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**HOW DO STUDENTS'
EXPERIENCES OF, AND
APPROACHES TO, MOOTING,
AFFECT THEIR LEARNING
OF SUBSTANTIVE LAW AND
UNDERSTANDING OF THE LAW?**

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A thesis submitted in partial fulfilment
of the requirements of the
University of Northumbria
at Newcastle
for the degree of
Professional Doctorate in Law

Research undertaken in Northumbria Law
School

March 2021

Declaration

I declare that the work contained in this thesis has not been submitted for any other award and that it is all my own work. I also confirm that this work fully acknowledges opinions, ideas and contributions from the work of others.

Any ethical clearance for the research presented in this thesis has been approved. Approval has been sought and granted by the Faculty of Business and Law Ethics Committee on 22nd February 2018.

I declare that the word count of this thesis is 64, 580 words.

Ross Peter Fletcher

10th March 2021

(Revised 20th October 2021)

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CHAPTER 1

INTRODUCTION

Purpose of the Thesis

The purpose of this thesis is to explore how, and, if so, to what extent, mooting can play a role in affecting students' perceived understanding of substantive law. This thesis is the culmination of my interest in mooting as a form of education that I have developed during my studying and teaching of the law over the last 24 years, culminating in the doctoral studies which I commenced in 2015. These studies have as their primary focus the empirical research into the perceived learning experiences of a group of first-year law students who took part in extra-curricular moots on the topic of criminal law that I organised at Northumbria Law School during the 2018-19 academic year. This research took the form of focussed interviews with each of the students who mooted, triangulated with interviews with their seminar tutors. My analysis of these interviews was underpinned by, and interpreted from the perspective of, an understanding of experiential learning theory, and constructed using the methodological approach of analytic induction.

The research that culminated in this thesis, while informed by my own experience as a tutor and moot coach, enabled me to attain a much greater appreciation of the importance of investigative inquiry into the learning experiences engaged in by students in higher education so as to develop my practise as an educator. It also attuned me to just how important is the personality and lived experience of the learner in facilitating the quality of the learning experience. My thesis will conclude by stating that there is a case for mooting to be used in legal education to offer students an approach to learning substantive law that is more challenging and rewarding than the "lecture followed by seminar" approach commonly adopted in English higher education providers. However, as I explain in the final chapter of this thesis, this study also identifies a number of difficulties for student mooters that present a challenge to a general implementation of such an approach (not that it would be appropriate to make any such pretensions to generalisability in a qualitative study of this nature).

I am confident that the approach that I have adopted when preparing this thesis, in terms of the theoretical basis upon which it is premised, the depth of the empirical research that I have conducted, and my approach to analysing the findings of my research, makes for an original

contribution to the body of literature on mooting that can inform and enhance all programmes of legal education.

Background to the Research

Mooting (sometimes referred to as “moot court”) is a type of mock courtroom exercise that takes place in many university law schools. The students who take part are provided with the facts of a fictitious legal dispute, which is referred to as the “moot problem”. The students are then required to research and prepare oral submissions in support of one of the parties to the dispute, before presenting the case that they have prepared in a mock courtroom environment before the moot judge (usually a legal academic or practitioner).

I began mooting in the first year of my undergraduate law degree in 1997, and I engaged in inter-mural and inter-varsity moots throughout my studies. As I am a naturally introverted personality, I found it to be both exhilarating and motivating to adopt the role of an advocate and explain in a courtroom setting my understanding of the law that I had researched, and this increased my resolve to become a qualified barrister. Upon completion of my degree (which incorporated the-then Bar Vocational Course) and commencing employment as a paralegal at a solicitors’ firm, I appeared in court on several occasions and drew upon my experience of mooting to conquer the sense of nervousness that I experienced when before a judge, as well as to present my case in a coherent and structured manner (if not always with the outcome that my firm’s client desired).

Between 2003 and 2017, a significant part of my employment as Senior Lecturer at Northumbria University was taken up by the duty of Moot Co-Ordinator. Throughout my performance of this duty, I viewed it as a concomitant to my role as a teacher of fundamental legal subjects and skills, and endeavoured to encourage students to adopt the attitude of not being daunted by fear of failure in their studies, and to be creative in their use of the law to solve problems. Throughout that period, I also strove to encourage involvement in mooting from all students, with a view to their realizing from their legal education similar goals to that which I had from my own. One aspect of this duty consisted of my organising the Law School’s internal moot competitions, the requirements of which included writing moot problems, selecting moot judges from the staff or students who volunteered to judge (and occasionally requesting volunteers when none were immediately forthcoming) and often judging moots myself. Another aspect included selecting teams for inter-varsity moots, and helping prepare the selected teams for the challenges of mooting against a team of students representing a different university. The most rewarding aspect of this duty came in seeing the (at times considerable) efforts of the students with whom I had worked being recognised by their attaining successful results in their law studies, and going on to practice law.

As a result of this experience, I have come to view mooting as potentially the ideal vehicle – more so, perhaps, than seminar tuition – for developing students’ confidence in understanding substantive law, and in adopting a creative approach to applying their understanding. However, at Northumbria University, mooting is not part of the university degree curriculum. It is an activity carried out in the students’ own time, for which they do not directly obtain academic credit (although from which it has been recognised that they obtain other personal benefits¹). This gives rise to the question whether mooting has a place in higher education as a means of teaching law in its own right – and, if so, what that place is - which has resulted in this thesis.

Before commencing work on this thesis, I had formed preliminary views, based upon my experience of working with student mooters during inter-mural and inter-varsity moot events, and particularly in observing the development of student mooters throughout their involvement in the latter events, that mooting is capable of being not just an enjoyable extra-curricular activity or a way to develop practical skills, but a valuable method of learning substantive law. These views were based principally upon the many comments that I had received from student mooters to the effect that they believed themselves to have acquired, as result of their preparation for and performance in a moot, a greater understanding of the substantive law involved in the moot problem than they had believed to be the case for them beforehand.

An inquiry as to the validity of this proposition requires:

- an understanding of what, from the perspective of the student participants, is involved in preparing for, participating in, and receiving feedback after a moot, and;
- how the perceptions of the students involved in the moot experience differ;
- an analysis of the learning experience of the students taking part in the moots;
- an understanding and application of experiential learning theory to the practise of mooting, as well as to the mooting experiences of the students who took part in this study.

¹ Snape, J. & Watt, G. (2010) *How to Moot: A student guide to mooting* (2nd edition) Oxford: Oxford University Press, pp 13-15

Principal Research Question and Objectives

The title of this thesis (*“How do students’ experiences of, and approaches to, mooting, affect their learning of substantive law and understanding of the law?”*) comprises the principal research question upon which this thesis is based. I will aim to answer this question by exploring the concept of mooting conceived as a method for the teaching of substantive law, and the appropriate place (if any) for the implementation of mooting so conceived, within the first year of a law degree. I devised the principal research question with a view to answering it through the medium of a study into the nature of mooting as an experiential learning activity, exploring how that experience is perceived by the students taking part in this study, and what can be learned from an analysis of the findings from that study that can inform the development of a programme of legal education.

To answer this question, it is necessary to fulfil several Objectives:

- 1: To explain how mooting has been used in legal education historically, and what position is taken as to the role of mooting in legal education by modern legal academics and practitioners.
- 2: To set out the theoretical basis of my study.
- 3: To draw conclusions from the empirical research carried out to date into mooting in legal education.
- 4: To set out the method and methodology that I will use to answer the principal research question.
- 5: To set out the findings that I derived from my study.
- 6: To set out the conclusions that I drew from an analysis of those findings.

These Objectives form the structure of the chapters of this thesis.

In order to fulfil Objective 1 (“To explain how mooting has been used in legal education historically, and what position is taken as to the role of mooting in legal education by modern legal academics and practitioners”), it is necessary to understand how mooting has played, and still does play, a role in legal education. Accordingly, I will give an historical account of the

rise in popularity, subsequent decline, and recent re-emergence, of mootings in legal education, before giving a narrative account of the views expressed by some legal academics and practitioners as to the perceived benefits and detriments of mootings. I will conclude this chapter by setting out some arguments that emerge from the relevant literature in respect of the appropriate place of mootings within modern legal education, and my own conclusions based upon these that have informed the literature review that comprises the second chapter of this thesis.

An historical overview of mootings in English legal education

A system of formal legal education has existed in England since at least 1234. We know this because in that year, King Henry III issued a writ ordering that all law schools in London be closed “now and in the future”². It has been argued that Henry was motivated to do this by an intention to suppress legal knowledge *per se*³ and thereby prevent unrest. However, it could alternatively be interpreted in the context of the maxim that “it is for him who establishes to explain his deed”⁴ that Henry’s intention was in fact to prevent misinterpretation of the law, particularly the notion of royal absolutism that continued to be propagated by followers of King John, who regretted the curtailment of their privileges by Magna Carta⁵.

Rather than killing off legal education, however, the writ seems to have in fact inspired a surge in popularity. The legal profession was then in its infancy, and people requiring representation in court would be represented by an “attorney”, who would be well-known to the judges and expected to behave professionally for fear of being reprimanded for “speaking foolishly”⁶. In 1292 there appeared to be “a superabundance”⁷ of persons intent on practising law, such that a writ was issued in that year to authorise attendance at court by “a certain number, from every county, of the better, worthier, and more promising students”. This is believed to be the origin

² Henry III Close Rolls 1234 m22 (*Close Rolls of the Reign of Henry III Preserved in the Public Record Office*, HMSO/Mackie and Co 1909)

³ Slapper, G (2012) “Is studying law boring?” *The Guardian*, 6th August (<https://www.theguardian.com/law/2012/aug/06/studying-law-boring-gary-slapper>) (Accessed 8th March 2021)

⁴ Bracton, H (1968-77) *De legibus et consuetudinibus Angliae*, ed. George F. Woodbine, translated and revised Samuel E. Thorne, 4 vols, Cambridge, Mass. 2.33, 169, 305.

⁵ Carpenter, D.A (1996) *The Reign of Henry III* The Hambledon Press: London, pp 77-8

⁶ Harding, A (1911) *A Social History of English Law*. Reprint: London: Penguin Books 1986, p170

⁷ Plucknett, T.F.T (1983) “The Legal Profession in English Legal History” in *Studies in English Legal History* London: Hambledon Press, p338

of the Inns of Court and Chancery⁸. The four Inns of Court (Gray's Inn, Lincoln's Inn, Middle Temple, and Inner Temple) all still exist, and remain the only entities authorised to admit (or "call") practising barristers⁹, but none of the ten¹⁰ Inns of Chancery survive.

The Inns were regarded as a "*studium publicum*"¹¹ where the practice of law was taught. In the Inns of Chancery, students would become familiar with the basic procedures of oral pleadings for initiating and defending cases in court. In the Inns of Court, more advanced courtroom techniques were taught, along with tuition designed to equip the students with "a detailed knowledge of English law"¹². Both involved an expectation that students attend the nearby courts, "readings" (a combination of lectures and seminars), and moots¹³.

The origin of the moot system is unclear, but it has been suggested that it arose out of the system of "disputations" held in universities before the establishment of the Inns¹⁴. One of the meanings of the term "to moot" at that time referred to pleading a case in court¹⁵, and a moot took the form of a mock legal dispute arising out of a fictitious legal problem, contested between two pairings of two students, with one pairing representing either side of the dispute¹⁶. While, in essence, this is still how moots are conducted, the specifics of early moot practise differ greatly from the moots of today. The moot problems used in the Inns were kept in "moot books"¹⁷, several of which survive, and have been reproduced¹⁸. By comparison with the moots used in modern times, they are "extraordinarily complex"¹⁹, and raise a great many points of law: one moot used at Gray's Inn in the 1510s provoked a complaint that it "is an unreasonable

⁸ Jacobs, A.C (1936) "The Romance of the Inns of Court" 42 Michigan Alumnus Quarterly Review 68, p71

⁹ <https://www.barcouncil.org.uk/about/about-the-bar/other-organisations.html> (last accessed 8th March 2021)

¹⁰ Barnard's, Clement's, Clifford's, Davy's (or Thavie's), Furnival's, Lyon's, New, Staple, Strand, and St. George's Inns (Baker, J.H (2003) *The Oxford History of the Laws of England Volume VI 1483-1558* Oxford University Press, p453

¹¹ Brand, P.A (1992) *The making of the common law* London: Hambledon Press, p57

¹² *ibid* pp57-8

¹³ *ibid* p58

¹⁴ Walsh, C (1899) "The Moot System: An Appeal" 15 Law Quarterly Review 416, p417

¹⁵ Baker, J.H and Thorne, S.E (eds) (1989) *Annual Volume 105: Readings and Moots at the Inns of Court in the Fifteenth Century, Vol II. Moots and Readers' Cases* London: Selden Society; p.xlix

¹⁶ Brand *op cit* p58

¹⁷ Baker, J.H (1986) *The Legal Profession and the Common Law* London: Hambledon Press, p26;

¹⁸ Baker and Thorne *op cit*

¹⁹ *ibid* p xlv

case to be mooted at one time for there are twenty-eight points in it if it be well scanned"²⁰. The complaint evidently received some sympathy in the Inns of Chancery at least, where it was ordered in 1557 that each moot should contain no more than two points²¹.

The actual process of mooting was a considerably more exerting exercise than that practised today, as it involved the drafting of writs and pleadings in support of the parties' cases, as well as the oral arguments seen in modern moots²². Unlike modern moots, which are completed within the space of a few hours, the oral arguments in the old moot exercises would occupy several days²³. The argument of the moot was expected to be done "perfectly, without a book" on pain of fine²⁴, and any member of the Inn could be "called to bar", at which location they would take part in a moot. This is the origin of the term "barrister", to refer to a legal practitioner²⁵.

The practise of such exercises comprised the barristers' training, and occupied approximately ten to twelve years²⁶ of their lives. Mooting was an essential part of a barrister's qualification²⁷, as well as regarded as fundamental to the acquisition of legal understanding necessary to practise law: Thomas Wilson (writing in 1553) stated that he had "knowne divers that by familiar talking, & moutyng together have come to right good learning without any great booke skil"²⁸. However, by the seventeenth century, these exercises came be of decreasing importance, in favour of study based upon "the proliferation of printed texts"²⁹ that were by then available to those seeking to learn the law. The exercises still continued to be practised, but by the mid-eighteenth century they "had dwindled away" to "meaningless forms"³⁰, consisting by the start of the nineteenth century of "reading a few lines written down...by the

²⁰ Baker (1986) *op cit* p21

²¹ *loc cit*

²² Baker and Thorne *op cit* p.xlviii

²³ Baker (2003) *op cit* p466

²⁴ *ibid* p457

²⁵ *ibid* p458

²⁶ Brand *op cit* p58

²⁷ Prest, W.R (1967) "The Learning Exercises at the Inns of Court 1590-1640" 9(3) *Journal of the Society of Public Teachers of Law* 301, p310

²⁸ Wilson, Thomas (1553) *The Arts of Rhetorique* f.21 (quoted *ibid*)

²⁹ Prest *ibid* p313

³⁰ Holdsworth, W.S (1972) *A history of English Law* (7th edition), *Volume XII* London: Methuen; p79

butler”³¹, the most difficult aspect of which was, according to Walter Bagehot, reading “some six words” without laughing³².

By this time, the Inns of Chancery had ceased to exist³³, and the Inns of Court did not offer “any effective teaching of law”³⁴. Indeed, it was acknowledged that the only real requirement to qualify as a barrister was “the keeping of terms by the eating of dinners”³⁵, so that “a stranger to legal habits and customs would almost be led to suppose, that the several cooks of the Societies possessed the same art that was in use amongst the Professors of Laputa, where every viand was impregnated with science”³⁶. A corresponding lack of instruction in the law took place at the universities, as an example of which Lord Eldon is quoted as stating that his examination at University College, Oxford, consisted in its entirety of his being asked to give the name of the college’s founder³⁷.

Clearly, these affairs gave rise to concerns for the future of the legal system and the safety of the public generally. To address these, a Select Committee of the House of Commons met in 1846. Its report recommended that universities should teach, and award degrees, in English law³⁸, which should be distinct from the routes to professional qualification administered by the Inns of Court and (for solicitors) the Law Society³⁹. Similar reforms were in progress at the Inns, committees from which recommended that the Inns should establish lectureships in law, which reform duly took place in 1852⁴⁰. However, students still had the option of qualifying as

³¹ Campbell, J (Lord) (1881) *Life of Lord Campbell, Lord High Chancellor of Great Britain: consisting of a selection from his autobiography, diary, and letters; Volume I* London: John Murray, p134 (quoted *loc cit*)

³² Bagehot, W (1870) “Bad Lawyers or Good”? 7 *Fortnightly Review* 685, 686 (quoted Holdsworth *ibid* p80)

³³ Jacobs *op cit* p73

³⁴ Holdsworth *op cit* p77

³⁵ *ibid* p79.

³⁶ Wynne, E (1790) *Strictures on the Lives and Characters of the most Eminent Lawyers of the Present Day: Including, among other Celebrated Names, those of the Lord Chancellor, and the Twelve Judges* : London: G. Kearsley, p146 (quoted *loc cit*)

³⁷Bagehot *op cit* p685

³⁸ Select Committee on Legal Education (1846) *Report From The Select Committee on Legal Education, Together with the Minutes of Evidence, Appendix and Index* House of Commons: p xlvii (cited Holdsworth Vol XV *op cit* p235)

³⁹ *ibid* p lxi ((cited Holdsworth Vol XV *op cit* p237)

⁴⁰ Holdsworth *loc cit*

barristers by attending lectures only until 1871, at which point the Inns Council of Legal Education made examinations a compulsory assessment for qualification as a barrister⁴¹.

Amidst this reform, the moot system remained neglected. It was noted that while “interesting evidence upon the point” was given to the Select Committee, it “received scant notice amidst the numerous larger issues which were dealt with in their reports”⁴². At the end of the nineteenth century, the programme of moots organised by the Gray’s Inn Moot Society was the only known attempt to carry on the moot tradition at the Inns of Court: a state of affairs that the Society’s Secretary lamented, writing that “learning, however profound, is, in the law above all places, of little avail without an equivalent of readiness and skill in application” and that the demise of the moot system was evidence that “pure book-learning” had been “made a fetish” which “in the law everything is sacrificed to”⁴³.

The failure of the other Inns to follow the lead set by Gray’s was criticized by, amongst others, Sir Frederick Pollock, in a series of articles in the *Law Quarterly Review*⁴⁴. Eventually the other Inns of Court would organise their own moots, starting with the Inner Temple in 1926⁴⁵. However, despite Walsh⁴⁶ and Pollock⁴⁷’s adjurations that the moot system become a compulsory part of legal education, it would enter the lives of law students in a form adopted from the legal education system in the United States of America. There, a tradition of competitive mooting, originally administered by universities, but from 1870 organised by student-administered “clubs”, had begun to thrive⁴⁸. English universities in fact adapted to this before the Inns, mooting having been conducted at the University of Cambridge before 1889⁴⁹, and similar initiatives were taken up by other student-run societies at other universities⁵⁰. These were enthusiastically received, and by 1950 it had been observed that “[g]enerations of London law students will testify to the value they derived”⁵¹ from the moots organised by

⁴¹ Gower, L.C.B “English Legal Training: A Critical Survey” (1950) 13 *Modern Law Review* 137, p141

⁴² Walsh *op cit* p420

⁴³ *ibid* 425

⁴⁴ Pollock, Sir Frederick; (1886) 2 *Law Quarterly Review* 118; (1903) 19 *Law Quarterly Review* 259-260 (cited Duxbury, N (2000) “When we were young: notes in the *Law Quarterly Review*: 1885-1925” 116 *Law Quarterly Review* 474 fn 47)

⁴⁵ Baker and Thorne *op cit* p lxxxvi

⁴⁶ Walsh *op cit* p424

⁴⁷ Pollock (1903) *op cit* p260

⁴⁸ *ibid* 421

⁴⁹ Pollock, Sir Frederick (1889) 5 *Law Quarterly Review* 227 (cited Duxbury *op cit*)

⁵⁰ Bathurst, M.M (1943) “English Legal Education” 3 *Lawyer’s Guild Review* 9, 11

⁵¹ Gower *op cit* p189

the University of London's college law societies. Elsewhere, the first inter-university moot court competition open to English universities, the Philip C. Jessup International Law Moot Court Competition, commenced in 1960⁵².

