. DISCRIMINATORY IMPACT

The youths in our project commonly reported being singled out for particularly harsh and often inappropriate treatment by both school officials and the police. They believed they were “marked” and stereotyped by the neighbourhoods in which they lived, the clothes they wore (including colours associated with particular gangs), their race, gender, and who their friends were. Two youths engaged in the following exchange:

Youth: Principals don't like you sometimes and they find the smallest reasons to get you out of school, for the smallest things they will kick you out, they don't give nobody chances, especially the black students.

Youth: We have a bad rep.

Facilitator: Really, what happens?

Youth: For the smallest things, you have no hope, they don't give nobody a second chance. It's one strike and you are out.

Youth: Or 20-day suspension, and that's half a semester gone.

Facilitator: That happens often?

Youth: Yeah, to people who don't really deserve it, they just get in trouble. And if one person gets in a fight and other people are surrounding them and they aren't doing nothing, all those people will get suspended, too. (Focus Group C)

In another interesting exchange, the youths challenged assumptions that they believe are commonly and problematically made about the clothing they wear:

Facilitator: So what do you get hassled about? Who gets hassled and what do you get hassled about?

Youth: The way you dress.

Facilitator: Explain to me.

Youth: When you wear hats.

Youth: Or certain colours.

Youth: Baggy clothes.

Facilitator: Ok. So clothes, hats.

Youth: And the way you wear your clothes.

Youth: They might look at me and think I'm a bad guy. But the attitude tells it all. I'm a gentleman out here you know what I mean.

(Laughter)

Youth: It's better to dress like good youth to commit crimes anyway.

Youth: Politicians wear suits. And they're hurting us out here. They wear suits and ties you know what I mean.

Youth: The Crown. They wear suits and ties. (Focus Group D)

Echoing a common sentiment expressed regarding the youths' relationship with the police, one youth offered his view that the persistent police harassment youths experience was connected to both race and neighbourhood:

The police that come to our school ... [inaudible] ... once they see the Westview uniform ... I'm not even gonna say the Westview uniform ... once they see what colour skin you have you are bad news. I could be walking and they will just like screw-face me, I could be walking in the neighbourhood and they think I am going somewhere bad and they just look at you like you have their shirt on, they just stare at you. They don't look at you as a person, they look at you as where you're from. (Focus Group C)

Race, in particular, was identified by many youths as shaping the views their teachers held about them:

Interviewee: Even at school teachers treat you differently.

Interviewer: How do they treat you differently?

Interviewee: Like if you're a black kid walking through the hallway you're going to cause trouble. Or they're expecting you to cause trouble or be bad. So.

Interviewer: Do you find, have they pegged you in a way? Do you feel like you're pegged as being ... even when you came in at grade 9 you said that you kind of developed a reputation for being bad and that particular kind of thing and that follows you. How else do you think that effects you or how else do you thing [sic] they see you?

Interviewee: Teachers? Some teachers say I'm smart and I can go somewhere and others just don't like me. We don't agree. But there is only a few of them who actually like me, or who I believe like me. ...

Interviewer: Is there anything in your experience with, like anything that we've been talking about, like school discipline or security or what you've seen in the courts or with police that you would want to change?

Interviewee: Don't just put ... like most of us around here, like know what they

want to be or become. But because of our background I guess they think that, think different, or think bad, or yeah. They already have their idea of what we are or what we do.

Interviewer: Does that limit you, do you think?

Interviewee: Yeah it does.

Interviewer: How does that affect you in your own personal kind of way? Like how does it limit you?

Interviewee: I don't know. Some place we go out certain people look at us a certain way. Or feel like you're not wanted. So you don't even bother going sometimes. (Interviewee 8)

Virtually all of the youths agreed that boys were subject to more harassment from both teachers and the police than girls. But as one young woman made clear, the harassment takes place at the intersection of gender and race:

Interviewer: What about girls? Do girls get hassled as much as guys at your school?

Interviewee: I think guys get hassled more. Especially, not to sound more racist or nothing ... black guys.

Interviewer: Of course, yeah.

Interviewee: In our school, it's 'cause the neighbourhood, and you dress like this and this. The guys wear baggy with their favourite colour and thing. So they get hassled 'cause the teacher sees that. If you have a blue flag⁷⁶ or red flag behind you then you're not there to learn. You're thinking about gang stuff. So they get hassled. (Interviewee 2)

Another youth expressly connected harassment and discrimination to intentional processes of social exclusion:

Youth: [We] get hassled about the way we dress, colours, religious beliefs.

Facilitator: Why do they harass you for these things?

Youth: Because they want to protect what they think is the society. And in school, it is a way to filter out some of the people that they don't want in society. Put them over here in this corner. They have too much control in school. They can tell this guy to cut your nails or you can't come into school [one of the youths had earlier noted in the conversation that he was harassed in school on religious grounds, including being required to cut his nails and beard]. Why should they be able to say that? School

76. The term "flag," as used here, refers to bandanas that youths wear, often hanging out of their rear pocket.

should be something that is free. Everyone has the right to go to school and the right to learn. I don't think it is a privilege. That is the way that they're trying to treat it. They're trying to treat it like, you need to bow down to us and follow our rules and do it the way we say. That's not fair. (Focus Group A)

As is clear from the quotes, the youths felt that they were frequently misjudged by others—they felt that a whole set of unfounded and intractable assumptions about their abilities, their motivations, and their characters flowed from their skin colour, their neighbourhoods, their gender, and their clothing. In other words, they experienced pervasive stereotyping. Significantly, the youths also observed that these stereotypes prevented most teachers, principals, and hall monitors from understanding the realities of their lives at home and in the community, and the challenges that these facts posed for their school lives. When asked what makes it difficult to finish school other than the harassment of school discipline, one youth gave this reply:

Poverty. If you live in poverty you know what I mean, and you're young, and you're going to high school. High school becomes the time when you start to look at everything in the world, you know what I mean. Hanging with kids from other neighbourhoods. You're beginning to see what life is all about. It's all about money. And if you're in poverty, you don't, your priorities get messed up. If you need to buy food to eat and you need to buy clothes to wear, where you going to go? You're getting that stuff more than doing your homework. (Focus Group D)

Another youth was one of several to note that some teachers really do not know them, and do not care:

Some teachers know the struggle some kids are going through. But the people [teachers] that don't know the kids, they don't know what they're going through at home, they don't know what happens behind closed doors.

When kids go to school, they are straining too much. You have to have a fun place in school where you can relax and have fun. Teachers don't make it that way, they're like [action demonstrates a dictatorial person]. (Focus Group A)

The youths in our project described school officials and police as often being “overly aggressive, belittling, and discriminatory”—attributes that McMurtry and Curling note were commonly used by the youths they met to describe authority figures. As they conclude,

[t]he sad reality is that if police stops or interventions are done discriminatorily or aggressively or in a degrading manner, or if youth are belittled in court [or school] or harassed while in custody [or school], a deep sense of grievance and frustration can

result. ... [Y]outh must be treated with respect and dignity; they cannot be expected to respect a system that does not respect them.⁷⁷

Indeed, this notion of mutual respect pervaded our discussions with youth.

C. THE IMPACT OF SUSPENSIONS

Recounting their personal experiences and offering their own analyses, youths were clear that suspensions are counter-productive, often increasing (in both the short- and long-term) the potential for involvement with the criminal justice system:

A few years back, they had a zero tolerance policy or something like that where you weren't allowed to swear or fight or anything like that at school, and what happened was it boomeranged instead; it made more criminals on the streets than actually helping people because all these youths were being kicked out and they had nothing to do so that the (inaudible) skyrocketed. (Focus Group B)

I think a lot of students, even myself, when I came back after suspension it was even worse because the problem wasn't solved, sending me home and I wasn't doing nothing ... I was bored ... I want to go outside and do something on the streets. (Focus Group A)

Offering a different interpretation of school safety, the youths in one focus group talked about the importance of staying in school, linking it to community safety:

Youth: Unsafe in school is when the principal decides to kick out someone who is giving maybe a little trouble in school or someone who may be having a hard time, you know, adjusting to high school and they just decide to kick this person out of school and out of ... put them on the street and there is ... nothing constructive for them to do. They're just on the streets and they're just wandering you know. I think that's unsafe. That happens everyday.

Facilitator: You're talking about getting suspend[ed], being kicked out.

Youth: For the wrong reasons.

Youth: Even being suspended for a long period of time. After a while I might not want to go back.

Youth: It discourages you.

77. McMurtry & Curling, *supra* note 61 at 77, 79.

Facilitator: What is the process? Walk me through the...

Youth: You know what they say. They say the safe school was enacted when they built the super-prisons. It's the same timelines. And when you put the Safe Schools Act, the political policy you kick out young black youth and other youth that are caught up and marginalized. Right. And this creates a population of unskilled youth that are hungry for the world and are forced to face the world. But then there is a super-prison that is empty and waiting to be filled. And what the street creates is monsters. That is what they perceive it as. So they give it enough political back to get a million for taser guns, another couple million to hire new police forces and they continue to do what they do to us.