There has since been an "explosion"⁵³ of inter-university moot court competitions, with in excess of twenty competitions open to students⁵⁴. At university level, research in 2005 found that 93% of the participating universities involved their students in mooting, with 60% stating that mooting formed part of their curriculum⁵⁵. This slow realisation of the ambition set out by Walsh and Pollock has been described as "the rediscovery of an ancient treasure of legal education"⁵⁶.

In respect of the first part of Objective 1 ("*To explain how mooting has been used in legal education historically, and what position is taken as to the role of mooting in legal education by modern legal academics and practitioners*"), I can conclude that mooting traditionally was the primary method of learning substantive law, and, following a period of neglect, has in more recent years come to be widely engaged with by law students both as part of their programmes of study, and as an extra-curricular activity.

As stated above, I am of the view that mooting is capable of being not just an enjoyable extra-curricular activity or a way to develop practical skills, but a valuable method of learning substantive law. To address the second part of Objective 1, it is necessary for me to consider the views of others on the place of mooting within the modern legal education system.

I should note at this point that the emergence of moot court societies in United States law schools broadly coincides (perhaps coincidentally) with the emergence of what would come to be called legal realist theory through the writings of legal academics at those same institutions⁵⁷, which in turn informed the development of the theory behind clinical legal

⁵² Brown, C (1978) "The Jessup Mooting Competition as a Vehicle for Teaching Public International Law" 16 Canadian Yearbook of International Law 332, 333.

⁵³ Dickerson, D (2000) "In Re Moot Court" 29 Stetson Law Review 1217, 1224

⁵⁴ https://learnmore.lawbore.net/index.php/Get_Mooting:_Rundown_of_Competitions (last accessed 5th March 2021)

⁵⁵ Gillespie, A.A and Watt, G (2006) *Mooting for Learning*, Warwick: UKCLE. (summary available at <http://ials.sas.ac.uk/ukcle/78.158.56.101/archive/law/resources/teaching-and-learning-strategies/gillespie2/index.html>) (last accessed 5th March 2021)

⁵⁶ Snape and Watt *op cit* p13

⁵⁷ eg: Holmes, O.W Jnr (1897) "The Path of the Law" 10 Harvard Law Review 457

education⁵⁸. While there is, perhaps, much to be said about the relationship between mooting and clinical legal education, and the contrast between the principle-based approach to preparing for a moot and the fact-based approach involved in most commonly accepted forms of clinical legal education, such a discussion is beyond the scope of this thesis, premised as it is upon an exploration of the practical experience of students taking part in moots, rather than mooting as an abstract concept within legal education.

Some views on the pedagogy of mooting

Although not explicitly recognised in terms of pedagogical theory (such concepts not being recognised generally at the time), the historical overview of mooting set out above contains some strong arguments as to the ways in which mooting provides an educational benefit. Such views have been widely expressed in contemporary times also. Recognition has been given to the benefits provided by mooting to a student in terms of improving their ability to research, and to recognise the importance of working well as part of a team, which has been recognised as a particularly important attribute for practising lawyers given insufficient attention by the legal education system, which emphasises individual achievements and encourages competition on this basis⁵⁹.

The process of mooting has been described as “a specific form of simulation which enables students to practise and develop a range of skills”⁶⁰. The practice of these skills has been noted as offering such benefits as the opportunity for students to manage their time effectively in order to determine how best to prioritise the several academic demands that compete with mooting for their time, in doing so preparing them for the pressures that practising lawyers are subjected to⁶¹. The particular changes to the legal profession, driven in the main by technological innovations, have been recognised as creating an environment which will

⁵⁸ eg: Frank, J (1933) “Why Not A Clinical Lawyer-School?” 81(8) University of Pennsylvania Law Review 907

⁵⁹ Finneran, R.E (2017) “Wherefore Moot Court” 53 Washington University Journal of Law and Policy 121, pp126-7

⁶⁰ Wolski, B (2009) “Beyond Mooting: Designing an Advocacy, Ethics and Values Matrix for the Law School Curriculum” 19 Legal Education Review 41, p46

⁶¹Dickerson *op cit* 1217-1218

require law graduates to be confident and resilient in order to thrive: attributes that the experience of mooting provides opportunities to develop⁶².

An important element of the role of a practising lawyer, the “ability to withstand interruptions”, has been recognised as an aspect in which mooting provides invaluable practise, through the requirement that students respond to judicial interventions made during their submissions⁶³. Moreover, the enhanced confidence and improved analytical skills, as well as improvements in students’ written and oral communication skills, and their ability to “think on their feet”⁶⁴, have been noted as transferrable attributes making involvement in moots advantageous to students seeking any employment⁶⁵, but particularly when applying to be a pupil barrister, in relation to which it has been stated that “there can be no excuse for getting to a pupillage interview without having done a moot”⁶⁶. Similarly-positive views have been expressed by solicitors in respect of the benefits of mooting for prospective trainees, particularly in relation to the interview process⁶⁷. Other acknowledged benefits of mooting include “the thrill or rush of competition”, improvements to self-confidence, and a “greater sense of empathy for how the law treats individuals”⁶⁸. Particular importance has been placed upon the opportunity provided by mooting to obtain practice in developing a “personality and style” of advocacy in a competitive environment⁶⁹. This has been recognised as a skill that mooters develop by becoming used to what is expected of them when mooting through a process of “systematic desensitisation” by repeated exposure to moot practice⁷⁰. The opportunities available through

⁶² Parsons, L (2017) “Competitive Mooting as Clinical Legal Education: Can Real Benefits be Derived from an Unreal Experience?” 1 *Australian Journal of Clinical Education* 4, p14; Parsons, L (2018) “Competitive Mooting: An Opportunity to Build Resilience Skills for Legal Practice” 4 *Australian Journal of Clinical Education* 1, pp 12-17

⁶³ Snape and Watt *op cit* p14

⁶⁴ Dickerson *op cit* 1217-1218

⁶⁵ *ibid* p1226-7

⁶⁶ Kramer, A (2007) *Bewigged and Bewildered? A Guide to Becoming a Barrister in England and Wales* Oxford: Hart Publishing, p89

⁶⁷ Calder, K, and Sacranie, S (1996) “Is mooting useful in degree level education, and if so, how should it be integrated into a degree programme?” (unpublished LLB dissertation, University of Warwick), cited Snape and Watt *op cit* p15

⁶⁸ Ringel, L.S (2004) “Designing a Moot Court: What to Do, What Not to Do, and Suggestions for How to Do It” 37(3) *PS: Political Science and Politics* 459, p460

⁶⁹ Finneran *op cit* p127

⁷⁰ Thomas, M and Cradduck, L (2014) “The art of mooting: mooting and the cognitive domain” 20 *International Journal of the Legal Profession* 223, p230

mooting to build social and career progression networks with fellow students, as well as alumni and the local legal profession, have also been identified⁷¹ .

Mooting has been described as being “like an iceberg”, in that it can have deeper and perhaps more important benefits to the students involved than those relating to the oral performance of the moot which might be immediately obvious.⁷² From a more explicitly pedagogical perspective, a recognised benefit of mooring has been its providing an opportunity for students to prepare and argue points of law, which has been described as “a skill critical to lawyers”, and “something which we in the classroom increasingly deny our students”⁷³. An especially important aspect of this, and an element particular to mooring, is the opportunity to analyse and synthesis points of law arising out the case law researched, and to devote a degree of time to doing this that the time constraints of “normal classroom” instruction precludes⁷⁴. The ability to do this, and to then express a clear oral or written understanding of “what may be very complex legal material”, which mooring “nurtures”, has been described as lying “at the heart of [lawyers’] skills as lawyers”⁷⁵. The time involved in preparing for a moot, and effort required in order to do so, also provides students with the opportunity to develop their understanding of the application of rules of statutory interpretation, and concepts relating to judicial precedent, with a degree of focus not available elsewhere in the curriculum.⁷⁶

From the perspective of an educational theorist, mooring has been described as of particular significance as an educational experience in that it enables a learner to engage with all six “levels” of cognitive activity necessary to achieve the “goals” identified by B.S Bloom in his influential work on educational objectives. Thomas and Craddock describe this by reference to the demands of participating in a moot, which necessitate parallel attainment of the upper three levels (analysis, evaluation, and creation) of the revised taxonomy of Bloom’s educational objectives, the lower levels (remembering, understanding, and applying) having been attained by the earlier stages of moot preparation⁷⁷. Similarly, it has been noted that

⁷¹ Ringel *op cit* p460

⁷² Huxley-Binns, R (2010) “Hardly a moot point” 160 *New Law Journal* 7411, 7411

⁷³ Gaubatz, J.T (1981) “Moot Court in the Modern Law School” 31 *Journal of Legal Education* 87, p88

⁷⁴ *ibid* p89

⁷⁵ Snape and Watt *op cit* p13

⁷⁶ *loc cit*

⁷⁷ Thomas and Craddock *op cit* pp227-8 (citing Anderson, L.W; Krathwohl, D.R; Bloom, B.S (2001) *A Taxonomy for learning, teaching, and assessing: a revision of Bloom’s taxonomy of educational objectives* New York:Longman, p70).

mooting facilitates development of the identified hierarchical objectives of affective learning⁷⁸, the first two stages of which (“Willingness to pay attention” and “voluntary compliance”) are fulfilled by the very fact of a student’s engagement in the task of moot preparation⁷⁹, and the third stage (“acceptance”) through the student’s adoption during the moot of the rules of courtroom procedure, including speaking in accordance with courtroom etiquette⁸⁰. The fourth and fifth stages (“rearrangement of value systems” and “incorporation of values into life”) have been recognised as more difficult goals for the mooter to achieve, in that they require the mooter to adjust their perceptions of the morality involved in the case that they have been instructed to present, and to adopt a stance when advocating that the court should support submissions that they have made that may be at odds with their own views about the case involved. In this sense, the mooter is required to adopt a similar position to a legal professional who may disagree morally with the client that he or she is professionally obliged to represent⁸¹. It has been recognised that development of these attributes will most likely take place over a sustained period of involvement in mootings⁸²

It has been noted that certain disadvantages can arise for students as a result of their involvement in mootings. Some of these are common to experiences that offer a different approach to the traditional lectures and seminars, but others are unique to mootings. The competitive nature of mootings might bring with it conflicts between teammates, as well as the “winners and losers” of a moot. There are also the potential financial costs for students of travelling to moots⁸³, particularly if their university is unable to make the substantial financial investment necessary to participate in international moot court competitions⁸⁴. Also, involvement in international moots may give rise to difficulties brought about by language or cultural differences⁸⁵. One such problem arose following the lunch break at the heats of the K.K Luthra Memorial Moot Court Competition (contested annually at the University of Delhi), when an English mooter unused to Indian cuisine ate a bowlful of chutney in the belief that it

⁷⁸ Thomas, M and Craddock, L (2018) “Chill out! Mooting and the affective domain” 25(3) *International Journal of the Legal Profession* 317, pp 318-19 (citing Krathwohl, D., Bloom, B. & Masia, B. (1964) *Taxonomy of Educational Objectives: Handbook II: The Affective Domain*: New York: David McKay).

⁷⁹ Thomas and Craddock (2018) *ibid* p321

⁸⁰ *loc cit*

⁸¹ *ibid* pp 321-22

⁸² *ibid* p319

⁸³ Ringel *op cit* p460

⁸⁴ Brown *op cit* pp339-40

⁸⁵ Parsons (2018) *op cit*, p6.

was soup. Consequently, his moot participation was interrupted by an unscheduled need to excuse himself for personal reasons⁸⁶.

Other factors which have been identified as possibly disadvantageous towards the students involved include the effort necessary to prepare effectively for a moot, which might adversely impact upon the student's other educational demands, or create negative personal impact in the form of stress. This has been identified as a problem particularly likely to arise in the case of first-year students, who may be ill-equipped to deal with the emotional and intellectual challenges presented by mooting⁸⁷. However, it has been argued that this can, as with other public speaking activities, be reduced over time by a mooter's developing techniques to reduce the likelihood of the moot performance being impeded by any anxiety that the mooter may be experiencing⁸⁸, as well as support and assistance from the staff involved in organising the moots⁸⁹.

The moot system has long been criticised for lacking realism, insofar as the moot court environment does not sufficiently resemble a real court hearing, resulting in "an obviously artificial make-believe air"⁹⁰, or, more damningly, "a mere game"⁹¹. This particular criticism has its source in part in the moot problems that students are required to base their submissions upon, which are often by their nature outlandishly unrealistic in substance⁹², as well as in their plain setting-out of the facts of the moot case, which has been described as potentially causing students to believe incorrectly that "facts in real life are defined, concrete, and knowable rather than uncertain, slippery and complex"⁹³, and thus fail to appreciate the demands involved in real case preparation, where the facts are far from clear⁹⁴, or may be "missing"⁹⁵ and in relation to which the outcome of "most appellate cases turn"⁹⁶. Similarly, mooters are encouraged to make use of all of the time that they are allotted by the competition rules, whereas in practise

⁸⁶ Conversation with Sidharth Luthra, January 2015

⁸⁷ Wolski *op cit* pp67-8

⁸⁸ Thomas and Craddock (2018) *op cit* pp317-18, pp324-329

⁸⁹ *ibid* pp 330-4

⁹⁰ Blatt, W.M (1936) "An Experiment in Moot Court Work" 8(5) American Law School Review 417, p417

⁹¹ Gaubatz *op cit* p87

⁹² *loc cit*

⁹³ Wolski *op cit* p55

⁹⁴ Gaubatz *op cit* p88

⁹⁵ Wolski *op cit* p56

⁹⁶ Kozinski, A. "In praise of moot court – not!" (1997) 97. Columbia Law Review 178, p189

a judge “would never object” if an advocate did not use all of their available time⁹⁷ Also, the common feature of moot problems being divided into sections, which are addressed by the individual students in the moot team, has been criticised as unrepresentative of real case preparation, the nature of which is such that a lawyer is required to “immerse himself in the case” as a whole, rather than attempt to compartmentalise it⁹⁸.

The fact that moot preparation requires students solely to focus upon points of law has been criticised as an inaccurate representation of real appeal court procedure, in that such proceedings invariably involve procedural issues that are not addressed within the moot format⁹⁹, and when points of law do arise, they are more likely to come about from a “gradual discovery of the facts” rather than “a discovery of new and groundbreaking principles of law”¹⁰⁰. This has been identified as giving rise to the risk that students may fail to appreciate “the relevance of facts in the operation of the law”¹⁰¹. This, it has been argued, results in moots becoming a process that “serves academic values... which are extrinsic to the litigation process”, and “teaches students the perverse lesson that the strength of the client’s case – indeed, the fate of the client – is irrelevant”¹⁰². It has been argued, however, that the focus upon points of law necessitates that student mooters become accustomed to the need to “exercise independent professional judgement”, rather than risk too close identification with one’s client, which is described as likely to give rise to ethical concerns “more problematic than any danger of creeping passivity in the legal profession”¹⁰³

A related criticism pertains to the extent to which moot participants and judges “worship form”, with emphasis on form over content, for example, in deciding a moot competition in favour of the team with the best display of advocacy skills¹⁰⁴. This is unlike the position in real courtroom hearings, where the contrary position prevails¹⁰⁵. The emphasis in moot judging upon the mooters’ oral submissions (as opposed to the written briefs or skeleton arguments that they have drafted) has been criticised as not reflective of real courtroom practice, where written

⁹⁷ Martineau, R.J (1981) “Moot Court: Too Much Moot and Not Enough Court” 67 American Bar Association Journal 1294, p1297

⁹⁸ Kozinski *op cit* p193 (gendered pronoun in original)

⁹⁹ Martineau *op cit* p1296

¹⁰⁰ Finneran *op cit* p124

¹⁰¹ Wolski *op cit* p55

¹⁰² *ibid* pp184-5

¹⁰³ Hernandez , M.V (1998) “In defense of moot court” 17 Review of Litigation 69, p75

¹⁰⁴ Kozinski *op cit* p181

¹⁰⁵ Gaubatz *op cit* p88

submissions are afforded increasingly greater importance¹⁰⁶ The requirement that moot judges decide the winners of a moot based upon the effectiveness of the advocacy involved has been criticised as unrepresentative of real courtroom advocacy, in which lawyers may display extremely effective advocacy, but nonetheless fail to persuade a judge to decide a case in their favour because the judge does not agree with the points that they are making¹⁰⁷. The unrealistic nature of mooting, it has been submitted, teaches students bad habits that “must be unlearned...by bitter experience”¹⁰⁸, such as encouraging students to “show off” in order to attempt to impress the judge with their advocacy abilities¹⁰⁹ (although it has been argued elsewhere that this problem can, and should, be prevented by a good moot judge¹¹⁰).