Youth: Less people in school, the more killing on the street. (Focus Group D)

D. YOUTHS' RESPONSES TO PERCEIVED INJUSTICES

1. NAMING

To name a legal issue, problem, or potential dispute, one requires timely access to knowledge of the specific legal norms relevant to the actual situation being experienced. For the youths in our project, this meant timely access to relevant knowledge about the substantive legal norms governing school discipline: what school administrators are permitted to do and in what circumstances; what factors are to be considered; and what substantive and procedural rights are granted to students and/or their parents when school discipline is meted out. Similarly, in their encounters with police—both in relation to matters arising at school and those beyond the schoolyard—youths needed access to timely and relevant knowledge about the legal norms governing police conduct and about their rights vis-à-vis the police.

While legal problems relating to the use of school discipline, discrimination, and on-going police harassment and abuse were pervasive in the lives of most of the youths who participated in our study, they had little idea of the governing legal norms or of their rights (substantive or procedural).⁷⁸ Moreover, for most youths, there were no immediate and obvious routes to access the information that they needed. Indeed, a persistent theme in the interviews and focus groups was that the youths did not know what the authority figures present in their lives were legally permitted to do, nor what rights they had as subjects of this

78. Roderick A. Macdonald's observation that the characterization of a problem as a legal problem is often a significant barrier to access to justice certainly holds true for the youths in our project. Macdonald, "Canada Today," *supra* note 20 at 29.

authority. And for most, they had no idea of how, where, or from whom they could access this information:

Youth: I think the teachers have too much rights. Students have no rights.

Youth: They abuse their power.

Facilitator: They abuse their power? So what rights do you have as a student in school?

Youth: A student in school has no rights. You have to listen to what the teacher and principal say to you and if you don't agree with what they say to you, they kick you out of school.

Youth: And they'll suspend you, harass you.

Youth: Teachers are like [corrections officers].

Youth: They have too much power. The principals and the teachers. Because you can't ... and it's dangerous. Going to school is like your job. Workers have unions and stuff like that to protect them in their job. But students don't have no union to protect us, to say "okay, you can't suspend him for this reason." Or "you can't expel him for this reason." You get suspended first, expelled first, and then you have to go to the board of education to plead with them to let you back in. (Focus Group D)

Interviewer: And what about in cases of school discipline? Is there access to justice in like school discipline cases like when you were expelled?

Interviewee: No. There's no system. There's no way to find if you're guilty or not. It's just whatever they say happens.

Interviewer: That's it. There's no procedure for you to complain or protest? No?

Interviewee: No. I don't think so. I mean there probably is, but you have to take it to a high extent. Like, all that effort for nothing.

Interviewer: So if you found out there is a way to like protest being expelled would you?

Interviewee: Yeah, of course. (Interviewee 6)

When asked if there was a place where students could go to learn about their rights, one youth responded, "[There are] no rights. You're guilty until proven innocent" (Focus Group D). Another youth answered, "unless you wanted to research it on your own, that's the only way because you have computers and a library but in terms of having certain people come in and talk about justice and human rights and things about law, we don't really have that

or have access to that” (Interviewee 3). Others explicitly connected lack of knowledge to lack of access to justice, noting that without knowledge of their rights, they did not have access to justice.

Interestingly, some of the participants noted that information is not merely difficult to access. Rather, in their view, information is actively hidden from them to ensure the maintenance of existing power imbalances.⁷⁹ After concluding she did not have access to justice in school, one youth explained why:

Interviewee: 'Cause I never really took time to learn about ... my access to justice. I never took time to find a way where I could know my rights and know what to do when this happens. That's why I think I don't know about [access to justice]. 'Cause I never took time to learn about it.

Interviewer: Is it up to you to find out?

Interviewee: No. I don't think so. I think that's being hidden from you. 'Cause if they come and tell you this and you finally know I could have done this when this happened, they think the more kids know what they could do the more it's like ... I think it's the school's responsibility [to teach this to you]. Because you're supposed to get full justice everywhere you go. Like schools, community, like little things like those centres and all those places you go. I think that should be taught in a lot of places. 'Cause kids are going through so much. They know if this happens, 'cause kids are not always wrong... Most of the times they're wrong. But sometimes, people wrong them. (Interviewee 2)

Another participant thought the close relationship between the school and the police meant that the school had little interest in ensuring that he knew his rights:

Facilitator: There's nothing provided in your school to let you know about your rights?

Youth: If anything, my school would want me booked. The school, like, they cooperate with the cops, right. They're not going to be trying to help out [their] students or whatever. Why would they do that? (Focus Group F)

79. The idea that those with power may actively conceal information or make information obtuse and difficult to access is found in some of the access to justice literature, particularly the literature that examines access to justice from the vantage point of low income citizens. See *e.g.* Morrison & Mosher, *supra* note 12 at 651, arguing that “[i]t need hardly be added that in many cases there is nothing accidental about the lack of available information: the strategic deployment of ignorance is a quintessential strategy to maintain power imbalance and dependency.”

Significantly, many of the youths described a phenomenon of being silenced—of being shut down when they asked questions about why they were being disciplined, or when they tried to tell their side of the story. In view of this, many of the youths clearly did not experience the elements of procedural fairness described in TDSB's Safe Schools Manual. It is ironic, however, that while the youths frequently got into trouble for being too loud, they were consistently silenced in their interactions with conventional authority figures, such as police officers and school administrators:

Youth: When I was expelled they just came to my class and told me you're expelled. That was it. I never went back. Nobody talked to me or nothing. They just gave me a letter and said don't come back The principal kicked me out and said don't come back.

Facilitator: Did you have any opportunity to say anything?

Youth: Can't say nothing. It's just like, the streets. (Focus group D)

Facilitator: So one of the [things] we're interested in is finding out how you guys get informed, like how you guys get disciplined. Like how is it you find out you're going to get suspended? Is there any way that you can challenge this?

Youth: One time I got suspended they didn't even tell me.

Facilitator: They didn't even tell you? So how did you know?

Youth: I came back to school and they said, "You're not supposed be on [school] property, you're suspended."

Facilitator: So they didn't explain to you at all that you were suspended? When you came back did they tell you why?

Youth: Attendance. For attendance.

Youth: Same here.

Facilitator: You didn't know why [or that you] were [suspended]?

Youth: Yeah.

Youth: Sometimes it's no reason.

Youth: They say that's the way it works.

Youth: It's something that the principal believes. They won't even find out what hap-

pened. They'll just suspend you first and then a few days later, after I serve the suspension, they'll realize they made a mistake and they'll apologize to me like that makes up for my time on suspension.

Facilitator: So they'll apologize to you afterwards?

Youth: After, yeah. After already putting me on suspension. Say someone gets in a scrap, someone's fighting and I wasn't even there, but they'll assume it's me. So I'll be put on suspension immediately and a while later [they will say,] "Oops, sorry, we got the wrong guy." (Focus Group F)

Many of the youths also noted that talking may get you into deeper trouble (recollect that persistent opposition to authority is grounds for a discretionary suspension, while swearing at an authority is grounds for a mandatory suspension):

Facilitator: You have been suspended every year for something?

Youth: Yeah, so I already learnt me arguing or nothing doesn't work, me explaining myself doesn't work ... can't get through to these people so I just ignore them and I'll still get suspended, so ... I just ignore them. (Focus group B)

Another youth explained that when she had been called into the principal's office on different occasions she would also start out "trying to be nice." But when no one would listen to her side of the story, her anger and frustration would mount and the situation would go from bad to worse:

You didn't do nothing and you come in so nice and you know you didn't do nothing and you're so nice to them. And people just shut you down like that and don't listen to you and after that ... I just give up and say whatever I got to say to you. ... You suspend me. I know they don't care. It's not your education. You're not spoiling your life, you're spoiling mine. But just home watching TV. Waiting to go back to school. Just crazy like. And being so behind. 'Cause teachers don't care if you're suspended. (Interviewee 2)

Not surprisingly, this experience of being silenced, with no one willing to hear one's side of the story, gives rise to a sense of futility and hopelessness. As one youth noted, there is no access to justice in school discipline cases:

Interviewer: Do you think that youth have access to justice in school discipline cases?

Interviewee: No.

Interviewer: Why's that?

Interviewee: 'Cause whatever is there, you have to follow. There's not much we could do.

Interviewer: Not much you could do? Except for, you just kind of, do they tell you what's happening?

Interviewee: Yeah. Really. We have no say. And if we do, they never change it.

Interviewer: What do you mean they never change it?

Interviewee: Like rules or anything like that. Nothing really happens if we say anything about it.

Interviewer: Do you ever have questions about the discipline process in school and how that works?

Interviewee: No. I don't really question that. No. (Interviewee 7)

Interviewer: What I also mean is, is there a process...?

Interviewee: There's no process. It's just, do your papers and you're gone, or you come back within a few days.

Interviewer: If you like challenge them through some sort of process, your suspension?

Interviewee: Oh no. If you try to argue they'll just make it longer. That's what happened every time to me. If I was like you're making shit up, why are you doing this, he just covers your ... bla bla bla, I can't hear you and he'll make my suspension 10 days longer just for that you know. (Interviewee 12)

Note how closely these remarks track Franklin's description of technology, of "just the way things are done around here," wherein an authoritative knower (*i.e.*, a school official) determines the way things will be done, and these ways are seemingly impervious to challenge or change.