This lack of realism has been attributed to moots being organised by academics who lack practical experience¹¹¹. This may give rise to such unrealistic features as a focus in moot problems upon points of law that happen to have captured the public’s attention at that given time, which is very rarely the case in in real litigation¹¹², although the criticism that this results in students failing to understand how judicial precedent works has been rebutted on the basis that such a problem is more likely to be due to poor teaching practice¹¹³. The very fact that moots are commonly set in appellate courts, rather than courts of first instance, has been criticised as driven by the convenience of the academics, it being easier to replicate an appellate court hearing than a trial¹¹⁴, to the detriment of the students, who upon commencing their legal careers are much less likely to appear in an appellate court than a trial¹¹⁵. As a simulation-based method of learning, mooting has been criticised as likely to fail to provide its full potential educational benefit if students do not perceive it as “replicat[ing] actual practice” or being “relevant, meaningful, and interesting”¹¹⁶

While it has been accepted that moots cannot be expected to accurately replicate a real court hearing, it has been proposed that they could feasibly come closer to doing so, for example, by being based upon real courtroom hearings, and making all the relevant case papers

¹⁰⁶ *Ibid* pp57-9, Kozinski *op cit* p186

¹⁰⁷ *ibid* p183

¹⁰⁸ Kozinski *op cit* p180

¹⁰⁹ *ibid* p182

¹¹⁰ Hernandez *op cit*, pp87-8

¹¹¹ Kozinski *op cit* p179

¹¹² *ibid* pp191-2

¹¹³ Hernandez *op cit* p83

¹¹⁴ Martineau *op cit* pp 1294-5

¹¹⁵ Finneran *op cit* pp121-3

¹¹⁶ Wolski *op cit* p53

available for students to refer to when preparing their appeal submissions¹¹⁷. This proposal has in turn been criticised as likely, in the absence of thorough instruction in how to distinguish “facts” from “evidence”, to give rise to bad habits and misunderstandings of the same character to that which the existing moot system is criticised as being prone to¹¹⁸. Also, a specific rebuttal to the criticism that moots lack realism has been raised in relation to the use of moots as assessments, wherein the requirement to advocate a particular party’s position more accurately reflects legal practice than the requirement to adopt a position of impartiality when answering a “purely academic assessment”¹¹⁹. Similarly, the necessity for a mooter to rely upon “elegance as well as correctness” in making their submissions has been described as lending an element of realism to the process of legal education in promoting the message to students that decisions in real courtrooms rarely rely upon syllogistic reasoning alone¹²⁰

From the perspective of English legal education, it has been commented that the “sting” of many of the above criticisms can be drawn in that mooting as practised during undergraduate law studies does not, unlike mooting in American law schools, presume to be “a precursor for legal practice”¹²¹, such a purpose in England being served at present by the Legal Practice Course and the “vocational component” of Bar Training. Additionally, the above criticisms have themselves been criticised as being a symptom of the common tendency of practising lawyers to “look down” on legal academics¹²². The focus in moots upon questions of law has been described as not substantially lessening the practical benefit for students of engaging in the same sort of process of “answering questions and reasoning through issues” as is conducted by practising lawyers¹²³, nor the benefit of careful case analysis¹²⁴ or opportunities to gain in personal confidence before entering practise, which might be of particular importance in helping students with problems in their personal lives in helping them come to terms with those problems rather than risk an adverse effect to their careers¹²⁵. This approach has been defended as preferential to deciding moots based upon the merits of the parties’ cases, as such an approach “would unfairly assess competitors on matters over which they have no

¹¹⁷ Kozinski *op cit* pp194-5

¹¹⁸ Hernandez *op cit* pp83-4

¹¹⁹ Huxley-Binns *op cit* p7412

¹²⁰ Thomas and Craddock (2018) *op cit* pp320-321

¹²¹ Snape and Watt *op cit* p7

¹²² Hernandez *op cit* p70

¹²³ *ibid* p73

¹²⁴ *ibid* p74, 83

¹²⁵ *ibid* p78

control”¹²⁶. It has been submitted that most of the above criticisms of mooting are more likely to arise out of the way that a particular university organises its mooting programme, rather than mooting itself, and that “full, enthusiastic support” from the academic staff involved can prevent the occurrence of the identified problems¹²⁷. Such support should include making students aware of the importance of not adhering too rigidly to any “outline” submissions that they may have prepared, so as not to risk failing to give sufficient attention to answering questions put to them by the moot judge¹²⁸. The importance of giving meaningful formative feedback on the students’ written work has also been identified¹²⁹.

A further aspect of mooting that has attracted criticism is the tendency of mooters to resort to policy-based arguments when making their submissions (due to the nature of the moot problem making it difficult to identify any directly relevant authority) on the basis that this is not reflective of real courtroom practise¹³⁰. However, this aspect of mooting has been defended from a pedagogical perspective on the basis that it provides students with an opportunity to have regard to points of law in a broader context¹³¹.

In contrast to the criticisms of lack of realism raised by (in the main) legal practitioners, mooting has also been the subject to criticism from academic commentators on the basis that it is *too* representative of certain negative aspects of the reality of legal practice. These include the gender bias against women that pervades the legal system, which “allow[s] its training goals to be shaped by the gender-biased world of practice” and thereby “perpetuate[s] the existing system”¹³² by being governed according to rules established by and from the perspective of men, such as expectations of what female mooters should wear¹³³ and criticisms of non-verbal behaviour predicated upon gender stereotypes¹³⁴ resulting in a message that female mooters need to “mimic maleness”¹³⁵ in order to succeed in the legal profession. Such problems, it has been argued, cannot be solved by an attempt to “degender” moot proceedings, due to the

¹²⁶ *ibid* p86

¹²⁷ *ibid* p89

¹²⁸ Finneran *op cit* pp129-132

¹²⁹ Wolski *op cit* p65, Gillespie *op cit* pp33-4

¹³⁰ Kozinski *op cit* p192

¹³¹ Parsons (2018) *op cit*, p11

¹³² Morrison, M.N (1995) “May It Please Whose Court: How Moot Court Perpetuates Gender Bias in the Real World of Practice” 6(1) UCLA Women’s Law Journal 49; p55

¹³³ *ibid* pp58-61

¹³⁴ *ibid* pp62-4

¹³⁵ Atrey, S,(2013) “I Object Your Honour – The Moot Court Paradigm is Mootable” 6 NUJS Law Review 301,p313

gendered nature of the world¹³⁶. A proposed solution has been to encourage both male and female mooters to deploy in their submissions appeals to “kindness, flexibility, and emotion”¹³⁷ of the type stereotypically associated with women with a view to normalising such an approach to courtroom advocacy and initiating progress towards a legal system that is less hostile to women generally. It has also been recommended that students be taught about feminist approaches and the contributions made by female lawyers, and that moot court instruction include an element of awareness of the ethical concerns relevant to making courtroom submissions¹³⁸, as well as input from female moot judges and a moot “dress code” that is not predicated upon male-driven standards of courtroom dress¹³⁹.

Mooting has also been criticised for arguably inculcating in students an adversarial attitude towards the resolution of legal problems, and the adoption of a “win/loss” approach¹⁴⁰. This is at odds with prevailing attitudes in modern legal policy that disputes ought to be resolved (where possible) out of court and in a conciliatory manner¹⁴¹. This has been argued to have a detrimental effect upon a student’s development of their understanding of the role of a legal professional¹⁴². It is to be noted, however, that these criticisms have been made with particular regard to the system of mooting in India, where there is no distinction between undergraduate legal studies and professional legal training, and where although mooting is not a compulsory part of legal education in a *de jure* sense, it is in a *de facto* sense insofar as it represents for many students their only engagement with courtroom procedure during their legal education¹⁴³. These criticisms are less relevant in systems of legal education (such as that in England) where mooting usually takes place during undergraduate legal studies, which are then followed by professional legal training including training in professional ethics and alternative dispute resolution.

Although mooting is a feature of the curriculum at most modern universities, albeit predominantly via optional modules (which has been criticised for causing too few students to have access to the benefits offered by mooting¹⁴⁴) it is predominantly used as “a vehicle for

¹³⁶ Morrison *op cit* pp71-2

¹³⁷ *ibid* p77

¹³⁸ Wolski *op cit* pp48-51

¹³⁹ *ibid* pp82-3

¹⁴⁰ Atrey *op cit* p310

¹⁴¹ *ibid* p309

¹⁴² *ibid* pp309-10

¹⁴³ *ibid* p304

¹⁴⁴ Wolski *op cit* p64

the development of skills”¹⁴⁵ However, as noted above, mooting has in recent years been used as a method of teaching substantive law, as was one of its original purposes. The particular analytical approach required in order to prepare satisfactorily for a moot has been transposed for use as a method of teaching tax law, the adequate understanding of which has been recognised as requiring the deployment of such an approach¹⁴⁶. It has also been recognised that even if mooting is taught from a skills-based perspective, it can still succeed in imparting an element of substantive law tuition, because in order to demonstrate the relevant skills, it is necessary for students to have “an understanding of theory”¹⁴⁷. As well as being part of the teaching curriculum in many universities, the educational benefits of mooting have led to inter- varsity moot competitions being used as a vehicle for teaching the law arising out of such matters as the European Convention on Human Rights¹⁴⁸, as well as international law generally¹⁴⁹. In respect of the latter subject, it has been asserted that the contesting of points of law in the environment of an international moot court competition facilitates the study of the subject area by the students in greater depth than might be possible through classroom-based learning alone¹⁵⁰, as well as “recast[ing] the student-teacher relationship” so as to better enable university staff to educate students within a collaborative learning environment¹⁵¹. This endorsement, however, has been qualified by the provision that universities ought to provide sufficient incentive and reward in the form of academic credit for students able to make the effort to prepare for and participate in such an experience¹⁵².

Mooting has also been used in interdisciplinary teaching projects, including the teaching of law and medicine in the context of human cloning¹⁵³, and the teaching of law and literature via

¹⁴⁵ Gillespie, A.A (2007) “Mooting For Learning” 5(1) *Journal of Commonwealth Law and Legal Education* 19, p28

¹⁴⁶ Bentley, D (1996) “Mooting in an Undergraduate Tax Program” 7 *Legal Education Review* 97, pp100-102

¹⁴⁷ Wolski *op cit* p63

¹⁴⁸ Sundberg, J.W.F (1997) “Moot Court: An American Idea in a Nordic Setting”19(2) *Justice System Journal* 229

¹⁴⁹ Collins, E.C and Rogoff, M.A (1991) “The Use of an Interscholastic Moot Court Competition in the Teaching of International Law” 24(3) *PS: Political Sciences and Politics* 516

¹⁵⁰ Brown *op cit* p335

¹⁵¹ Collins and Rogoff *op cit* p517

¹⁵² Brown *op cit* pp337-8

¹⁵³ Pattinson, S.D, and Kind, V (2017) “Using a moot to develop students’ understanding of human cloning and statutory interpretation” 17(3) *Medical Law International* 111

the “Shakespeare Moot Court” project at McGill University¹⁵⁴, involving moots in which the only permitted authorities are the works of William Shakespeare. This has been described as “a way of restoring...Shakespeare criticism to the public realm” by the way in which the requirement to refer to the works of Shakespeare in a contemporaneous legal environment “takes to heart the principle that Shakespearean meaning is diachronic through and through”¹⁵⁵, as well as allowing law students an opportunity to study in depth the examination in literature of human qualities that judges must bring to bear when making decisions in court¹⁵⁶

In concluding this Chapter, I will address the second part of Objective 1 (“*To explain how mooting has been used in legal education historically, and what position is taken as to the role of mooting in legal education by modern legal academics and practitioners?*”) by stating that mooting has great potential to be used in legal education not just as a vehicle for skills training, or as a “fun” activity¹⁵⁷ but as a method of teaching substantive law. There are many criticisms made of mooting by Kosinski and others – however, the problems raised by these criticisms do not appear to be of the kind that could not be solved by a well-planned and implemented programme of study.

Further exploration of this subject involves fulfilling Objectives 2 (“To set out the theoretical basis of my study”) and 3 (“To draw conclusions from the empirical research carried out to date into mooting in legal education”). I will answer these questions in detail in the next chapter, but before doing so, I shall introduce the body of educational theory that I will go on to apply in order to understand how mooting can be conceptualised as a method of learning in higher education.

¹⁵⁴ Yachnin, P & Manderson, D (2010) “Shakespeare and Judgment: The Renewal of Law and Literature” 15(2) *The European Legacy* 195; <https://www.mcgill.ca/shakespearemoot/> (last accessed 8th March 2021)

¹⁵⁵ Yachnin (2010) “Renewing Literature’s Urgency” *ibid* 195-203, p203

¹⁵⁶ Manderson (2010) “Renewing Law’s Character”, Yachnin and Manderson *op cit* 203-211, pp210-11

¹⁵⁷ Gillespie *op cit* p21

Mooting as experiential learning

The nature of mooting as a method of education has been explained as a form of experiential learning, insofar as it relies upon the performance of an experience, followed by a process of reflection and improvement¹⁵⁸. The most influential exponent¹⁵⁹ of the theory of experiential learning is David A. Kolb, who describes experiential learning as “the process whereby knowledge is created by the transformation of experience”¹⁶⁰. Key to this is the process of knowledge as a spiral, whereby a learner reflects upon their experience and uses that reflection to transform and develop not just their understanding of the subject that they are learning, but the world that they have constructed as an environment in which to learn¹⁶¹. Viewed as such, this necessitates consideration of the theory underpinning the concept of learning by experience generally, as well as specifically in relation to mooting, so as to fulfil the objective of this thesis of addressing how a student’s experience of mooting can affect their learning and understanding of substantive law.

The theoretical basis for experiential learning, as conceived of by Kolb, is informed by his drawing upon the work of others – notably William James, John Dewey, Kurt Lewin, and Jean Piaget. In the next chapter, I will review the literature on experiential learning generally in order to set out Kolb’s theory as derived by him from these scholars, along with the criticisms that have been directed at Kolb’s work, both in respect of its foundations and its application. I will also refer to the literature specifically relating to the empirical research that has been carried out into mooting as a method of experiential learning, so as to inform my own investigation into this area.

¹⁵⁸ Wolski *op cit* pp51-52

¹⁵⁹ Burrige, R (2002) “Learning law and legal experience by education” in Burrige *et al* (eds) *Effective Learning and Teaching in Law*, London:Kogan Page, 25-51, p30

¹⁶⁰ Kolb (2015) *Experiential Learning: Experience as the Source of Learning and Development* (2nd edition) Upper Saddle River, NJ: Pearson: p49

¹⁶¹ *ibid* pp63-5

CHAPTER 2

LITERATURE REVIEW

In the previous chapter, I identified that the outcome of this thesis will be to answer the question of how students' experiences of, and approaches to, mooting, affect their learning of substantive law and understanding of the law. I explained that this has been informed by the context within which my research has taken place, the factors that have motivated me to conduct this research, and the objectives that I will be seeking to fulfil.

In this chapter, I will review the existing literature which relates to the subject under investigation. My aims in doing so are to (a) draw together the existing research and theories derived therefrom, and then; (b) establish the presence in the existing body of literature of gaps, which my own research aims to fill. My review will be structured as follows:

1. An explanation of the process that I will be using to review the literature. The "literature" to be reviewed can be grouped into two broad categories: literature on experiential learning, and literature on mooting.
2. A review of the literature on experiential learning, explaining the development of this theory as it is understood in modern education.
3. A review of literature involving studies based upon experiential learning theory in respect of role-play as a learning technique.
4. An identification of the categories of literature on mooting.
5. A review of empirical studies of mooting.
6. An identification of the gaps in the literature.

Forms of literature review

Before commencing a literature review, it is necessary first to consider the form that the review will take. I will examine the two forms that literature reviews have been primarily categorised as belonging to: the systematic review, and the narrative review¹⁶². Other forms of literature review have been noted¹⁶³ - one of which (meta-analysis) I will also consider.

Systematic reviews

Systematic reviews of literature are distinguished by their being conducted “according to scientific principles and rules”¹⁶⁴ in order to make for a study that “can be replicated by others”. This requires setting out an “explicit and rigorous methodology”¹⁶⁵, including use of a research protocol to clearly define how the search is going to be conducted, what is going to be included and excluded, and how the data to be obtained from the search will be analysed¹⁶⁶. The primary advantage of a systematic review is said to be that because it allows for coverage of the comprehensive body of research addressing the topic under investigation (it has been noted that to complete a systematic review, “it is incumbent upon the reviewer to locate every study ever conducted that meets these criteria [for inclusion]”¹⁶⁷), it allows for an “unbiased”¹⁶⁸ assessment of the literature.

It has been noted that systematic reviews have been accepted as the preferred method of reviewing literature – “Indeed, in many fields this approach is almost obligatory.”¹⁶⁹. However, the approach has been criticised as being founded upon a positivist epistemological stance

¹⁶² Bryman, A (2016) *Social Research Methods* (5th edition), Oxford University Press, pp90-91

¹⁶³ Boland, A, Cherry, M.G, Dickson, R (2017) *Doing a Systematic Review: A Student's Guide* (2nd Edition) Thousand Oaks, CA: Sage, pp8-14

¹⁶⁴ Cooper, H (1998) *Synthesizing Research: a guide for Literature Reviews* (3rd edition), Thousand Oaks, CA: Sage, xi.

¹⁶⁵ Boland *et al op cit* p12

¹⁶⁶ *ibid*, p 55

¹⁶⁷ Slavin, R.E “Best-evidence synthesis: an alternative to meta-analytic and traditional reviews” (1986) 15(9) *Educational Researcher* 5, p8 (cited Hammersley, M (2001) “On “Systematic” Reviews of Research Literatures: a “narrative” response to Evans & Benefield” 27(5) *British Educational Research Journal* 543, p544

¹⁶⁸ Macdonald, G (2000) “Social care: rhetoric and reality” in Davies, H.T.O, Nutley, S.M, and Smith, P.C (eds) *What Works: Evidence-based Policy and Practice in Public Services* Bristol: Policy Press, pp117-140, p131 cited Evans, J and Benefield, P (2001) “Systematic Reviews of Educational Research: does the medical model fit?” 27(5) *British Educational Research Journal* 527, p529

¹⁶⁹ Cooper, H *supra* fn164

towards existing research, conceptualising the research as a destination towards which the researcher charts a course and then “brings back knowledge”¹⁷⁰. Critics of this conceptualisation of the research process include Polanyi, who has described such an exercise as an attempt to make sense of research undertaken by others by imposing “strictly impersonal criteria of [the research]’s validity”, which is an impossible task, as to do so ignores the ever-present personal element in the research undertaken, and distorts the research by attempting to conceive of it in a way which “is to exercise the kind of lucidity which destroys its subject matter”¹⁷¹.

Notwithstanding the above criticisms of attempting to view the task of reviewing the literature through the lens of positivism, the perception of the systematic review as an artefact in itself has been called into question. Hammersley has pointed out that no review of the literature can be truly “ ‘a matter of synthesising data’ ” without an element of personal input on the part of the reviewer, as the task of reviewing the literature necessitates that “the reviewer...draw on his or her tacit knowledge, derived from experience”¹⁷² in order to produce the final analysis of the review. This, it has been noted, is apparent particularly in respect of the inclusion in systematic reviews of what has been referred to as “grey” or “fugitive”¹⁷³ literature – terms used to refer to literature that has not been subjected to review prior to publication, or which has not been published. As such literature has not previously been assessed as to its validity, the only assessment must be that of the reviewer – thus interposing between the literature and the end reader the reviewer’s critical opinion as the sole arbiter of validity¹⁷⁴. By attempting comprehensive coverage, the quest for objectivity pursued by the systematic reviewer has the inevitable end of a review that belongs more to the subjective dimension than any less “comprehensive” review ever can.

This latter point calls into question also another of the vaunted strengths of the systematic review process: that the final analysis is “unbiased”¹⁷⁵. This ignores the personal dimension constantly present in research, and the concept of reflexivity (defined as “the ability of human statements to alter the state of what is being stated, the person who states it and often too the

¹⁷⁰ Foster, P and Hammersley, M (1998) “A Review of Reviews: structure and function in reviews of educational research” 24(5) British Educational Research Journal 609, p610

¹⁷¹ Polanyi, M (1966) *The Tacit Dimension*. Reprint, Gloucester, MA: Peter Smith 1983:, p21

¹⁷² Hammersley *op cit* pp548-9

¹⁷³ Slavin *op cit* p10

¹⁷⁴ Foster and Hammersley *op cit* p621.

¹⁷⁵ MacDonald *supra* fn168

person who listens”¹⁷⁶), which has been noted as being “inseparable from the quality of being a subject, of being human” and thereby forming part of the research carried out by all researchers, “albeit not consciously” in all cases¹⁷⁷. Conversely, it has been noted that the recognition of the personal involvement of the researcher in the research act “need not be construed as bad practice or bias but as a source of data in its own right”¹⁷⁸. The significance of the positionality of the researcher in the research act has been regarded as “part of the empirical evidence for (or against) the claims advanced in the results of research”¹⁷⁹. Indeed, given that (as noted above) all reviews of literature involve a subjective element in the form of the scrutiny of the reviewer, it has been suggested that an overt recognition of “this ‘subjective’ element...in fact increases the objectivity of the research and decreases the ‘objectivism’ which hides this kind of evidence from the public”¹⁸⁰

It has also been suggested that the kind of literature review necessary to inform my research does not lend itself to the systematic review process because, by its very nature, it will include reference to qualitative data. Opinions diverge amongst advocates of systematic review¹⁸¹ as to whether qualitative data can appropriately be included in an evaluation of data at all: it has been commented, in the context of social work research, that “anything else” other than “randomised, controlled-trials...is ultimately a ‘disservice to vulnerable people”¹⁸². A less extreme approach is taken by Davies, who rebuts the charge that qualitative data is less valid than quantitative data, stating that such criticisms “seem to miss the point of what qualitative studies are trying to achieve”¹⁸³. However, Davies is careful to state that the inclusion of qualitative studies in a research evaluation is only useful in as much as it “enhances

¹⁷⁶ Gabriel, Y (2015) “Reflexivity and beyond – a plea for imagination in qualitative research methodology” 10(4) *Qualitative Research in Organizations and Management: An International Journal* 332, p333

¹⁷⁷ *ibid* p334

¹⁷⁸ James, K. and Vinnicombe, S. (2002) ‘Acknowledging the individual in the researcher’, in D. Partington (ed), *Essential Skills for Management Research*. London: Sage. pp. 84-98, p89.