2. BLAMING

As noted above, the articulation of a legal claim requires as a pre-condition that the aggrieved person blame another, holding the other as responsible. Yet what emerges from our data is a picture of widespread resignation, a sense that blaming another—where that person is more often than not a powerful authority figure—is futile. In other words, the youths are deeply conscious of the reality that in taking on conventional power, they are likely to lose (or even more disturbingly, be further harmed). After recounting how he and friends were beaten up by the police, one youth explained that there was nothing "you can do," unless the beating is captured on camera:

If it's not on camera, I'm not going to do it [make a complaint]. No point in wasting all that time. (Interviewee 6)

The participants repeatedly explained that when it is their word against that of a principal, a police officer, a hall monitor, or anyone with power, there was really no hope of being heard, let alone of winning. Some were also acutely aware of the potential backlash that may follow a challenge to conventional power. As Andrew Roman notes in relation to low-income people in receipt of social assistance, "the reality when one is totally dependent for one's livelihood on the goodwill of a large bureaucracy that can retaliate viciously if attacked" is that victims [of bureaucratic error or wrongdoing] are reluctant to complain.⁸⁰ The sense of both futility and danger is captured in this exchange between two youths:

Youth: But like sometimes you can't really sue the cop. Because my friend, he got arrested and they beat him up and then he filed a lawsuit and he told me that they ripped it up and threw [inaudible].

Youth: If you sue a cop, you are not going to like it. (Focus Group E)

For some of the youths, the lack of meaningful avenues to challenge authority figures was both a source of frustration and the object of harsh criticism. Although they did not proceed with formal complaints, they certainly were prepared to lay blame. For others, however, conventional power was overwhelming, and a debilitating acceptance of "the way things are done around here" was reflected in their comments. One youth explained how she often got into trouble for being late. She was regularly late because she had to care for her younger brother in the morning and walk him to school before going to her own school. When asked if she had spoken to her teachers about her brother, she said she had not:

'Cause they don't really ask [why she was late]. They just, you know, jump to conclusions. [She then continued to describe her experience of being suspended and later transferred to another school.] I told her [the vice-principal] she was wrong. But what can I do, you know. It's not my say ... [no one spoke to her about her rights and she said that there was no one to speak to]. The vice-principal really doesn't like me ... it was sad but like what could you say, she's the VP. Like, I didn't have no ... her word was bigger than my word. So I couldn't really say anything ... my mom

80. Andrew J. Roman, "Barriers to Access: Including the Excluded" in Allan C. Hutchinson, ed., *Access to Civil Justice* (Toronto: Carswell, 1990) 177 at 190.

talked about going to a higher level, like the head office of the TDSB but I told her don't even bother, you know. They're your principals, who are we? I'm just a student going to their school. So, yeah. (Interviewee 10)

In these relationships of dramatically unequal power, there is not a neutral and trusted person or institution to whom the youths can turn to invoke a credible threat of intervention that might reign in or challenge seemingly unbridled power. There is not, to return to the earlier observation of one youth, the equivalent of a union to whom they can turn for timely and trusted advice.

For the youths in our study, the (substantive and procedural) legal norms and school board policies governing school discipline were conceptually and practically inaccessible. In view of this, it matters little if the governing legislation provides the most finely crafted legal procedures—absent widespread knowledge of the procedures and without hope and trust that invoking them might make a difference, such procedures have little utility or value, and there is no access to justice. The experiences of the youths echo the observations of the United Nations Development Programme's Commission on the Legal Empowerment of the Poor:

[K]nowledge usually is not enough. Farmers may learn that they are entitled to land. But that knowledge is useless if government personnel, the military, a company or a landlord are powerful enough to ignore the law Thus, promoting knowledge of the law is worthwhile, but as a stand-alone strategy it seldom galvanizes legal empowerment. And assuming that knowledge is power can be counter-productive if it confines legal empowerment strategies to simply teaching people their rights ... access to justice also implies that there is a credible threat of an intervention.⁸¹

3. THE FUTILITY OF CLAIMING: UNBRIDLED POWER

It is interesting to observe the contrast between the North American access to justice literature and that found in the developing world. While access to justice is regarded in both literatures as an indispensable component of the rule of law,⁸²

81. Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone: Report of the Commission on Legal Empowerment of the Poor*, vol. 2 (New York: United Nations Development Programme, 2008) at 22, online: <http://www.undp.org/LegalEmpowerment/docs/ReportVolumeII/making_the_law_work_II.pdf>. See also vol. 1 of the same report.

82. For an example of the connection made in the North American context, see *B.C.G.E.U. v. British Columbia (A.G.)*, [1988] 2 S.C.R. 214 at paras. 24-26, where Chief Justice Dickson asked, "[o]f what value are the rights and freedoms guaranteed by the *Charter* if a person is denied or delayed access to a court of competent jurisdiction to order to vindicate them?" In

by contrast to much of the literature on access to justice in the developing world (wherein the rule of law is regarded as inadequately developed), the North American literature invariably assumes that the rule of law is firmly established. Thus, the issue of the challenges that departures from the rule of law present for access to justice—a pervasive theme in the access to justice literature in much of the developing world—is absent in the North American literature. The central components of the rule of law (*i.e.*, that the law is binding equally upon all, that it is superior and non-discriminating) are presumed to be features of social life in North America, even if it is occasionally acknowledged that the publicity requirement of the rule of law is not always fully satisfied. But this is not at all the reality described by the youths who participated in our project.

As noted above, the view is widely shared among the youths in our project that state systems will fail to hear you and that decision making within those systems will routinely track power. These are both important indictments of an effective rule of law. But the cynicism regarding the rule of law runs deeper still, as is captured tersely and powerfully by one youth who concluded: “You don’t have no law ... they [the police] are the law ... the police are the law.” In other words, law fails to impose any effective inhibitions upon the exercise of power.⁸³

While some youths, as noted earlier, thought that knowledge of their rights was important, others said that such knowledge really did not matter (or could be harmful), because in reality, those rights do not exist in practice, at least not for them. You see this in an exchange between youths during one of the focus groups. One youth begins:

No one really knows their rights, so when you get sent [to the office] you don’t know what to do. When you know your rights you can say, “You are not allowed to do that.”

the same decision, he observed that there “cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice. ... [he continues, quoting from the Court of Appeal] We have no doubt that the right of access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of citizens Any action that interferes with such access by any person or groups of persons will rally the court’s powers to ensure the citizen of his or her day in court” [citations omitted].

83. See Daniel H. Cole, “‘An Unqualified Human Good’: E.P. Thompson and the Rule of Law” (1999) [unpublished, archived online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=169264>].

[Another youth jumps in],

[n]o, no, I don't want to cut across, but there have been times when I say [to the police], "You can't search me, this is an invasion (inaudible)." "Smart ass ... come here, come over to the car ..." He calls the next partner around ... I'm not going to fight back, they are going to say it's an obstruction of justice or something like that ... so might as well let them search me and make a complaint afterwards. That's garbage. ... I was pretty scared ... next guy is coming around with his hand on his gun ... what's his hand on his gun for? I just said you can't search me.

[Yet another youth adds],

... [t]hey have to protect themselves, too.

[And the conversation continues],

Facilitator: Do the police uphold justice?

Youth: No.

Facilitator: How come?

Youth: 'Cause they abuse their power too much. For them, cooperation means doing whatever they tell [you] whether it goes against your rights or not, it's up to you if you know your rights, if you don't know your rights it's not my fault buddy, this is a city of democracy, you're supposed to know this kind of stuff ... if you don't know something it's not my fault, my job is to [inaudible] shit at you, to serve justice ... (Focus Group B)

They abuse their authority, just because they are a cop they think that they are God ... (Focus Group C)

Youth: Your rights can be broken by pretty much any cop. The cops decide. For me I've learn[ed] when I was young I'd think, "Alright, I'm all protected, I won't even care about cops." I'd think I was all smart and shit right. But then one day I just realized you know after you know, I got booked, I realized there is no rights.

Facilitator: Does it matter then? Does knowing your rights matter?

Youth: It does. In the longer, like when it's all over.

Youth: (inaudible) You can like actually break down a speech for them about your rights and let them know you know what's really going on. I think it could make a bit of a difference.

Facilitator: So knowing your rights matters in that respect but it doesn't matter when no one is watching?

Youth: Yeah. If you're getting booked in like a crowd of people or in a public street. Then it's different. Then your rights actually have something to do.

Youth: Another [thing] is like, with younger youth, like you know, the people that are in the streets, you know what I mean, like they don't really take the time out to find out about [their] rights. So cops know that they can go frig around with these guys and be like, these guys don't really know what's going on, so they can (Focus Group D)

Participants described experiences of being beaten by police officers with batons for not co-operating, and of being taken (or knowing others who have been taken) to Black Creek⁸⁴ and beaten by the police. And as noted earlier, they feel powerless to blame or claim. Over and over again, youths in both the interviews and focus groups offered the view that the police can do whatever they want, and get away with it. Legal rights are at best useless fictions, at worst something that can wind you up in a great deal more trouble if you attempt to invoke them:

It makes me feel like there will never be justice, not in the school system, not in the community, not with the police. The police [are] always going to harass. (Focus Group B)

I think cops are the biggest criminals out here. I think they're the biggest gang; I think they're the most well-recognized gang (Interviewee 5)

Once in the criminal justice system, a prevalent view expressed by the youths is that all the players work together, to protect their own interests, unbounded by law:

[L]awyers, police, legal aid, the crown all work together ... they're all part of the system, once you are in the system they are all working together. (Focus Group B)

[J]udges are set up. Everything is a set up. You think judges don't have barbeques, they have barbeques with the police and everything. People can't be stupid. (Focus Group A)

Similar comments are made about school authorities; they are seen to operate beyond the law, doing as they please, when they please, and how they please.