¹⁷⁹ Harding, S. (1987) ‘Introduction: Is there a feminist method?’, in Harding, S. (ed) *Feminism and Methodology: Social Science Issues*. Bloomington: Indiana University Press. pp. 1-14, p9

¹⁸⁰ *ibid*

¹⁸¹ noted Hammersley *op cit* p549

¹⁸² Oakley, A (2000) *Experiments in Knowing: gender and method in the social sciences* Cambridge: Polity Press, p318, quoting Macdonald, G (1997) “Social work: beyond control” in Maynard, A and Chalmers, I (eds) *Non-Random Reflections on Health Services Research* London: BMJ Publishing Group, 122-146, p144

¹⁸³ Davies, P (2000) “Contributions from qualitative research” in Davies et al *op cit* 291-316, p309.

quantitative studies by helping to determine the...conditions under which the findings of evaluative and experimental studies are likely to be generalisable and non-generalisable”¹⁸⁴. It follows, given that it is not the role of qualitative data to produce findings that are necessarily “generalisable”, but rather “relatively concrete illustrations of processes”¹⁸⁵, it is neither necessary nor helpful when composing that research to make use of a form of data analysis which is predicated upon the production of data that is “generalisable”.

Accordingly, I decided not to make use of a systematic review to inform my own research. It has, however, been commented¹⁸⁶ that it is not possible to undertake an “unsystematic” review of the literature, as all reviews must by their very nature involve a system of some sort, and to set up “systematic reviews” as the only alternative to “ostentatious narratives to enthuse the troops”¹⁸⁷ is to create a false dichotomy. My review of the literature will, therefore, be directed by my own understanding of the subject matter under investigation and of the key sources of information in the area in question, as well as my own positionality, which will inevitably inform the way in which the literature referred to is constructed and problematized¹⁸⁸

Meta-Analysis

Similar concerns to those expressed above in relation to use of systematic review have been expressed in respect of the technique of meta-analysis when conducting a literature review. This technique involves “combining samples and generating an average effect associated with the properties of the combined sample”¹⁸⁹. It has been commented that a narrative analysis without meta-analysis “remains difficult to evaluate, replicate, or challenge”¹⁹⁰. However, the application of this form of review has been questioned on the basis that it operates from the premise that there is “just one possible relationship between different studies: an additive one”¹⁹¹. A particular concern has been raised in respect of studies that claim to formulate cumulative knowledge in respect of the social sciences, due to “the lack of conceptual

¹⁸⁴ *ibid*

¹⁸⁵ Watson, T.J (2003) “Ethical Choice in Managerial Work: The Scope for Moral Choices in an Ethically Irrational World” 56(2): Human Relations 167-185, p174

¹⁸⁶ Hammersley *op cit* p550

¹⁸⁷ *ibid* p552

¹⁸⁸ Golden-Biddle, K. and Locke, K.D (1997) *Composing Qualitative Research* London: Sage p21

¹⁸⁹ Allen, M (2009) “Meta-Analysis” 76(4) Communication Monologues 398

¹⁹⁰ *ibid* p399

¹⁹¹ Hammersley *op cit* p548

overlap¹⁹² in respect of the theories underpinning the variant studies, with the effect that “..when the confirmation of a proposition depends upon who interprets it, its status as a knowledge claim is equivocal because its intersubjective testability is in doubt”¹⁹³. Conversely, it has been proposed that a narrative review which does not aim for overall aggregate, but instead considers the studies involved as “different parts of a single picture” whereby “each one that makes a genuine contribution changes the emerging theory”¹⁹⁴ reflects with greater limpidity the process of cumulative knowledge in the social sciences, given that in these disciplines – unlike the natural sciences - there is no “calculus”¹⁹⁵ by which “truth” can be measured

Narrative reviews

Unlike the process of conducting a systematic review, which necessitates a review of all available literature on the subject under investigation in order to make a claim for comprehensive coverage, the narrative review process has been described as being grounded in “what is already known” by the reviewer, in order to “frame[...] and justif[y]”¹⁹⁶, and thereby provide a starting point for, the reviewer’s research into the subject under investigation.

I chose to carry out a narrative review of the literature with a view to my own positionality in respect of the research area in question. With regard to the importance of reflexivity in research, I am conscious that the data to be derived from my research – including a review of the literature – is not, and cannot be “processed”¹⁹⁷, as if it were “separate from [my]self”¹⁹⁸. Specifically, my recognition of my experience in participating in, organising, judging, and hosting moots over the past 24 years “must invariably form an integral part of the “story”¹⁹⁹ that my research will tell. This recognition, in turn, facilitates by way of reflexivity what has been described as “bending-back”²⁰⁰ – that being the researcher’s recognition of an object

¹⁹² Freese, L (1980) “The problem of cumulative knowledge” in Freese, L (ed) *Theoretical Methods in Sociology* Pittsburgh, PA: University of Pittsburgh Press 13-69, p17

¹⁹³ *ibid* p19

¹⁹⁴ Hammersley *supra* fn 191

¹⁹⁵ Freese *op cit* p24

¹⁹⁶ Bryman *op cit* p91

¹⁹⁷ *loc cit*

¹⁹⁸ Gabriel *op cit* p334

¹⁹⁹ *ibid* p333

²⁰⁰ Archer, M.S. (2009) “Introduction: The Reflexive re-turn” in Archer, M.S. (ed) *Conversations About Reflexivity*. Abingdon: Routledge.1-13, p2

which in turn causes the researcher to think about their own self reflected in the light of that object. The specific object that calls for reflexivity here is the narrative literature review, which has been described as being “typically prepared by ‘experts’ to provide an overview of a specific topic, to raise overlooked issue and/or information gaps, and to encourage new research”²⁰¹. When I first read the last-quoted passage, I took the view that a narrative review would not be suitable in my circumstances, as I did not, at that time, consider myself to be an “expert” in the subject under investigation, as I associated that term with persons who have achieved a degree of renown or received accolades that I have not. However, adopting a reflexive stance, I have concluded that my experience of, and interest in, mooted within legal education at university does indeed imbue me with the necessary “expert”²⁰² status to conduct a narrative review of the literature.

As noted above²⁰³, any literature review must involve a degree of recourse to a “system” in order to inform the researcher as to how to construct and deconstruct the literature, even though that review may not be a “systematic” review in the formal sense. My own review takes as its starting point the structure suggested by Golden-Biddle and Locke²⁰⁴ for a researcher to deploy so as to formulate a review of the literature that will inform their own research. This structure is divided into two stages.

The first stage involves “Constructing Intertextual Coherence”²⁰⁵. This requires the reviewer to have regard to the existing body of knowledge on the subject under investigation, and set out “how they relate to each other and to the proposed study”²⁰⁶. This can be done by connecting work previously thought to be unrelated in order to “highlight the need for new work (ie: the present study)”²⁰⁷, by identifying “works already recognised in theoretical methods and perspectives” in order to inform a review that is “written as a setup for the present article, which explicates as a logical next step”²⁰⁸ the study being undertaken by the reviewer, or by identifying a body of works “linked by disagreement”²⁰⁹. Golden-Biddle and Locke term these

²⁰¹ Boland *et al op cit* p10 (quote marks in original)

²⁰² Adopting the definition of this term as “a person with a high level of knowledge or skill relating to a particular subject or activity” <https://dictionary.cambridge.org/dictionary/english/expert> [last accessed 8th March 2021]

²⁰³ Hammersley *supra* fn187

²⁰⁴ *op cit*

²⁰⁵ *ibid* p26

²⁰⁶ *loc cit*

²⁰⁷ *ibid* p29

²⁰⁸ *ibid* pp31-32

²⁰⁹ *ibid* p33

techniques respectively “synthesised coherence”, “progressive coherence” and “non-coherence”²¹⁰. The second stage, “Problematizing the Situation”²¹¹, requires the reviewer to have regard to the literature in order to identify that it calls for a contribution to be made, and to explain why this is so. This could be because the literature is either “incomplete” in that there is a gap in the existing literature which needs to be filled²¹², “inadequate” in that the literature suffers from an “oversight”²¹³ in failing to consider the subject under investigation from a particular perspective, or “incommensurate”, whereby the reviewer explicitly claims that the perspectives adopted in the literature are “wrong, misguided, or incorrect”²¹⁴.

The first stage of my literature review, therefore, must involve my constructing the literature. To begin doing this, it is necessary to identify the sources that I will be consulting, and to define the boundaries within which my search of the literature will take place. The scope of my review can be grouped into two kinds of “literature”. Specifically, these are literature on experiential learning theory, and literature on mootings. For reasons explained below²¹⁵ my review will not focus upon empirical studies in respect of other aspects of legal education, (although these may be mentioned in passing), but will draw upon literature on how role-play has been used in other areas of education to help students towards the necessary development for their chosen area of practice.

²¹⁰ *ibid* pp29-33

²¹¹ *ibid* p35

²¹² *ibid* p36-37

²¹³ *ibid* p37

²¹⁴ *ibid* p43

²¹⁵ *infra* fn317 *et seq*

Experiential learning theory

As mooted has been identified²¹⁶ as a form of experiential learning²¹⁷ that can be deployed to teach law in higher education, any attempt to construct a coherent narrative from the literature related to my area of inquiry calls for a consideration of the extent to which my review will draw upon the voluminous literature on experiential learning generally.

It is necessary, in order to understand the key principles of experiential learning theory that underpin my own research, to divide this group of literature into categories and review them accordingly. The specific categories to be reviewed, therefore, are literature setting out experiential learning theory, and empirical studies deploying that theory in practise.

Literature on experiential learning theory

In order to conduct a practical study underpinned by experiential learning theory, it is necessary to review the literature in which the fundamental elements of that theory are identified and expounded –an oft-quoted dictum of one of the founding scholars of what has come to be known as experiential learning theory is that “there is nothing so practical as a good theory”²¹⁸. My review of this literature²¹⁹, along with reference to the sources cited therein, is set out below.

²¹⁶ Burrige, R *op cit* p30

²¹⁷ Defined as “a sense making process involving significant experiences that, to varying degrees, act as the source of learning” (Beard, C (2010) *The experiential learning toolkit: Blending practice with concepts* London: Kogan Page p17)

²¹⁸ Lewin, K (1943-4) “Problems of Research in Social Psychology” in Cartwright, D (ed) (1951) *Field Theory in Social Science: Selected Theoretical Papers* (collected in Lewin, K (1997) *Resolving Social Conflicts and Field Theory in Social Science* Reprint: Washington DC: American Psychological Research Association 2008; pp279-288, p288.

²¹⁹ Abbey, D.S, Hunt, D.E, and Weiser, J.C (1985) “Variations on a Theme by Kolb: A New Perspective for Understanding Counseling and Supervision” 13(3) *The Counseling Psychologist* 477; Buchmann, M, & Schwille, J. “Education: The Overcoming of Experience” (1983) 92(1) *American Journal of Education* 30; Dewey, J (1933) *How We Think*. Reprint, Createspace: s.l 2014; Dewey, J (1938) *Education and Experience* Reprint: New York: Simon and Schuster, 1997; James, W (1901) *The Meaning of Truth*, Preface, available at <http://www.gutenberg.org/files/5117/5117-h/5117-h.htm> (last accessed 8th March 2021); James, W (1905) “The experience of activity” 12(1) *Psychological Review* 1; James, W (1890) *The Principles of Psychology* Vol I Reprint: New York: Henry Holt and Company: 1918. available at <http://www.gutenberg.org/files/57628/57628-h/57628-h.htm> (last accessed 8th

Foundations of experiential learning theory

William James

William James has been acknowledged²²⁰ as the “originator of experiential theory”. James conceived of “experience” as a substitute for what had come to be referred to by philosophers as “consciousness”²²¹, arguing that the entirety of each individual’s understanding of the world is a product of their experiences of “percepts” – for example, a recollection of being near a fire – accompanied by “concepts” – for example, comprehending that the fire is hot²²². James went on to assert that the dualistic notion of “knowing” and “feeling” as being separate concepts was a fallacy, as an individual’s recollection of a physical experience is no less “real” to the individual than the experience itself – or, as James put it, “thoughts in the concrete are made of the same stuff as things are”²²³. James asserted that this epistemological position – which he had elsewhere referred to as “radical empiricism”²²⁴ – should allow for resolution of philosophical “tangles” arising out of disagreements as to what a “fact” is²²⁵. Elsewhere, James had discussed the importance of “selection” of which memories to remember and which to forget, describing it as “the very keel on which our mental ship is built”²²⁶. This concept, transposed to experiences viewed through the lens of radical empiricism, would form the basis²²⁷ of John Dewey’s theories about experience and its importance in education.

March 2021); James, W. “Does Consciousness Exist?” [1904] *Journal of Philosophy, Psychology, and Scientific Method* 477; Kolb (2015) *Experiential Learning: Experience as the Source of Learning and Development* (2nd edition) Upper Saddle River, NJ: Pearson; Lewin, K (1942) “Field Theory and Learning” in Cartwright, D (ed) (1951) *Field Theory in Social Science* (collected in Lewin, K (1997) *Resolving Social Conflicts and Field Theory in Social Science* Reprint: Washington DC: American Psychological Research Association 2008; pp212-231; March, J.G (2010) *The Ambiguities of Experience* Ithaca, New York: Cornell University Press; Marrow, A.J (1969) *The Practical Theorist: The Life and Work of Kurt Lewin*, New York: Basic Books; Nonaka, I, and Takeuchi, H (1998) “The Concept of ‘Ba’: Building a Foundation for Knowledge Creation” 40(3) *California Management Review* 40, Piaget, J (1970) *General Epistemology*, Translated by Wolfe Mays (1972) London: Routledge Kegan & Paul.

²²⁰ Kolb *op cit* p23

²²¹ James (1904) *op cit*

²²² *ibid* p489

²²³ *ibid* p491

²²⁴ James, W (1901) *op cit*, Preface.

²²⁵ James, W (1905) *op cit* p3

²²⁶ James, W (1890) *op cit* p680

²²⁷ Kolb *op cit* p xxi

John Dewey

Dewey disparaged the notion that education should take the form of learning being “taught as a finished product”²²⁸, as to do so contradicts the notion of what education is (as Jerome Bruner would later put it, “knowledge is a process, not a product”²²⁹). Dewey set out his vision for a “new type of education” based on the notion that “all genuine education comes about from experience”²³⁰. Dewey emphasises that throughout this process, the educator must be “intelligently aware of the capacities, needs, and past experiences”²³¹ in order to evaluate the effect of the “moving force of an experience” upon the learner²³² and thereby to determine how the physical and social environment in which the learner is situated can be drawn upon, or even altered, in order to place the learner in “surroundings [that] are conducive to having experiences that lead to growth”²³³ so as to “extract at each present time the full meaning of each present experience”²³⁴ and thereby best enable the learner to draw upon this experience in the future (echoing James’ point about the importance of “selection”²³⁵ in mental functioning)

This, Dewey argues, minimises the likelihood that a learner might perceive knowledge as “segregated”²³⁶, and thus be unable to grow from that knowledge due to an inability to recall it unless “the same conditions recur....as those under which it was acquired”²³⁷. Dewey stresses that the role of the educator should not be that of “external boss or dictator”, but rather the “leader of group activities”²³⁸, and that the educator should keep to a minimum the exercise of his or her authority, only doing so when it is in the interests of the group in order that the group members can perceive such exercise of authority as fair rather than arbitrary²³⁹. Dewey emphasises also the importance of facilitating learners towards recognising and forming a purpose to their education, as without this they cannot understand what their education is leading up to, and are little more than “slaves” to their education, applying the definition of a

²²⁸ Dewey (1933) *op cit* p19

²²⁹ Bruner, J (1966) *Toward a Theory of Instruction* Cambridge, MA: Harvard University Press

²³⁰ Dewey (1933) *op cit* p25

²³¹ *ibid* p71

²³² *ibid* p38

²³³ Dewey (1933) *op cit* p40

²³⁴ *ibid* p49

²³⁵ *supra* fn226

²³⁶ *ibid* p48

²³⁷ *loc cit*

²³⁸ *ibid* p59

²³⁹ *ibid* pp54-5

“slave” as “the person who exercises the purposes of another”²⁴⁰. Dewey sets out the stages involved in that “formation of purpose” as involving the transformation of an impulse by “observation of surrounding conditions” accompanied by knowledge of those conditions, whether as a result of one’s own experience or the instructions of others, to arrive at a “judgement”²⁴¹

Kurt Lewin

The foundations of experiential learning theory, as formulated by Kolb, also draw upon the works of Kurt Lewin. Kolb’s treatment of Lewin, like his treatment of Dewey, has been subjected to criticism²⁴², which will be considered below. However, Lewin’s writings on action research and field theory, as well as those of others who have made reference to these in order to develop their own theories, contain references to concepts that share themes with the writings of Dewey and James, and can legitimately be conceived of as driving towards a common theoretical understanding of learning.

In particular, Lewin’s concept of a “system in tension” for representing psychological needs shares themes with Dewey’s notion of “segregated learning” and the need for an educator to be attuned to the learner’s environment in order to avoid this. The origins of this concept, which Lewin would expand and deploy in his later work, are attributed by Marrow to an incident (recalled by Lewin’s contemporary Donald MacKinnon) in which a waiter in a Berlin café had perfectly remembered Lewin’s order, and was then unable to recall what had been ordered after the bill had been paid. MacKinnon describes this as “a tension system...building up in the waiter as we were ordering and that upon payment of the bill the tension system was discharged”²⁴³. This theory would be deployed later in a well-known experiment by Lewin’s student Bluma Zeigarnik to demonstrate how participants better recalled uncompleted tasks than completed ones²⁴⁴, and would later be deployed by Lewin in the development of what he referred to as “field theory”, a concept that he defined as “a method of analysing causal

²⁴⁰ *ibid* p67. Dewey attributes this definition to Plato, but I have been unable to locate an original source for this.

²⁴¹ *ibid* pp68-9. Kolb depicts this process in graphical form at Kolb *op cit* p34 (Figure 2.2)

²⁴² Miettinen, R (2000) “The concept of experiential learning and John Dewey’s theory of reflective thought and action” 19(1) *International Journal of Lifelong Education* 54.

²⁴³ Marrow *op cit* pp27-8

²⁴⁴ Zeigarnik, B (1927) “U ber Behalten von erledigten und unerledigten Handlungen” 9 *Psychologische Forschung* 1 (cited *ibid* pp 244-6)

relations and of building scientific constructs”²⁴⁵. Lewin characterises this theory as involving an individual’s learning and development being determined by their “life space”²⁴⁶ - the metaphorical “space” an individual creates for him or herself out of their life history, as well as physical and social conditions, which is then altered by either a change in the individual’s “cognitive structure” or a change in their “valences” and “values”.