84. An isolated area that borders the Jane-Finch community.

There is certainly no sense on the youths' part that authorities are bound by transparent, overriding legal norms to which they will be held accountable and which equally govern all. Indeed, the view that pervaded the interviews and focus groups more than any other is that neither the criminal justice system nor the educational system follows their own rules. As the youths explained:

I think honestly as a police officer, they have rights to do anything. That's what over the years I came to believe. They have rights to do anything. (Interviewee 1)

I know a few rights, not all. Police [are] supposed to talk to you in a certain way. But usually when they come around here, they swear at you or call you names. (Interviewee 8)

I've seen people get beaten by the police ... And you never hear like something happened to them or nothing really. Like they can just do it and get away and that's it. (Interviewee 11)

They [cops] have to have a reason to search you; but if they really want to search you they'll say, "I saw you do this" or you look suspicious or fit a description and then they'll search you anyhow. (Focus Group A)

Interviewer: Have you gotten any information about what your rights are?

Youth: Yeah but it doesn't really matter about that. We don't really have those rights.

Interviewer: So tell me about that. Tell me what actually happens.

Youth: Supposedly if you don't have a record and you give them I.D. they're not supposed to search you. They still search you. Like, the only thing you have to tell them is your name. And if you don't tell them all that other stuff you get arrested for resisting arrest or whatever. So [many] things they have, rules, and they break them like. (Interviewee 6)

Justice to me means, just us. As in them. They don't care about us. Because if they did, we wouldn't have a justice system, you know what I mean. The system means that police is their bodyguard and all the rich folks. So therefore we have no justice. Just going to be marginalized all the time. (Focus Group D)

VI. TOWARDS ALTERNATIVE CONCEPTIONS OF "ACCESS TO JUSTICE"

As revealed through the interviews and focus groups, in the context of school and school discipline, the youths who participated in our project were firmly of the view that they did not have access to justice. In their accounts of access to justice, costs and delay do not figure prominently. Even when access to justice is conceptualized narrowly as access to institutionalized dispute resolution, access for these youths is impeded by a host of other barriers that are found at the bottom of the pyramid. Limited access to knowledge of the legal norms governing the conduct of school officials and police impedes the naming of legal disputes. Limited opportunities to speak and to be heard combine with the absence of credible threats to the power of state actors to mould the view that engaging formal legal processes is utterly futile. Indeed, a much more substantive indictment that emerges from the youths' accounts is that the "justice" system is incapable of delivering justice because it functions as a club for the privileged. Central to this indictment—and a similar indictment of Ontario's education system as incapable of delivering education—is the youths' experiences of pervasive stereotyping and discrimination. The sense that they were constantly judged not for who they are, but by where they live, how they dress, and the colour of their skin—that (almost) no one cares to find out who they are and what really goes on in their lives—emerges as perhaps the most profound impediment to their ability to access something they might call "justice."

As noted at the outset, we also asked youths to share with us their views of what access to justice should entail. Their descriptions of "justice" reveal both how justice is denied, and conversely, how it may be accessed. When asked to describe what justice means, one youth referred to her basketball coach because he understood, related, and knew the stereotypes.⁸⁵ Justice, she explained, is "to be treated equally. To be served and helped according to what it is you went through." Another made a very similar observation about his accounting teacher. Justice, as conceived by these youths, posits "understanding" as a prerequisite to judging. Justice requires coming to understand the reality of others, and resisting recourse to convenient stereotypes. This conception of justice resonates with

85. As Laura Nader notes, "where we find justice or injustice is dependent on variables not always tied to formal legal apparatuses" [citations omitted]. See Laura Nader, "Processes of Constructing (No) Access to Justice (For Ordinary People) (1990) 10 Windsor Y.B. Access Just. 496 at 496 .

the work of scholars such as Jennifer Nedelsky, who argue that judging requires an “enlargement of the mind,” the capacity to stretch one’s understanding of the world to encompass the experiences and perspectives of others.⁸⁶ Another youth captured a similar notion through a concrete example:

[I]f I committed a crime for money. The judge might say that he served justice by giving me five years, but why did I do that? I must have had a reason. I must have needed money for something. I didn’t have a job, no one gave me a job. How do you know why I did it? That’s not justice for me, ’cause I did it for a reason. (Focus Group D)