The term “valence” – to mean “a feature of the psychological environment that could be either positive or negative and that varied with the tension in the ‘psychical system’ related to the object concerned” - was first used by Donald Adams in an English translation of an article by Lewin from the German (the original gives “*aufforderungscharakter*”)²⁴⁷. The effect of a valence was demonstrated by Lewin in a paper he presented to the International Congress of Psychology in 1929, which was accompanied by a film²⁴⁸ of his infant niece learning how to sit on a stone, which involved resolving conflicting desires to walk forward and look behind. This became well-known years later after it was cited by Lev Vygotsky in his influential lecture “Play and its role in the mental development of the child”²⁴⁹.

These theories were put to practical use after Lewin’s move to the United States of America in 1933. Lewin migrated in order to escape the persecution of Jews like him that he (rightly) predicted would follow the rise to power of the Nazi Party²⁵⁰. In 1946, Lewin set about the task (inspired by his own experience of prejudice in Germany) of improving social relations within and between various disadvantaged groups in American society, forming the Commission on Community Interrelations (C.C.I), a research group committed to “‘action research’, that is, action on a realistic level, action that is always followed by self-critical objective reconnaissance and evaluation of results”²⁵¹. The C.C.I’s research always involved

²⁴⁵ Lewin, K (1943) “Defining the ‘Field at a Given Time”” in Cartwright, D (ed) (1951) *Field Theory in Social Science* (collected in Lewin, K (1997) *Resolving Social Conflicts and Field Theory in Social Science* Reprint: Washington DC: American Psychological Research Association 2008, 200-211, p201

²⁴⁶ Lewin, K (1942) “Field Theory and Learning”, *ibid* 212-231, p213

²⁴⁷ Marrow *op cit* pp56-7.

²⁴⁸ A recording is available at <https://www.youtube.com/watch?v=3x4HWLMAwe8> (last accessed 8th March 2021)

²⁴⁹ Vygotsky, L.S (1933/2016) 7(2) *International Research in Early Childhood Education* 3 (This article includes a new translation of Vygotsky’s lecture from the original Russian – recorded by stenograph in 1933 – as well as a history of previous publications and (at times inaccurate) English translations).

²⁵⁰ Marrow *op cit* pp66-69

²⁵¹ Lewin, K, Marrow, A.J and Hendry, C.E (1945) *Accent on Action: A New Approach to Minority Group Problems in America* C.C.I Publications (cited *ibid* p193)

consideration of first-hand accounts of the members of the groups involved. The C.C.I engaged in numerous projects²⁵² before Lewin's death in 1947.

One innovation that emerged from Lewin's research was the "discovery" of the "T Group". This type of learning environment originated when participants in training exercises organised by Lewin, Ronald Lippitt, and others "wandered into" the trainers' evening evaluation meetings, during which the trainers evaluated the day's activities²⁵³. When one of the trainees took issue with some of the observations made about her performance, an "active dialogue" developed, which made "participants more sensitive to their own conduct, and brought criticism into the open in a healthy and constructive way"²⁵⁴. A report of this exercise by Lippitt contains observations on the learning process involved, which involve reflecting on an experience, formulating actions to take as a result, then testing those consequences in practice²⁵⁵. The groups were (and continue to be) used widely by the National Training Laboratories²⁵⁶ set up by Lewin's colleagues after his death to train members of organisations in group working. Kolb comments on the similarity between this model and that drawn from Dewey's writings²⁵⁷, and it has been noted that Lewin's teaching techniques deployed during his involvement with the Research Centre for Group Dynamics were informed by Dewey's philosophies²⁵⁸. Likewise, Lewin's contemporary Gordon Allport commented on Lewin and Dewey's "striking kinship" with regard for their shared concern with the workings of democracy and "the importance to social science of freedom of inquiry"²⁵⁹. In an exhaustive text on the theory and practice of T Groups²⁶⁰, Dewey's theories are described as "very central" to the operation of T Groups, as well as "modern educational thought" generally²⁶¹, and experiential learning is described as

²⁵² Reports are cited Marrow *op cit* pp267-276

²⁵³ Lippitt, R (1949) *Training in Community Relations* New York: Harper & Brothers, pp138-9

²⁵⁴ Lippitt, quoted (presumably verbatim) in Marrow *op cit* pp212-213 (Marrow cites "Lippitt (1949)" (ie: *ibid*) as a source. However, the quoted passage appears nowhere in Lippitt's book).

²⁵⁵ Lippitt *op cit* p169. The process is depicted graphically at Kolb *op cit* p32

²⁵⁶ www.ntl.org (last accessed 8th March 2021)

²⁵⁷ *ibid* p33

²⁵⁸ Marrow *op cit* p167-8

²⁵⁹ Allport, G.W (1948) "Foreword to the 1948 Edition" in Lewin, G.W (ed) (1948) *Resolving Social Conflicts* (collected in Lewin, K (1997) *Resolving Social Conflicts and Field Theory in Social Science* Reprint: Washington DC: American Psychological Research Association 2008; 5-9, p7, quoted *ibid* p234 – Marrow misquotes Allport's phrase "striking kinship" as "community of spirit".

²⁶⁰ Bradford, L.P, Gibb, J.R and Benne, K.D (eds.) (1964) *T-Group Theory and Laboratory Method*, New York: John Wiley & Sons

²⁶¹ *ibid* p466

the “most effective” method for a T-Group trainer to deploy “with respect to getting mutual understanding among the various members of the group”²⁶².

Jean Piaget

The conclusions drawn by Jean Piaget in his *Genetic Epistemology*²⁶³ play an important role in the development of experiential learning theory also. Piaget’s work is based upon his research into the development of children’s learning, and identifies a distinction between the early years of children’s development (before the age of seven) when their learning is based upon the discovery of and replication of functional processes (eg: reading, basic mathematics) and the implementation of “formal operations”²⁶⁴ based upon symbolic reconstructions of forms of learning previously encountered. Piaget refers to these two stages as “accommodation” and “assimilation”²⁶⁵, and uses these concepts as the basis for his constructivist theory of learning development, contrasting this with the positivist model of “behaviourism”, which (inaccurately, in Piaget’s view) proceeds from a conception of the development of learning as being based on “functional cop[ies]”²⁶⁶ of observed activities. Piaget refutes the concept of knowledge being based upon empirical observations by reference to an anecdote of a restaurateur who refused to serve “steak without potatoes” because he had no potatoes, but would serve “steak without spinach” because he had some spinach²⁶⁷. Piaget’s conception of all understanding is derived from this “continuous construction” of new knowledge forms, and he regards the differences in degrees of complexity between earlier and later acquired forms of knowledge as supporting a constructivist epistemological interpretation of that understanding²⁶⁸.

²⁶² Horwitz, M “Training in Conflict Resolution” *ibid* pp365-378, 376

²⁶³ *op cit*

²⁶⁴ *ibid* pp 42-3

²⁶⁵ *ibid* p6

²⁶⁶ Hull, C.L (1930) “Knowledge and purpose as habit mechanisms” 37(6) *Psychology Review* 511, 523 (quoted *ibid* p55)

²⁶⁷ Piaget *op cit* p73

²⁶⁸ *ibid* pp 91-3.

David A. Kolb's experiential learning theory

Kolb takes as a basis for his conception of the differing forms of experiential learning²⁶⁹ a pictorial representation²⁷⁰ of Piaget's conception of general learning development, and, drawing from the sources referred to above, states that "learning (ie: experiential learning) is the process whereby knowledge is created by the transformation of experience"²⁷¹. A key characteristic of this theory relates to the distinction between "apprehension" and "comprehension"²⁷², the former concept being the appreciation of an experience, while the latter being the ability to "create for [ones]self and communicate to others a model of that situation that could last forever"²⁷³. Kolb regards the process of learning as a spiral, whereby a learner's reflection on their experience allows them to transform their prior understanding and develop it in order to reinterpret their construction of the world in the light of that experience²⁷⁴, describing this process as "autopoiesis" (ie: "self-creating")²⁷⁵. Additionally, Kolb places importance upon the concept of a "learning space", referring here both to the physical environment in which learning takes place, and to the mental space that the individual creates in their own understanding in which to process the knowledge acquired by themselves or others. This is drawn from the Japanese concept of "ba" (literally "place")²⁷⁶

Kolb's conception of the process whereby a person learns by experience relies upon his theory that such a process is determined by the "form of learning"²⁷⁷ that an individual will make use of, as well as the "learning mode" used by the individual to deploy that form. Kolb states that identification of these factors can be used to determine the "learning style" that best suits an individual. Kolb's first writings on this subject propounded four "learning styles"²⁷⁸, but his subsequent work has identified nine. All are set out below:

²⁶⁹ Kolb *op cit* p68

²⁷⁰ *ibid* p36

²⁷¹ *ibid* p49

²⁷² *ibid* pp 69-77

²⁷³ *ibid* p69

²⁷⁴ *ibid* p63-5

²⁷⁵ *ibid* p62

²⁷⁶ *ibid* p290, quoting Nonaka, I and Konno, N *op cit*

²⁷⁷ *ibid* pp100-1

²⁷⁸ *ibid* p143

<u>Form of Learning</u>	<u>Learning Mode</u>	<u>Learning Style (Original)</u>	<u>Learning Style (Revised)</u>
Comprehension transformed by Extension (“CΔE) – the mental adaptation of a theoretical solution in order to arrive at a practical outcome.	Concrete Experience (CE) – actual, personal involvement in experiences – “feeling as opposed to thinking” ²⁷⁹	Convergent – reliance upon AC and AE – use of hypothetical deductive reasoning in order to solve specific problems.	Initiating – initiating actions in order to find meanings in experiences (AE & CE)
Apprehension transformed by Extension (“AΔE”) – making physical adaptations in order to arrive at a position that “feels right” ²⁸⁰	Reflective Observation (RO) – reflecting on the experience in which the individual took part in order to determine what took place	Divergent - reliance upon CE and RO – considers the physical environment from different perspectives in order to arrive at a theoretical solution.	Experiencing - identifying meanings from being deeply involved in experiences (CE, AE, and RO)
			Imagining - imagining possible solutions as a result of reflecting on experiences (CE & RO)
Apprehension transformed by Intention (“AΔI”) – reviewing one’s perception of a physical environment in order to decide how to alter that environment.	Abstract Conceptualisation (AC) – thinking about the concepts and ideas involved in order to arrive at a solution.	Assimilation – reliance upon AC and RO – focussed upon ideas and abstract concepts rather than people	Analysing - formulating an integrated solution by reflecting (RO and AC)
			Thinking - abstract and logical reasoning (RO, AC and AE)

²⁷⁹ *ibid* p105

²⁸⁰ *ibid* p101

Comprehension transformed by Intention (“CΔI”) – reconsidering one’s theoretical approach to a situation.	Active Experimentation (AE) – practical application in order to determine “what works as opposed to what is absolute truth” ²⁸¹	Accommodative - reliance upon CE and AE – active planning and taking actions – “at ease with people but...sometimes seen as impatient and ‘pushy’” ²⁸²	Deciding – using theories and models to arrive at solutions to a problem (AC and AE)
			Acting - motivated by an integrated approach towards the task and the people involved (AE, CE and AC)
			Balancing - will take all four modes into consideration

In focussing upon the practical application of experiential learning in higher education, Kolb acknowledges the difficulties caused by the competing needs to balance the acquisition of knowledge, the provision of which might traditionally might have been the purview of a school system provided with better public funding than the present system, and the increased importance of educating students according to whichever of the above styles best suits them²⁸³. Kolb points out that the role of the educator is to “draw out” (applying the origin of the word “to educate”) the innate resources and abilities of the learners, and proposes four “Educator Role Profiles” (discussed below) that an educator can deploy in order to identify which particular learning style/s best suits the learner²⁸⁴. Kolb stresses that learners and educators should be aware of the importance of transitioning between learning styles where appropriate to the role in which one is placed, as a linear approach can cause difficulties – the example of former U.S President Jimmy Carter’s dealing with the Panama Canal handover with apparent insufficient regard to its economic and political consequences is quoted as an example of this²⁸⁵.

²⁸¹ *ibid* p105

²⁸² *loc cit*

²⁸³ *ibid* pp240-2

²⁸⁴ *ibid* 304

²⁸⁵ *ibid* p313

In summary, the concept of experiential learning as defined by Kolb propounds a mode of education whereby the educator sets in motion conditions that enable the learner to access a “life space” within a “system in tension”, by way of which the learner can translate the conditions that they are experiencing into knowledge. The conditions under which this knowledge has been acquired by the learner allows it to endure with and ensure a more meaningful effect upon the learner than knowledge that has been acquired by way of “segregated learning”²⁸⁶.

Criticisms of experiential learning theory

The concept of experiential learning as conceived of by Kolb has attracted criticism on various grounds, chief amongst which being that it is prone to error due to the involvement of the learner rendering the learning process more prone to bias and consequent inaccuracy. Eisenstein and Hutchinson conducted research into students’ ability to retain information acquired during an “action-based task”²⁸⁷, and concluded that the students’ personal drive to accomplish the task in many cases resulted in the inaccurate recollection of information, concluding that “reliance on this type of experiential learning is likely to be a risky proposition”²⁸⁸. More damningly, the potentially distorting role of inherent bias and confusion on the part of the learner has been referred to elsewhere²⁸⁹ as undermining the entire concept of learning from experience, rather than from the observations of knowledge transmitted by others (ie: experts), as the sort of learning that takes place in the latter case can (it has been submitted) be trusted not to be subject to the sorts of errors that learning from experience can give rise to. Conversely, personal experience, or learning by way of “common sense”, has been described as “refut[ing] itself”, as it pretends to a form of objective truth while being based entirely upon subjective perception²⁹⁰, and belongs to an unreliable heuristic form as a result of the source of the information from which the learning takes place being determined by what is subjectively available to the learner²⁹¹. Such opposition has been voiced historically also: in response to William Langdell’s innovative “case law method” implemented at Harvard Law School, whereby students would be expected to read case law reports prior to class discussions and learn about the case law accordingly (rather than have the law “taught to

²⁸⁶ Dewey (1933) *supra* fn236

²⁸⁷ Eisenstein, E.M and Hutchinson, J.W (2006) “Action-Based Learning: Goals and Attention in the Acquisition of Market Knowledge” 43 *Journal of Marketing Research* (May 2006) 244

²⁸⁸ *ibid* p 257.

²⁸⁹ Buchmann, M, & Schwille, J. *op cit*; March, J.G *op cit* (cited Kolb *op cit* ppxix-xx)

²⁹⁰ Buchmann & Schwille *ibid* p34

²⁹¹ *ibid* pp35-6

them”) – a strategy that would now be described as experiential learning – comments that “the law was not in the idle talk of these young boys”²⁹² were observed. The process of learning involved in the implementation of Langdell’s method is not dissimilar from that which is demonstrated by students engaged in moots – as I will go on to explain in more detail below.

In response to such criticisms, Kolb points out that although experiential learning is admittedly heuristic in nature, the same criticism can equally be made in respect of all forms of acquisition of knowledge, as the transmission of knowledge from an “external” source is arguably more prone to errors brought about by bias on the part of the author of the source material due to unjustified faith in the application of specific data to general or “professional tunnel vision”²⁹³, or irrelevance due to the passage of time since the source material came into being.

The epistemological foundations of Kolb’s theory have been called into question also. Miettinen comments that Kolb’s theory “lumps together”²⁹⁴ various disparate sources in order to construct a theory that lacks sufficient support from the sources referenced – in particular, Miettinen notes that Kolb’s “Lewinian model” does not appear in any of Lewin’s work²⁹⁵ - and at times also distorts the meaning of the sources referenced. Miettinen in particular takes issue with Kolb’s interpretation of Dewey’s writings on learning, stating that Kolb’s interpretation of this as giving rise to a learning “cycle” artificially imposes a dialectic between experience and reflection, whereas Dewey’s concern was with the resolution of problems encountered during empirical experience by way of reflection, and that “To Dewey, experience is not a matter of psychological state, nor anything in the minds of individuals”²⁹⁶. In response, Kolb states that the experiential learning procedure, conceived of as a dialectic, results in the emergence of the distinct styles of learning that he identifies as a way of adapting to this tension²⁹⁷, and that Miettinen’s criticism that the identification of distinct styles “makes it necessary to postulate distinct modes of adaptation”²⁹⁸ is misguided.

Kolb’s work has also come under specific criticism in respect of his conception of learning styles. Such criticism arises in respect of Kolb’s conception of his theory of learning styles as having been grounded in the philosophy of Karl Jung, which connection has been described

²⁹² Fessenden, F.F (1920) “The Rebirth of the Harvard Law School” 33 Harvard Law Review 493, 499

²⁹³ Kolb *op cit* xx

²⁹⁴ Miettinen *op cit* p56

²⁹⁵ *ibid* pp57-8

²⁹⁶ *ibid* p70

²⁹⁷ Kolb *op cit* pp56-7

²⁹⁸ Miettinen *op cit* p61

as “extremely dubious”²⁹⁹. This has been described as based upon a misunderstanding of Jung’s theory of typologies, within which (unlike Kolb’s theory, in which emphasis is placed upon the dominant personality trait) subordinate personality traits can be just as important an aspect of an individual’s personality as a trait that appears to be dominant in nature³⁰⁰. Similarly, Kolb’s theory has been described as departing radically from Jung’s contextualist stance by being idealistic in conception, due to its focussing upon the learner’s abilities rather than the context within which these are developed³⁰¹. Further criticism has been aimed at Kolb’s conception of a narrow scope of “styles” within which to categorise learners, which has been described as subjecting to artificially inflexible restrictions the many ways in which learning can be understood³⁰². Similarly, the concept of learning styles as conceived of by Kolb has been criticised for being based upon the application of theory rather than the application of empirical findings, and statistical analysis has cast doubt upon the extent to which the concept of the learning cycle upon which Kolb’s theory is based can be applied in practice³⁰³. This has been described as making the method of limited value in attempting to predict learner behaviour. It has, however, been noted that the method was designed not for this purpose, but rather as a form of self-assessment³⁰⁴

To conclude, if there is a mordant criticism that can be levelled at Kolb’s theory, it is that it has been constructed from the selected readings of his chosen sources in order to fashion a theory of his own devising. A theory of learning so conceived is anathema to a positivist conception of education theory. However, adopting a constructivist approach to the learning process, whereby “the learner reflects on lived experience and then interprets and generalises this experience to form mental structures...that can be represented, expressed, and transferred to new situations”³⁰⁵, it is legitimate to conceive of a theory that has itself been constructed and

²⁹⁹ Garner, I (2000) “Problems and Inconsistencies with Kolb’s Learning Styles” 20(3) Educational Psychology 341, p344

³⁰⁰ *ibid* pp342-3

³⁰¹ *ibid* p344

³⁰² *ibid* pp344-6

³⁰³ Coffield, F., Moseley, D., Hall, E, and Ecclestone, K. (2004) *Should we be using learning styles?: What research has to say to practice*. London: Learning and Skills Research Centre (http://www.itslifeijimbutnotasweknowit.org.uk/files/LSRC_LearningStyles.pdf) [last accessed 8th March 2021] p30, p43

³⁰⁴ *ibid*, p30

³⁰⁵ Fenwick, T.J (2000) “Expanding Conceptions of Experiential Learning: A Review of Five Contemporary Perspectives on Cognition” 50(4) Adult Education Quarterly 243, 248 (cited Kolb *op cit* p54)

conceived of in this way in order to formulate a system whereby the process of learning can be understood. Even in an article critical of Kolb's conception of learning styles, it is commented that although "Kolb's explanations of his own theory and psychological grounding of his work is seriously flawed...[t]his does not necessarily mean that his theory is wrong"³⁰⁶

In conclusion, I can fulfil Objective 2 (*"To set out the theoretical basis of my study"*) by stating that when conducting my own research into mooting as a method of learning the law whereby legal understanding is constructed by the learner, my research will be underpinned by the theoretical understanding of experiential learning as constructed by Kolb, with reference to the founding scholars he refers to, and will be referring to Kolb's theories when attempting to understand the role of mooting as a method whereby learning by experience occurs in legal education.

At this point, I will set about fulfilling Objective 3 (*"To draw conclusions from the empirical research carried out to date into mooting in legal education"*) by reviewing the empirical research conducted to date in relation to mooting, as well as in respect of other teaching and learning techniques that have involved role-play.

Studies into the practical implementation of experiential learning.

In respect of the need to locate a narrative review of the literature "within a particular theoretical space"³⁰⁷, I have decided that my review of the literature should exclude studies focussed upon exploring or defining forms of experiential knowledge³⁰⁸. Such studies must proceed from the *a priori* basis that taking part in an experience results in the acquisition of knowledge, or (to use Polanyi's terminology) that the "tacit knowing"³⁰⁹ gained through sensory perception of an experience results in an "acceptance of an articulate form"³¹⁰, with which the actor may engage in order to learn from that experience. My research, however, concerns the question whether any, and if so, what, articulate forms emerge from the tacit knowing derived from mooting and other forms of experiential learning.

³⁰⁶ Garner *op cit* p347.

³⁰⁷ Golden-Biddle & Locke *op cit* p20

³⁰⁸ Several are cited by Kolb (2015) *op cit* p188

³⁰⁹ Polanyi, M (1958) *Personal knowledge: Towards a post-critical philosophy*. Reprint, London: Routledge 2002, p264

³¹⁰ *loc cit*

David A. Kolb, described as the “most influential exponent”³¹¹ of experiential learning theory, has jointly compiled a bibliography of all academic writings on experiential learning to have been written since 1971 (the year of his own first publications on the subject³¹². The Kolbs’ bibliography³¹³ consists of six “pdf” documents containing between 2,385 (Volume 1) and 187 (Volume 5) references, and of between 65 (Volume 5) and 229 (Volume 3) pages in length. It was, therefore, necessary for me to determine how best to make use of such a voluminous resource in order to ensure that I had not overlooked relevant material but also did not waste time searching for relevant material that may not be present.

A “Ctrl+F” search of each of the six pdf documents using the search term “moot” generated only one result, which was in the context of the expression “have been mooted” in the abstract of an article about household consumption practices³¹⁴. It was, therefore, necessary for me to consider whether my search ought to extend to reading in full the bibliography in order to identify references to literature on forms of experiential learning that take the form of a “mimicry of a rite of practice”³¹⁵ (eg: role play) in order to attempt to establish a “synthesised coherence”³¹⁶ between literature on such activities and that on mooting.

This calls for consideration of the feasibility of “constructing congruent relationships”³¹⁷ between literature on mooting, and literature on other forms of experiential learning, which in turn necessitates consideration of the extent to which mooting can be said to be “congruent” with other forms of experiential learning. The peculiar position of mooting as a form of experiential learning has been noted, with its being described as “restricted to the replication of a form of a somewhat specialised and esoteric form of lawyer activity”³¹⁸. This point acknowledges the special status of mooting in relation to other forms of experiential learning: unlike, for example, the “T Groups” designed by Lewin³¹⁹ and built upon by Kolb to develop his own experiential learning exercises for teaching psychology³²⁰, to take part in a moot

³¹¹ Burrige *supra* fn 159

³¹² Kolb *op cit* p.xxiv

³¹³ Kolb, A.Y and Kolb, D.A *Experiential Learning Theory Bibliography: Volume 1-6 1971-2019*.

Cleveland, O.H: Experience Based Learning Systems Inc,

<https://learningfromexperience.com/research-library/#rl-bibliography> (last accessed 8th March 2021)

³¹⁴ *ibid*, Volume 3 2011-2012 (Revised May 2016), p62

³¹⁵ Burrige *op cit* p30

³¹⁶ Golden-Biddle & Locke *supra* fn 210

³¹⁷ *loc cit*

³¹⁸ Burrige *op cit* p27

³¹⁹ Marrow *op cit* pp210-14

³²⁰ Kolb *op cit* p287

requires a considerable degree of prior learning of a particular academic subject – specifically, the substantive law involved in the moot problem – in order to be able to “undertake research to identify a theory of the case and prepare...submissions”³²¹, thus presenting a barrier to access by persons unversed in such prior learning. Account must also be taken of the point made by Burrige about the “esoteric” nature of the moot in relation to legal practice. This acknowledges that the moot is a representation of a hearing in an appellate court, which is a further sub-domain of legal practice uncommon even to practising lawyers. Court statistics for 2018³²² show that in total 2,073,400 civil claims were issued in the County Courts in that year, while in the same year, the Court of Appeal (Civil Division) disposed after a full hearing of 931 appeals³²³, which equates to 0.00005% of the claims commenced. This demonstrates the particularly uncommon nature of the appeals procedure, and suggests that a form of experiential learning specifically designed in order to represent it ought to be evaluated in terms of its experiential learning attributes in isolation from other forms of experiential learning, even those practised within legal education.

A further aspect of mooting that arguably sets it apart from other forms of experiential learning concerns the role of the moot judge, whose interventions and authoritarian presence result in the moot taking on a much more dialectical dimension than the experiential learning exercises envisaged by Kolb. In particular, it is difficult to categorise the role of the moot judge as belonging to either one of the “Educator Role Profile[s]” listed by Kolb³²⁴, but rather as an amalgamation of elements of all four roles, with the added dimension that the judge’s role as educator involves consideration of the mimetic aspect of the moot, which dictates that the moot be conducted in accordance with one or other system of prescribed rules, either the rules of procedure of a real court³²⁵, or specially designed for the purposes of the particular moot

³²¹ Gillespie *op cit* p30

³²² Ministry of Justice (2018) “Civil Justice Statistics Quarterly, England and Wales, January to March 2018 (provisional)”; Civil Justice Statistics Quarterly, England and Wales, April to June 2018 (provisional)”; Civil Justice Statistics Quarterly, England and Wales, July to September 2018 (provisional)”; Civil Justice Statistics Quarterly, England and Wales, October to December 2018 (provisional)” <https://www.gov.uk/government/collections/civil-justice-statistics-quarterly#2018> [last accessed 8th March 2021]

³²³ Ministry of Justice (2019) “Royal Courts of Justice Annual Tables 2018) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/806898/2018_RCJ_tables.xlsx [(last accessed 8th March 2021)]

³²⁴ Specifically: “Facilitator”, “Expert”, “Evaluator” and Coach (Kolb (2015) *op cit* p304)

³²⁵ Ringel *op cit* p460

activity³²⁶. This has been described as imposing limitations on the educative nature of the moot, but at the same time allowing for “illumination” of the process of legal education by the interplay of procedure and substantive law³²⁷. Parallels might be drawn here with T.W Adorno’s theory of mimesis in order to attain “non-identity” and thereby be rid of “the abolition of selfhood hitherto promoted by the subject”³²⁸. I will return to this subject when considering the findings of the research.

Accordingly, I determined to set the parameters of my literature review, in the light of my own experience of mooting in legal education and recognition of the unique position of mooting as a form of experiential learning in legal education, to focus primarily upon reviews of studies relating to mooting. Such a review makes no pretensions to be all encompassing, but at the same time recognises the special place of mooting as a form of higher education, and that to go to any great lengths in attempting to devise links between studies relating to it and other forms of experiential learning for literature review purposes would be the metaphorical equivalent of the “bridge to be crossed only by impecunious Methodists” derided by the Master of the Rolls in the real Court of Appeal many years ago³²⁹.

In respect of the factors set out above, I had considered confining my literature review to studies focussing solely upon mooting. However, as has been widely recognised, the study and practice of law is of very broad general application, and is of “relevance to social life at all levels”³³⁰, and, similarly, the practice of legal education has a symbiotic relationship with other educational spheres. Accordingly, to ensure that I had fully considered the practises involved in the part played by mooting in legal education, it was necessary for me to have regard to literature on how role-play has been used in other areas of education to help students towards the necessary development for their chosen area of practice. Such breadth of coverage is also necessary for any prospect of developing the findings arrived at through my research into application beyond the strict confines of legal education.

My review of the literature, accordingly, encompasses a review of articles from a variety of educational disciplines involving research into the practical application of role-play or simulation as a form of experiential learning. I selected these from the Kolbs’ experiential

³²⁶ Yachnin, P & Manderson, D *op cit*

³²⁷ Gaubatz *op cit* 89

³²⁸ Adorno, T.W (1984) *Aesthetic Theory*. Boston: Routledge p195

³²⁹ *Baddeley v Inland Revenue Commissioners* [1953] Ch.504, 519 per Lord Evershed M.R (quoting from the argument of J.H Stamp, junior counsel for the Inland Revenue),

³³⁰ Twining, W (1994) *Blackstone’s Tower: The English Law School* London: Sweet & Maxwell, p21

learning bibliography³³¹ (described as “probably the biggest experiential learning bibliography on the web”³³²) using a “Ctrl & F” search for “role-play”, and then scrutinising the abstracts of the articles retrieved. The objective of this scrutiny was to enable me to identify the extent to which the articles involved research into the educative effect of role-playing itself, or mentioned the subject only in passing: for example, in the context of computer-based role-playing game simulations. My review deliberately excluded forms of learning derived from practice itself (for example, clinical legal education), for the reason that these methods of learning rely upon the “concrete experience”³³³ of the learner to an extent that is so as to cause the learning experience involved not to be congruent with that involved in mooted. I also excluded studies into forms of role-play designed to offer practice at basic competencies of skills or inquiry, or professional competency assessments, on the basis that such studies are not relevant to the subject of my research, but focus rather upon the assessment of a particular element of learning confined to the discipline in question.

The review, accordingly, encompasses a small number of studies, all carried out in recent years³³⁴, and spread over a diverse range of fields of practice so as to allow for consideration of the ways in which forms of learning experiences similar to mooted have been considered to be relevant to the instruction of the discipline being taught. I will review these articles in chronological order of publication.

³³¹ *supra* fn 313

³³² Greenaway, R (2000) “Powerful Learning Experiences in Management Learning and Development: Appendix II Bibliography” <http://reviewing.co.uk/research/plerefs.htm> [last accessed 8th March 2021]

³³³ Kolb *op cit supra* fn 277

³³⁴ Ballon, B. C., Silver, I. & Fidler, D. (2007). “Headspace theater: An innovative method for experiential learning of psychiatric symptomatology using modified role-playing and improvisational theater techniques” 31(5) *Academic Psychiatry*. 380 (Vol 2); Tang, T. S., Funnell, M. M., Gillard, M., Nwankwo, R., & Heisler, M. (2011). “The Development of a Pilot Training Program for Peer Leaders in Diabetes Process and Content” 37(1) *Diabetes Educator* 67; van Rijssen, H. J., Schellart, A. J. M., Anema, J. R., de Boer, W. E. L., & van der Beek, A. J. (2011) “Systematic development of a communication skills training course for physicians performing work disability assessments: from evidence to practice” 11(3) *BMC Medical Education* 28 (<https://bmcmededuc.biomedcentral.com/articles/10.1186/1472-6920-11-28>) [last accessed 8th March 2021]; Holt, R. L., Tofil, N. M., Hurst, C., Youngblood, A. Q., Peterson, D. T., Zinkan, J. L., White, M.L, Clemons, J.L, Robin, N. H. (2013) “Utilizing High-Fidelity Crucial Conversation Simulation in Genetic Counseling Training” (161A Part A) *American Journal of Medical Genetics* 1273; Hontvedt, M., & Arnseth, H. C. (2013) “On the bridge to learn: Analysing the social organization of nautical instruction in a ship simulator” 8(1) *International Journal of Computer-Supported Collaborative Learning* 89.

Ballon, Silver, and Fidler “Headspace Theater” (2007)³³⁵

This article arises out of the authors’ research into to their own teaching that employed the titular technique. The technique, which draws upon improvisational theatre as well as experiential learning theory³³⁶ is designed to allow the learners to gain understanding of and empathise with persons who have particular psychiatric conditions by “role-play[ing]” characters who have differing perceptions of reality³³⁷ so as to simulate the experience of persons with those conditions. In the exercises, which take the form of improvised acted scenarios³³⁸, some of the learners are assigned roles to perform and others asked to observe the performance. The scenario is concluded either by the facilitator upon the expiry of a set time limit, or by the learners at any time. At that point, the learners discuss their experience with input from the facilitator to “help[...] elaborate the cognitive and emotional factors in a psychiatric symptom”³³⁹.

The article concludes with a summary of research conducted in order to elicit learners’ responses to the experience of Headspace Theater. The authors comment that “themes” were obtained by “verbal” feedback, following which “written feedback was provided by a satisfaction questionnaire”, which was then analysed³⁴⁰.The authors comment that the feedback was “universally positive”, despite the participants having been actively solicited for negative feedback, which they attribute to the “great care” taken by the facilitators in setting up and controlling the learning environment. The quoted responses include observations by the respondents that the activities “were innovative and promoted excitement in participants”, “allow[ed] more contextual understanding of the material being taught”, and that they “wanted more [scenarios] to be developed to help augment understanding of other mental health conditions”³⁴¹.

As with the articles on mootng that I will later refer to, this article demonstrates the perceived benefits to the learners involved in the form of personal motivation and stimulation of interest that can arise out of active participation in the activity that they are learning about. However, the lack of detail on the method used by the authors to collect their data makes it difficult to evaluate the extent to which the participants’ responses may have been influenced by the

³³⁵ As with all the articles in this section, see *supra* fn334 for full citation.

³³⁶ Ballon, Silver, and Fidler *op cit* p381

³³⁷ *ibid* p380

³³⁸ *ibid* pp386-7

³³⁹ *ibid* p384

³⁴⁰ *ibid* p382

³⁴¹ *ibid* p385

presence of other participants, or by the content of the questionnaire (the questions are not provided). The nature of the learning process involved differs considerably from that which takes place in a moot, as the mooter's "performance" depends heavily upon their own legal understanding, whereas the success of Headspace Theater relies very much upon the degree to which the participants are able to successfully interact with the other participants. This is due in large part to mooters being provided with adequate detail to prepare for the moot in advance, whereas the advance instructions in Headspace Theater may be (intentionally) incomplete or misleading.

Tang *et al* "The Development of a Pilot Training Program for Peer Leaders in Diabetes" (2011)

This article focusses on the teaching of a programme designed to educate prospective leaders of peer support groups for people with diabetes about diabetes self-management education (DSME)³⁴². The programme explicitly adopts Kolb's experiential learning model as a structure designed to simulate DSME peer learning sessions³⁴³. This is described as one of the three "components" of the programme, the other two being "knowledge acquisition" in respect of understanding of "diabetes-related educational topics", and "skills development" in respect of "the communication, facilitation, and behaviour change skills necessary" to facilitate a DSME group³⁴⁴.

The authors go on to discuss the structure and content of the training programme, throughout which role-play and group facilitation simulation exercises are used, as well as "peer leader simulations" in which participants are invited to present "lecturettes" on topics about which they have learned in previous sessions. The authors observe, on the basis that different individuals have different styles of learning³⁴⁵, that "there may be an advantage" in respect of the different teaching tools deployed in this process,

While it is of interest to see the explicit application of the experiential learning model used as a basis for the design of the programme, and consequent recognition of the distinct attributes needed to acquire a full understanding of the subject taught, the programme appears to depart from Kolb's concept of experiential learning as a holistic process in that it distinguishes "experiential learning" as a separate strand from "knowledge acquisition" and "skills development". In particular, "motivation-building skills"³⁴⁶ are identified as a distinct learning

³⁴² Tang *et al op cit* p68

³⁴³ *ibid* p70

³⁴⁴ *loc cit*

³⁴⁵ *ibid* pp 75-6

³⁴⁶ *ibid* p70

outcome rather than an aspect of the overall process of learning. Accordingly, the programme does not appear to recognise fully the potential of experiential learning. Also, it is difficult to assess the extent to which the authors' aims set out above³⁴⁷ have been fulfilled without evidence of research in respect of the learners' experience of this exercise.

van Rijssen *et al* "Systematic development of a communication skills training course for physicians performing work disability assessments" (2011)

This article focusses on an evaluation of the course explained in the title of the article. After reviewing literature emphasising the importance of effective communication when carrying out a work disability assessment, the authors identify the absence of a course for training physicians to develop this specific aptitude³⁴⁸, before setting out the stages of the development of the course and the process to be used in evaluating its outcomes³⁴⁹. The authors identify the matters that they consider to be relevant to the needs of the physicians carrying out the assessments, and the strategies to be adopted in order to deploy these in practice, with reference to the applicable basis in experiential learning theory³⁵⁰. They explain that the taught sessions on the course involved "guided practice", including role-play in which the teacher played an assessment claimant, with one of the students in the role of the physician, and the other students providing feedback and reflections afterwards³⁵¹. Finally, the authors set out the process by which they intend to evaluate the participants' views of this programme³⁵²

As with the study by Tang *et al*, it is difficult to assess the extent to which this programme has fulfilled its goals without having regard to data relating to feedback from the exercise and/or the authors' attempts to evaluate this. Also, the focus of the programme is (intentionally) not so much upon the development of a specific field of knowledge (as is often of the outcomes of a moot) as upon the "knowledge, awareness, and the communication skills that are relevant for all physicians"³⁵³. As a result, although couched in a specific subject area, the way in which the programme operates means that its application can be much wider in scope than can mooting within legal education.

³⁴⁷ *supra* fn344

³⁴⁸ van Rijssen *et al op cit* p2

³⁴⁹ *ibid* pp3-4

³⁵⁰ *ibid* pp5-8

³⁵¹ *ibid* p6

³⁵² *ibid* pp9-10

³⁵³ *ibid* p10

Holt *et al.*: “Utilizing High-Fidelity Crucial Conversation Simulation in Genetic Counselling Training” (2013)

This article focusses upon the importance for genetics professionals of providing parents with potentially upsetting information relating to the genetic details of their unborn child in the manner least likely to cause distress to the parent(s) Such exchanges are known as “crucial conversations”³⁵⁴. The authors devised a training programme intended to simulate a crucial conversation, specifically with expectant parents in respect of an amniocentesis result indicating a child with Down Syndrome³⁵⁵ in which eight trainees participated, three of whom were qualified genetics practitioners, and five of whom were medical students (the authors note that the members of the latter group were “significantly younger” than those in the former group³⁵⁶). The simulation was designed according to spatial requirements intended to replicate those present in the practical surroundings of an office setting, and was followed by a debriefing session, the design of which the authors describe as “grounded” in Kolb’s theories³⁵⁷.

Upon completion of the programme, an evaluation survey was disseminated among the participants, extracted examples of which include the observations that the programme “allowed for preparation, performance and great and immediate feedback in an environment that supports education and growth” (from a practitioner trainee)³⁵⁸ and “felt much more realistic than role playing with classmates, but safer than the high stakes of a real session”³⁵⁹ (from a student trainee). The authors acknowledge the limitations of their study due to the small number of participants, as well as the practical limitations imposed by the nature of the activity being simulated – it being impracticable to simulate every issue relevant to a conversation of this nature within the constraints of the simulation³⁶⁰.