Tied to this notion of justice as genuinely seeking to understand the reality of others is the idea of “respect.” As noted earlier, “respect” is invoked repeatedly by the youths. For them, “respect” is integrally connected to justice; they spoke of the importance of being acknowledged (a few described feeling so ignored as to be invisible) and respected for who they are. Predictably, the idea of respect was also tied to the opportunity to speak and to be heard. And the youths were clear that respect is a two-way street, that mutuality of respect is integral. As one youth put it in speaking about justice and respect:

You could respect the police, but only if they respect you ... I show my teachers respect but they still have to earn my full respect by showing respect back. (Interviewee 9)

Further dimensions of justice are captured by a youth who emphasized the importance of knowledge and of the “freedom” that comes when authorities follow the rules. In effect, he described the central importance of the rule of law to access to justice:

[Justice is] like knowing your rights ... I’m saying that it should mean you have a right and you do have the freedom meaning that if the cops are not arresting you and you’re not on a warrant arrest that they shouldn’t have to come up to you and just talk to you and you should have the freedom to just walk away. That’s what I mean by freedom. (Interviewee 9)

Echoing this sentiment, another youth noted, “[j]ustice is they should follow the proper rules and not take advantage of their powers” (Focus Group A).

Yet a further dimension of justice was captured by a youth who described

86. Jennifer Nedelsky, “Embodied Diversity and the Challenges to Law” (1997) 42 McGill L.J. 91. See also *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, where the Supreme Court of Canada engages with the centrality of this idea to the task of judging.

justice as “an opportunity to start back fresh ... not keeping you entwined in their system forever” (Focus Group D). This signals a belief in the capacity of each of us to learn from our mistakes, and points to an approach to discipline that is not solely punitive, but which sees the opportunity for learning and growth that potentially resides in the mistakes we make.⁸⁷

In these accounts, access to justice requires understanding, engagement with the reality of others, transparency regarding both the content of the rules/laws and how authority is exercised in relation to those rules, the opportunity to participate (to speak, to be heard), and the opportunity to learn (including through mistakes). Certainly some of the impediments to accessing justice for the youths could be traced to the policies and practices introduced through Ontario’s *Safe Schools Act* and the new technologies of regulation it introduced. Its increased use of surveillance, broadening of infractions, and use of mandatory suspensions and expulsions without consideration of personal circumstances all had implications for access to justice.

The 2008 reforms to the *Education Act* may enhance access to justice in some modest ways. So, for example, procedural details are no longer left to local school boards and notices to students (or parents where the student is under eighteen) must include information about the duration of and reason for discipline, information regarding programming (which now must be provided while students are under suspension or expulsion), information about the right to appeal, and a copy of board policies and guidelines.⁸⁸ As such, this may go a small distance toward filling in some of the information gaps, but even in terms of information provision, it does little to get information into the hands of youths when they need it. Importantly, the reforms move away from mandatory suspensions and expulsions (suspensions continue to be mandatory where circumstances are being investigated to determine whether expulsion is warranted), and the Act directs decision makers to contextualize their decision making by reference to a variety of mitigating factors. While this opens up the possibility

87. See Mary M. Shannon & Douglas S. McCall, “Zero Tolerance Policies in Context: A Preliminary Investigation to Identify Actions to Improve School Discipline and School Safety,” online: <<http://www.schoolfile.com/safehealthyschools/whatsnew/capzerotolerance.htm>> at 18. This research report, prepared for the Canadian Association of Principals, notes the self-limiting nature of punitive discipline, in contrast to an approach to discipline as an opportunity to teach and learn social skills.

88. See *Education Act*, *supra* notes 34 and 51.

of decision making that considers the particular circumstances of each student, absent profound changes that tackle systemic discrimination and create an environment built upon equal respect, this too will make little difference. While the *Safe Schools Act* reforms and practices enlarged the realm of injustice, they alone do not account for the youths' experiences of injustice. Rather, other features of the broader social context—stereotyping, discrimination, and unbounded power—shaped their experiences of injustice, and no doubt influenced the particular course the implementation of the *Safe Schools Act* reforms took. In the end, access to justice for the youths in our project will require much more than reforms to the *Education Act*.⁸⁹ To begin with, in thinking about how we can increase access to justice for these young people, we might re-imagine schools as the site for a justice pedagogy, where the language of justice is not only spoken, but where justice is modelled and practised, and the lessons learned about access to justice are profoundly different from those recounted to us by those who took part in our study.

89. McMurtry and Curling also conclude that while the reforms are important, there is much more that needs to be done to transform public education. See McMurtry & Curling, *supra* note 61.