The activity which is the subject of Holt *et al*’s study shares several similarities with mooted, particularly with respect to the care taken to maintain a presence of realism in relation to the physical environment of the simulation. However, as with the study by van Rijssen *et al*, the value of the simulation appears to be, and to have been interpreted by the trainees as having

³⁵⁴ Holt *et al op cit* p1273

³⁵⁵ *ibid* p1274

³⁵⁶ *ibid* p1275

³⁵⁷ *ibid* p1274

³⁵⁸ *ibid* p1275

³⁵⁹ *ibid* p1276

³⁶⁰ *loc cit*

been³⁶¹, the opportunity to assess and enhance the aptitude of the participants in respect of how they manage a crucial conversation, as opposed to the content of the conversations themselves. Also, as with the study by Tang *et al*, the divergent range of the respondents' practical experience, while undoubtedly of practical benefit to the less experienced participants, presents a complicating factor that makes it difficult to determine the extent to which the student participants benefitted from the simulation itself.

Hontvedt and Arnseth: "On the bridge to learn" (2013)

Unlike the authors of the other articles reviewed in this section, Hontvedt and Arnseth's background is in research into education. Therefore, the focus of their article is not upon the practice-specific benefits of the role-playing activity involved. Rather, the authors' focus is specifically upon the perceived educational effect of the learning environment created during the role-playing activity engaged in by the students, and the meaning created thereby.

The role-playing activity involved is a ship simulator training exercise on a nautical studies programme at "a Norwegian university"³⁶². After a discussion of this exercise as a popular teaching method in Norway, particularly with regard to the fact that it is perceived to "provide[...] risk-free training for critical situations, such as accidents"³⁶³ the authors discuss the particular simulation exercise that the article is concerned with, specifically a simulation of a cruise ship "sailing" along the Oslo Fjord towards Oslo. The exercise involves a combination of video projection and physical construction in order to replicate a ship's bridge³⁶⁴. The authors pose the question as to how this exercise "offer[s] opportunities for learning and instruction"³⁶⁵.

The authors' study is framed as a project grounded in a "socio-cultural learning perspective", based upon "investigating learning as participation in social practices"³⁶⁶. The particular relevance of the ship simulator exercise concerns the "joint construction"³⁶⁷ of meaning in respect of the exercise involved by the participants, which the authors describe as arising through the operation of two simultaneous "activity contexts"³⁶⁸ – that of being students in a

³⁶¹ *ibid* pp1275-6

³⁶² Hontvedt and Arnseth *op cit* p90

³⁶³ *ibid* p92

³⁶⁴ *ibid* p97

³⁶⁵ *ibid* pp90-91

³⁶⁶ *ibid* p94

³⁶⁷ *ibid* p95

³⁶⁸ *ibid* p96

learning environment, as well as acting out the roles of a ship's crew. The authors then explain, with transcribed extracts from the applicable dialogue, the process whereby the students created this context by way of the dialogue involved, and examples of instances where this did not operate successfully due to misunderstanding or confusion³⁶⁹. The authors conclude that the content of the students' interactions demonstrated a recognition of the educational nature of the exercise, which in turn influenced the social construction of the learning environment, whereby "the students' way of jointly creating a simulated context may be considered a meaning-making activity in itself"³⁷⁰, and that "The ship simulator...has clear potential for learning, but this study has shown that the *simulated* far exceeds the simulator"³⁷¹.

Hontvedt and Arnseth's study clearly demonstrates the learning potential of role-play-based learning. However, its focus is very much upon the learning experience as perceived by the researchers, rather than the learners – as with other articles referred to in this section, there is no empirical research presented whereby this latter (and arguably more important) aspect can be evaluated. Also, there is little consideration of experiential learning theory – the concept of "transform[ing] experience into learning"³⁷² is mentioned only once in the context of the debriefing session for the students following the simulation, rather than being considered as an essential outcome of the activity as a whole.

Conclusion

The above literature review comprises a discussion of a variety of methods deployed by educators to make use of role-play in higher education. The literature is linked by agreement as to the benefit of this method of education insofar as it allows learners to gain experience of an activity relevant to the outcome of their studies in a comparatively low-risk environment. The literature is incomplete³⁷³ in that there is insufficient consideration of experience as a form of learning in itself, with limited reference to applicable experiential learning theory. Where the theory of learning is considered, in Hontvedt and Arnseth's study, the treatment is inadequate in that it takes insufficient account of the perception of learning as specifically relating to the learners themselves. Finally, the literature is inadequate in that where it contains research into the learning experience from the perspective of the learners involved, the groups are comprised of students with differing ranges of proficiency as regards learning the subject in

³⁶⁹ *ibid* pp99-107

³⁷⁰ *ibid* p109

³⁷¹ *ibid* p110

³⁷² *ibid* p92

³⁷³ *supra* fn210

question. Accordingly, there is a gap present that calls to be filled by a qualitative study of the learning experience of learners with an as near as practicable common range of proficiency.

Having conceptualised mooting as an experiential learning technique, and having reviewed the literature on experiential learning in as much as it is relevant to my research question, it is now necessary to review the literature specifically on mooting.

Review of literature on mooting

In order to review this category of literature, it is useful to conceptualise it in terms of five sub-categories. I list these sub-categories below in the order in which I consider them to be of the most relevance to my study. I identified the literature in this category by searching thoroughly using online research databases (using “mooting” as a search term) and following searches based on references in the literature consulted, as well as (in the case of the one unpublished source to which I have referred) personal correspondence³⁷⁴. The first sub-category is the most relevant, and I have accordingly given it most attention in my review, both in terms of searching for relevant literature within that sub-category, and in reading in depth the literature identified. The sub-categories listed thereafter are of decreasingly relevant status, and I have accordingly given correspondingly less attention to identifying and reading literature within those categories. For reasons given above³⁷⁵, I determined not to draw upon unpublished source material to inform this review. However, I have made one exception to this principle, the reasons for which will be explained below.

The categories of literature are:

- 1) empirical studies of mooting;
- 2) literature about the pedagogy involved in mooting;
- 3) literature about the history and development of mooting;
- 4) practical guides to mooting;
- 5) reports of moot competitions.

Below, I have set out the extent to which I have reviewed the literature within each sub-category (in reverse order to the above list), and my reasons for so doing, in a level of detail corresponding to the relevance of the literature in each sub-category.

³⁷⁴ Email from Elaine Hall (10th April 2017); Email from Stephen Clear (10th April 2017)

³⁷⁵ *supra* fn174

5) Reports of moot competitions

These comprise by far the majority of the published source material which refers to mooting. A HeinOnline³⁷⁶ search for “moot court” generates in excess of 24,000 results, most of which appear to be reports of activities relating to moot court proceedings at university law schools based primarily in the United States of America, where mooting has been part of the curriculum since the mid-19th century³⁷⁷, but with some reports from mooting competitions held at English universities, as well as international mooting competitions³⁷⁸.

I have not devoted much attention to reading these reports, as their primary focus is upon specific factual circumstances of moot court competitions, which matters are outside the ambit of my study. While it is true that some of the literature referred to in Sub-Category 3 deals with such matters also, the literature in that sub-category addresses moot competitions that took place at a time in history when the pedagogical theory behind mooting (and, indeed, education in general) was not written about, or indeed properly recognised, and thus the facts of the moots that took place are the best quality literature available to begin to develop an understanding of this sphere of moot-related knowledge. Accordingly, my research into literature on mooting written at a time when such concepts have been recognised will not focus in detail upon this sub-category, but more so on such theoretical concepts – the time of first recognition of which³⁷⁹ broadly coincides with the re-emergence of mooting within legal education³⁸⁰.

4) Practical guides to mooting

My background reading on mooting has required reference to a selection of the numerous texts and articles on the practical considerations involved in mooting and the organisation of moot competitions³⁸¹. I have referred to some of the information obtained from these resources

³⁷⁶ <https://heinonline.org> – last accessed 8th March 2021.

³⁷⁷ Dickerson *op cit* pp 1223-4

³⁷⁸ A typical example is Brawn, L and Thorpe, S (2007) “Mooting at Coventry University 12(2) Coventry Law Journal 91

³⁷⁹ James, W (1890) *The Principles of Psychology* Vols I and II. New York: Hold, Rinehard and Winston (cited Kolb *op cit* p38)

³⁸⁰ Walsh *op cit*

³⁸¹ Atrey, S,(2013) “I Object Your Honour – The Moot Court Paradigm is Mootable” 6 NUJS Law Review 301;Blatt, W.M (1936) “An Experiment in Moot Court Work” 8(5) American Law School Review 417; Brown, C (1978) “The Jessup Mooting Competition as a Vehicle for Teaching Public International Law” 16 Canadian Yearbook of International Law 332; Gaubatz, J.T (1981) “Moot Court in the Modern Law

in Chapter 1, and found some of the references to further reading useful in gathering additional reading material with which to develop my studies into the tradition of mooting in higher education – in particular the reference by Snape and Watt to mooting in the Inns of Chancery³⁸², which sparked my interest in mooting as form of teaching substantive law and inspired me to undertake research into this subject. However, as my studies do not purport to add to the body of literature on the practice of mooting, but rather to explore the theory underpinning it, I have not conducted any further research into this matter beyond that necessary to set out the matters addressed in the previous chapter.

3) Literature about the history and development of mooting

In order to develop an understanding of mooting as it presently exists in higher education, I have had to consult a range of sources³⁸³ that explore the historical development of mooting

School” 31 *Journal of Legal Education* 87; Hill, J (2009) *A Practical Guide to Mooting* Basingstoke: Palgrave MacMillan; Kaye, T and Townley, L (1996) *Blackstone’s Book of Moots* London: Blackstone Press; Morrison, M.N (1995) “May It Please Whose Court: How Moot Court Perpetuates Gender Bias in the Real World of Practice” 6(1) *UCLA Women’s Law Journal* 49; Pope, D and Hill, D (2011) *Mooting and Advocacy Skills* (2nd edition) London: Sweet and Maxwell; Ringel, L.S (2004) “Designing a Moot Court: What to Do, What Not to Do, and Suggestions for How to Do It” 37(3) *PS: Political Science and Politics* 459; Snape, J. & Watt, G. (2010) *How to Moot: A student guide to mooting* (2nd edition) Oxford: Oxford University Press; ; Sundberg, J.W.F (1997) “Moot Court: An American Idea in a Nordic Setting” 19(2) *Justice System Journal* 229; Williams, G, and Smith, A.T.H (2012) *Learning the Law* (12th edition) London: Sweet and Maxwell; Wolski, B (2009) “Beyond Mooting: Designing an Advocacy, Ethics and Values Matrix for the Law School Curriculum” 19 *Legal Education Review* 41; Yachnin, P & Manderson, D (2010) “Shakespeare and Judgment: The Renewal of Law and Literature”, *The European Legacy*, 15:2, 195

³⁸² Snape and Watt *ibid* p13

³⁸³ Baker, J.H (1986) *The Legal Profession and the Common Law* London: Hambledon Press; Baker, J.H (2003) *The Oxford History of the Laws of England Volume VI 1483-1558* Oxford University Press; Baker, J.H and Thorne, S.E (eds) (1989) *Annual Volume 105: Readings and Moots at the Inns of Court in the Fifteenth Century, Vol II. Moots and Readers’ Cases* London: Selden Society; Brand, P.A (1992) *The making of the common law* London: Hambledon Press; Fisher, R.M (1977) “Thomas Cromwell, Humanism and Educational Reform 1530-40” 122 *Bulletin of the Institute of Historical Research* 122; Fisher, R.M (1977) “Thomas Cromwell, Dissolution of the Monasteries, and the Inns of Court 1534-1540” 15 *Journal of the Society of Public Teachers of Law* 103; Fisher, R.M (1977) “Reform, Repression and Unrest at the Inns of Court 1518-1558” 20(4) *The Historical Journal* 783; Harding, A (1911) *A Social History of English Law*. Reprint: London: Penguin Books 1986; Jacobs, A.C “The Romance of the Inns of Court” 42 *Michigan Alumnus Quarterly Review* 68; Holdsworth, W.S (1972) *A history of English Law*

in the Inns of Court and Chancery, and its evolution into its present form as a more or less instructive method of engaging students with the law that they are learning in higher education. I have referred to many of these sources in Chapter 1 to conceptualise the system of mooting in modern legal education in respect of its historical context. As with the previous sub-category of literature, my review has been necessarily limited by the fact that my own research does not presume to be able to add to the literature on the history of mooting (and I have addressed this sub-category of literature in the Introduction, rather than the Literature Review chapter, of this thesis for the same reason). My review of literature on this topic was restricted to coverage of the considerable volume of literature on English legal history that made reference to mooting to the extent that I considered it necessary to develop an understanding of the positionality of mooting in higher education, in order to “highlight the gap that [my] research will fill”³⁸⁴.

2) Literature about the pedagogy involved in mooting

As explained above, the development of theoretical considerations relating to educational practice beginning about the end of the 19th Century coincided broadly with the re-emergence of mooting in higher education. Accordingly, my review of the literature relating to mooting has included consideration of a sufficient quantity of the limited amount of literature that addresses these subjects together³⁸⁵ to be able to construct a narrative by means of “progressive

(7th edition) London: Methuen; Plucknett, T.F.T (1983) *Studies in English Legal History* London: Hambledon Press; Prest, W.R (1967) “The Learning Exercises at the Inns of Court 1590-1640” 9(3) *Journal of the Society of Public Teachers of Law* 301

³⁸⁴ Golden-Biddle & Locke *op cit* p27

³⁸⁵ Bentley, D (1996) “Mooting in an Undergraduate Tax Program” 7 *Legal Education Review* 97; BurrIDGE, R (2002) “Learning law and legal experience by education” in BurrIDGE *et al* (eds) *Effective Learning and Teaching in Law*, London: Kogan Page, 25-51; Collins, E.C and Rogoff, M.A (1991) “The Use of an Interscholastic Moot Court Competition in the Teaching of International Law” 24(3) *PS: Political Sciences and Politics* 516; Finneran, R.E (2017) “Wherefore Moot Court” 53 *Washington University Journal of Law and Policy* 121; Gower, L.C.B “English Legal Training: A Critical Survey” (1950) 13 *Modern Law Review* 137; Hernandez (1998) “In defense of moot court” 17 *Review of Litigation* 69; Huxley-Binns, R (2010) “Hardly a moot point” 160 *New Law Journal* 7411; Kozinski, A. “In praise of moot court – not!” (1997) 97. *Colum L. Rev.* 178; Martineau, R.J (1981) “Moot Court: Too Much Moot and Not Enough Court” 67 *American Bar Association Journal* 1294; Parsons, L (2017) “Competitive Mooting as Clinical Legal Education: Can Real Benefits be Derived from an Unreal Experience” 1 *Australian Journal of Clinical Education* 4; Parsons, L (2018) “Competitive Mooting: An Opportunity to Build Resilience Skills for Legal Practice” 4 *Australian Journal of Clinical Education* 1; Thomas, M and Craddock, L (2014) “The art of mooting: mooting and the cognitive domain” 20 *International Journal of the Legal Profession* 223; Thomas, M and Craddock, L (2018) “Chill out!

coherence” showing “cumulative knowledge growth over time and consensus among researchers”³⁸⁶. While the amount of literature in this sub-category is lesser in volume than the literature making up reports of moot competitions, practical guides to mooting, and literature about the history and development of mooting, its relevance to the topic under investigation is considerably greater, and has been considered in depth in the previous chapter. The conclusion relevant to my study that appears to emerge from this sub-category of literature is that highlighted in probably the first published work on the subject: that mooting provides an educational benefit unavailable elsewhere in that it allows a student “to obtain a grip upon the question he³⁸⁷ is invited to tackle, and others cognate to it, which he is not likely to lose”³⁸⁸. The question whether this proposition holds true in modern legal education – and if so, to what extent - is explored by the final sub-category of literature.

1) Empirical studies of mooting

It has been observed that “there is a dearth of empirical research on the actual benefits of experiential learning techniques for students”³⁸⁹. Indeed, empirical studies into mooting make up by far the most sparsely populated sub-category of literature related to mooting, as well as the sub-category containing the literature directly relevant to my study. In the following section of this chapter, I will set out the salient points arising from this sub-category of literature³⁹⁰ in

Mooting and the affective domain” 25(3) *International Journal of the Legal Profession* 317; Walsh, C (1899) “The Moot System: An Appeal” 15 *Law Quarterly Review* 416.

³⁸⁶ Golden-Biddle & Locke *op cit* p31

³⁸⁷ At the time of Walsh (the Honorary Secretary of the Gray’s Inn Moot Society)’s writing, women were not permitted to join the Inns of Court. Following the coming into force of the Sex Disqualification (Removal) Act 1919, the first female members were admitted to the Inns in 1920 (Golding, D.F (2017) “Women: The Beginnings” (<https://www.graysinn.org.uk/history/women/women-the-beginnings>) (last accessed 8th March 2021)

³⁸⁸ Walsh *op cit* 426

³⁸⁹ Daly, Y and Higgins, N (2010) “Simulating the Law: Experiential “Techniques in the Modern Law Curricula” 84(1) *Research in Education* 79, 79

³⁹⁰ Billings, P (2017) “Evaluating the Pedagogic Value of Mooting and “Nooting” at the Administrative Appeals Tribunal” 43 *Monash University Law Review* 687; Boylan-Kemp, J (2013) “The role of mooting in modern day legal education, all students, all subjects, all years?” (unpublished) (<http://archive.legalscholars.ac.uk/edinburgh/posters.cfm>) – last accessed 8th March 2021); Daly, Y and Higgins, N (2010) “Simulating the Law: Experiential “Techniques in the Modern Law Curricula” 84(1) *Research in Education* 79; Gerber, P and Castan, M (2012) “Practice Meets Theory: Using Moots as a Tool to Teach Human Rights Law” 62(1) *Journal of Legal Education* 298; Gillespie, A.A (2007) “Mooting For Learning” 5(1) *Journal of Commonwealth Law and Legal Education* 19; Kammerer, E.F (2018)

order to demonstrate progressive coherence. I will also present a case that the literature is “incomplete”³⁹¹, and highlight a need for the “unique contribution”³⁹² that I propose to make with my own study, by conducting empirical qualitative research into the question of the extent to which mooting can be used to teach points of substantive law in higher education. Accordingly, I will review the literature cited above in the chronological order in which it was published or (in the case of the one unpublished work) presented³⁹³. This order will show the process whereby the literature has developed, and the extent to which each contribution draws upon, or omits reference to, those which precede it.

“Undergraduate Moot Court: Student Expectations and Perspectives” 51(1) PS: Political Science & Politics 190; Kammerer, E.F (2020) “Coaching and Teaching Competitive Moot Court: Comparing Faculty Approaches” 16(4) Journal of Political Science Education, 496

Keyes, M.E and Whincop, M.J (1997) “The Moot Reconceived: Some Theory and Evidence on Legal Skills” 8 Legal Education Review 1; Krupová, T, Pošíková, L, Friedel, T and Potucký, J (2013) “Do moot courts belong to high schools? And if so, under, what circumstances?” 19 International Journal of Clinical Legal Education 405; Lynch, A (1996) “Why Do We Moot? Exploring the Role of Mooting in Legal Education” 7 Legal Education Review 67; Marsh, L & Ramsden, R (2015) “Reflections on a high school mooting competition: bridging the gap between secondary and tertiary education” 49(3) The Law Teacher 323; Pattinson, S.D, and Kind, V (2017) “Using a moot to develop students’ understanding of human cloning and statutory interpretation” 17(3) Medical Law International 111; Turner, J, Bone, A and Ashton, J (2018) “Reasons why law students should have access to learning law through a skills-based approach” 52(1) The Law Teacher 1; Watson, P & Klaaren, J (2002) “An Exploratory Investigation into the Impact of Learning in Moot Court in the Legal Education Curriculum” 119 South African Law Journal 559.

³⁹¹ Golden-Biddle & Locke *op cit* pp36-37

³⁹² *ibid* p49

³⁹³ *supra* fn 390 cites the literature in alphabetical order by author. The article by Krupová *et al* was published in June 2013, and will accordingly be reviewed before the research by Boylan-Kemp, which appeared at the Society of Legal Scholars conference in September of that year. The article by Pattinson and Kind will be reviewed before the article by Billings, as it was accepted for publication in July 2017, while although the specific date of publication of Billings’ article is not clear, it contains references to authorities published in November of that year. Similar considerations pertain to the situating of the review of the article by Turner, Bone, and Ashton prior to Kammerer’s 2018 article (both published in January 2018, but reference in the latter to an article published in November 2015 suggests that it was written after the former, which was submitted for publication in July of that year (Turner, Bone and Ashton *ibid*, p1)

Lynch, A: "Why do we Moot?" (1996)³⁹⁴

Based upon online search records, and lack of reference to any earlier sources directly on the subject either by Lynch or subsequent authors, Lynch's article appears to have been the first published attempt to consider the place of mooting within legal education by carrying out empirical research. Indeed, the novel nature of Lynch's research is remarked upon in the first paragraph of Lynch's article, where he notes that "it seems that the presence and use of mooting is rarely called into question"³⁹⁵.

The article is focussed upon the use of mooting at the Law Schools in Queensland, Australia, and involves consideration of the theoretical bases for mooting, as well as empirical research in the form of focus group interviews with students involved in the moots (twenty students were interviewed in total³⁹⁶). The interviews were all with students at Griffith University, where mooting formed part of the taught curriculum on several compulsory modules taught to students over the course of their four years of study. The article mentions other Queensland Law Schools where mooting is used order to assess student learning, as the assessment exercise in optional modules (Queensland University of Technology), or as a stand-alone advocacy module (University of Queensland)³⁹⁷, but no empirical research is carried out in relation to these.

Lynch considers the theoretical standpoint of mooting as an approach to learning, and identifies that moots are a form of assessment that require a "multidimensional approach"³⁹⁸ in the form of the "cognitive" (identifying the strategy to be used in presenting the legal argument in the moot) and "affective" (the actual moot presentation) dimensions involved³⁹⁹, as well as a form of learning grounded in constructivist theory insofar as it requires that a student taking part "interpret and absorb...meaning from the vast amounts of case and statute law... relevant to the moot problem" and then "construct[ing]...knowledge from the materials they will discover through their research"⁴⁰⁰.

Lynch's article also focusses upon mooting as a form of experiential learning. By way of introduction, Lynch refers to the observation that students should engage in learning through

³⁹⁴ As with all the articles in this section, see *supra* fn 390 for the full title and citation

³⁹⁵ Lynch *op cit* p67

³⁹⁶ *ibid* p77

³⁹⁷ *ibid* pp71-3

³⁹⁸ *ibid* p74

³⁹⁹ *ibid* p75

⁴⁰⁰ *ibid* p77

the “ordinary practices of the culture”⁴⁰¹, and to the function of Kolb’s Experiential Learning Cycle in identifying the process whereby a learner reflects upon their experience in order to elicit what they have learned. Lynch states that this makes for a learning experience that is to a great extent constructed by the student, as “there is little imparting of knowledge from teacher to pupil” in a moot, and references articles on experiential learning that emphasise the importance of the operation of both the cognitive and affective domains of learning operating together, as is the case during a moot⁴⁰². Lynch refers to writings on problem-based learning (wherein “the process is both the focus for the problem and the assessment”⁴⁰³) to emphasise the importance to the learning experience of what the student mooters do in order to prepare their case during the moot, as opposed to how successful their case ultimately proves to be in the moot court, noting that “[m]any of the arguments heard in moots are rather desperate, and the assessing academic knows this – has foreseen it in fact when she or he drafted the question”⁴⁰⁴. Lynch attaches particular importance to the effect of motivation in student learning, and the way in which problem-based learning strategies can drive this factor by giving students control over the learning process. Finally, Lynch highlights the importance of co-operative learning as part of a group when carrying out problem-based learning, and the fact that moots, by their nature, provide a peer group within which the student can draw upon the experiences and observations of others in that group to develop their own understanding⁴⁰⁵.

Lynch’s research involves a phenomenographical (ie: focussing upon the experience of mooting, rather than mooting in general)⁴⁰⁶ investigation by way of focus group interviews with groups of five students. There were four groups in total, all segregated by gender, and made up of two groups of first-year students, and two groups of third-year students⁴⁰⁷. The recorded interviews each involved the group being asked the same three questions about their experience of mooting, and minimal subsequent questions only where necessary for

⁴⁰¹ Brown, J.S, Collins, A & Dugid, P (1989) “Situated Cognition and the Culture of Learning” (Jan-Feb) Educational Researcher 32, 34 (cited *ibid* p78)

⁴⁰² Lynch *op cit* pp78-9

⁴⁰³ *ibid* p79

⁴⁰⁴ *ibid* p80

⁴⁰⁵ *ibid* p81

⁴⁰⁶ *ibid* p82

⁴⁰⁷ *ibid* p83

clarification of points made by the students⁴⁰⁸. Lynch's analysis of the data arising from these interviews involved grouping the responses into four "categories of description"⁴⁰⁹:

"1. Mooting prepares students for the 'real world' through the acquisition of various skills" – Lynch's analysis of this category of responses⁴¹⁰ identifies the importance for the student interviewees of the moot experience allowing them to practice and develop skills in research and communication, which Lynch comments "seem[...] to prepare them for that 'real world' in a way that other forms of assessment do not."⁴¹¹: Lynch in particular highlights one student response explicitly invoking the importance (at least for that student) of "learn[ing] from experience"⁴¹²;

"2. Mooting provides an opportunity for students to learn from their peers and develop group skills" – this contains Lynch's observations of the student's accounts of the benefits of working as part of a group when preparing for a moot, as being "rewarding...when the team worked well and...instructive...when it did not"⁴¹³;

"3. Mooting is an activity which causes in most students a powerful mix of elation and terror" – here, comments from the students are recorded which demonstrate extreme emotive responses to the moot process, including in one case an adverse physical reaction⁴¹⁴. Lynch's overall analysis of this category of responses is that the considerable effort invested by students in moot preparation should be reflected in an assessment which carries more weighting towards their qualification than was the case for the module under investigation⁴¹⁵

"4. Mooting is an excellent way to learn the substantive law" – the responses in this category involve observations by the students that they found the experience of the moot beneficial, because it required them to "really know"⁴¹⁶ the law that was the subject of the moot. Lynch comments that "while there is very little written on the learning benefit of mooting, it is one clearly appreciated by students"⁴¹⁷.

⁴⁰⁸ *loc cit*

⁴⁰⁹ *loc cit*

⁴¹⁰ *ibid* pp84-6

⁴¹¹ *ibid* p86

⁴¹² *loc cit*

⁴¹³ *ibid* p88

⁴¹⁴ *loc cit*

⁴¹⁵ *ibid* p91

⁴¹⁶ *ibid* p92

⁴¹⁷ *loc cit*

Lynch's article concludes with the observation that the reactions and observations demonstrated by the students suggest that mooting was perceived by them to be of great value to their legal education, and was conceptualised by the students as having more value as formative than summative assessments, as was the case for mooting at the Inns of Court, wherein moots "literally were the legal education of those who sought to become lawyers"⁴¹⁸. Lynch suggests that the student responses demonstrate a capacity to reflect on the experience of mooting, and that educators interested in experiential learning might utilise this opportunity to develop the "reflective observation" stage of Kolb's experiential learning process⁴¹⁹.

Lynch's article, perhaps deliberately, raises perhaps more questions than it answers. As Lynch's research was carried at a university where mooting was used as a compulsory assessment method, a gap arises in respect of what student perceptions of moots might be where the "tension"⁴²⁰ of a compulsory assessment is not present. The nature of the focus groups whereby the research was undertaken has the inevitable consequence that individual student perceptions of moots are not identified, as "the unit of analysis is the view of the group"⁴²¹. A consequence of the focus group process is that the point that Lynch considers to be of most interest arising out of the study (that being the relationship between mooting and student learning) is not examined in as much detail as would be necessary to fully appreciate or understand it, as Lynch himself appears to acknowledge⁴²². For example, the comment by a student interviewee that the student had "never opened a case book"⁴²³ before preparing a moot calls for further comment, as do the comments that the moot task required students to "really know"/"understand"⁴²⁴ the law involved in the moot, and how or why they considered that process to differ from the process involved in other areas of their studies. Finally, the experiential learning theory that appears to underpin Lynch's conclusions is not developed or explained in the preceding sections. This may be due in part to the spatial constraints under

⁴¹⁸ *ibid* p95

⁴¹⁹ *ibid* p95

⁴²⁰ Marrow *supra* fn 243

⁴²¹ Cohen, C, Manion, L and Morrison, K (2011) *Research Methods in Education* (7th edition) Abingdon: Routledge, p433

⁴²² *supra* fn 417

⁴²³ Lynch *op cit* p85

⁴²⁴ *ibid* p92

which Lynch's article was written. Additionally, the passage of time since the article was written means that it does not reflect the current formulation of Kolb's theory⁴²⁵.

Keyes & Whincop – "The Moot Reconceived" (1997)

As is the case for Lynch, Keyes & Whincop's article is based upon research conducted in relation to student experiences of mooting at Griffith University, at which Keyes and Whincop were both employed at the time⁴²⁶. The authors' research evolves from their devising a formative assessment of the compulsory Tax Law module at Griffith in the form of a moot specifically designed for that purpose, as was suggested by Lynch as an appropriate use of the moot process⁴²⁷. Keyes and Whincop do not cite Lynch's article: this may be because their article was written before Lynch's was published: however, it is submitted that Keyes and Whincop cannot have been unaware of the research that Lynch was carrying out at their university.

Keyes and Whincop's article takes as its starting point the notion that "the traditional form of the moot...[is] a means of assessment"⁴²⁸. The authors use this to commence a discussion of different forms of assessment theory (which they state have been "overlooked in the current focus on learning"⁴²⁹), including experiential learning and constructivism, highlighting that according to such theories "reflection is used to construct meaning"⁴³⁰. The article also refers to cognitive apprenticeship theory, which posits that "learning will be most effective where students undertake 'authentic' tasks"⁴³¹, identifying "authentic" tasks for this purpose as those approximating the tasks carried out by legal professionals in practice, while identifying the criticism of this theory that it "has the potential to reify uncritically current practice"⁴³².

Keyes and Whincop highlight the importance of feedback being part of assessment strategy, and the unsuitability of summative assessment for this purpose, as students will in many cases not have the opportunity to put such feedback to practical use⁴³³. Reference is made to the then-recent emphasis in legal education of skills tuition, addressing two different conceptions

⁴²⁵ *supra* fn278 *et seq*

⁴²⁶ Keyes & Whincop *op cit* p2

⁴²⁷ Lynch *op cit* pp95-6.

⁴²⁸ Keyes & Whincop *op cit* p2

⁴²⁹ *ibid* p6

⁴³⁰ *ibid* p4

⁴³¹ *ibid* p5

⁴³² *loc cit*

⁴³³ *ibid* p9, p18

of the relationship between skills tuition and academic instruction⁴³⁴, identifying the importance of formative assessment in the development of students' skills⁴³⁵, in particular the skills which Keyes and Whincop categorise as relating to "facility with doctrine" (ie: use of legal research materials), advocacy skills, "strategic skills" (ie: identifying what submissions to make and how to advance one's case), and group working skills⁴³⁶.

Having identified as a problem the lack of opportunity for students in "traditional" moots to make practical use of the feedback provided by the moot judge, Keyes and Whincop devised a two-stage moot format for their formative moot assessment project. The first stage consisted of a "Directions Hearing", which required the students to set out the submissions that they intended to make. The moot judge would then explore these submissions with the students in order to advise whether the submissions ought to be amended or aborted. This was followed by the filing of the students' written submissions, about which they would be examined orally by the moot judge. Keyes and Whincop state that they adopted this format in order to allow the students to present their submissions in full, without the interruptions for questioning that invariably occur in the traditional moot⁴³⁷. The opposing student teams were then required to exchange their written submissions and present written rebuttals: again, this is explained by the authors' intended focus upon the need for the students to present their case as best they may without interruptions⁴³⁸. The format involved the 104 students studying the module being divided into teams of three, and carrying out the work required for each exercise over the course of a 21-day period⁴³⁹, following which the students were assessed based on criteria of which they had been notified in advance⁴⁴⁰. After the final moot, the students were sent a questionnaire to complete and return, which 100 of them did⁴⁴¹. Qualitative research was then carried out in two focus groups, which "an average of five students" attended⁴⁴².

The comments made by the students in their responses to the questionnaires focus primarily upon the format and content of Keyes and Whincop's exercise itself, rather than mooting in general, although particular note was made of an unsolicited remark by a student (not in

⁴³⁴ *ibid* pp11-15

⁴³⁵ *ibid* p15

⁴³⁶ *ibid* p16

⁴³⁷ *ibid* pp21-23

⁴³⁸ *ibid* p23

⁴³⁹ The schedule is set out *ibid* pp24-5

⁴⁴⁰ The criteria are set out at p25.

⁴⁴¹ *loc cit*

⁴⁴² *loc cit*

response to any of the prescribed questions) that the exercise was beneficial because the student “felt as if [the student was] participating in real litigation”, which Keyes and Whincop identify as supporting the cognitive apprenticeship theory of education⁴⁴³. Other comments of note include the observation that, while Keyes and Whincop intentionally devised the exercise in the understanding that the students participating had not engaged in a great deal of prior study of the law in question in order that the exercise could be used to “accelerate independent, and deep, learning”⁴⁴⁴, the responses suggested that the majority of students appeared to feel that they had insufficient prior legal understanding to be able to participate effectively in the moot⁴⁴⁵. The observations on the written submissions stage of the moot included the statement that this allowed the students to “concentrate on knowing arguments and cases” rather than memorise a submission to be presented orally, the presentation of which Keyes and Whincop state that “some students...find to be a bore”⁴⁴⁶.

The students’ responses to the questions on the extent to which they considered the exercise to have developed their skills were overwhelmingly positive in nature, including one observation by a student, who believed him/herself to have as a result of the exercise “gained a greater understanding of revenue law as I was forced to research and comprehend the law as opposed to merely doing a little reading and relying on lecture notes to get me through.”⁴⁴⁷. Another student’s feedback focussed upon the factor of “individual motivation” driving the student to find out for him/herself an understanding of the law involved in the exercise, as opposed to other kinds of learning activities, which the students described as “spoon feeding”⁴⁴⁸. The article concludes with Keyes and Whincop’s recommendation that use of this form of moot be considered in legal education generally as a way of enhancing students’ legal education and providing formative feedback thereon, although with recognition of the demands in the form of time and work that it represents⁴⁴⁹.

Keyes and Whincop’s article contains some very thought-provoking research suggesting suitable uses of mooting in legal education. However, it does not examine the possible impact of the “traditional format” of mooting, but rather aims to solve the authors’ perceived problems

⁴⁴³ *ibid* p26

⁴⁴⁴ *ibid* p27

⁴⁴⁵ *ibid* p27

⁴⁴⁶ *ibid* p32

⁴⁴⁷ *ibid* p34

⁴⁴⁸ *loc cit*

⁴⁴⁹ *ibid* pp37-9

with that format. Some of these perceived problems are subject to challenge, in particular the statement (not supported by quoted observations from the research) that students consider oral submissions to be “a bore”⁴⁵⁰, which is diametrically opposed to findings from research elsewhere⁴⁵¹ and may be the result of tutor and/or student perceptions of the particular area of law relevant to Keyes and Whincop’s exercise⁴⁵². Finally, the research focusses heavily upon the skills involved in mooting and (deliberately) does not expand upon the role played by mooting in learning substantive law. Comments made in the questionnaire responses relevant to this⁴⁵³ do not appear to have been expanded upon in the focus groups, raising questions that call for further investigation by qualitative research into this particular issue.

Watson and Klaaren: “An Exploratory Investigation Into the Impact of Learning in Moot Court” (2002)

Watson and Klaaren’s research into mooting at the University of the Witwatersrand, Johannesburg (“Wits”) originates from their observation of the experience of a particular student from what was traditionally regarded as a “disadvantaged” background (she was an Indian migrant) who graduated (posthumously) from Wits in 2000. The student had excelled in internal and inter-varsity moots, but had not performed well in exams and other academic exercises, and attributed this to her being “able, through oral argument, to see connections that she otherwise would not have”⁴⁵⁴. The authors describe the introduction of credit-bearing moot court modules at Wits in 2001, and introduce their intention to carry out research into mooting from two perspectives. The first of these pertains to the role played by mooting in enhancing participation from students from “disadvantaged backgrounds” who traditionally would struggle on a law degree, which aim Watson and Klaaren consider to have been achieved based upon records of the demographic backgrounds of the students enrolled on the module⁴⁵⁵.

The second “and perhaps more fundamental”⁴⁵⁶ perspective relates to pedagogical issues surrounding mooting generally. Watson and Klaaren’s research into this consisted of sending out questionnaires to the students enrolled on the module, 17 of which were returned (this

⁴⁵⁰ *supra* fn 446

⁴⁵¹ Lynch *op cit* pp88-9

⁴⁵² Keyes & Whincop *op cit* p34

⁴⁵³ *loc cit*

⁴⁵⁴ Watson & Klaaren *op cit* p548

⁴⁵⁵ *ibid* p552

⁴⁵⁶ *loc cit*

was a 40% response rate)⁴⁵⁷. The questionnaire required the students to rate their own academic ability, reflect on their experience of mooting, and state whether they considered their results in the mooting module to be a fair reflection of their academic ability⁴⁵⁸. The student feedback recorded in the questionnaire includes favourable comments on the value of the learning experience generally; however, Watson and Klaaren observe that:

“...no student specifically mentioned their level of understanding of the content-matter of the moots themselves, or connected moot participation to their broader understanding of legal content. This is despite the fact that they were required in the questionnaire to rate their understanding of law. Furthermore, the students' ratings of their understanding of the law gave no useful indication of any shift that may have occurred in this area through moot participation, and were not found to have any relation to either students' pre-or post-moot performance, or to show any between-group differences.”⁴⁵⁹.

Watson and Klaaren infer from this that “the learning which takes place in the moots...is of a different kind”⁴⁶⁰ of learning to what they earlier describe as the “surface and atomistic approach to learning”⁴⁶¹ adopted by lectures and other forms of teaching that focus on exam preparation. They suggest the relationship between mooting and other forms of student learning should be best understood in terms of mooting allowing access to a different way of understanding the law, albeit not necessarily in a way that will make the subject matter easier to understand, particularly not for students from disadvantaged backgrounds. Reference is made to “in-depth, but informal” interviews with two students from such backgrounds, who are noted as having made observations to this effect⁴⁶²

Although Watson and Klaaren's article purports to make observations about mooting generally, these observations can be challenged on the basis that they have been made within the particular constraints of the assessed module of study being researched, and the particular precepts that they are seeking to challenge. It is worth noting that at least one of the student responses places particular focus upon racial differences between students and moot judges as a barrier to learning in the moot context, which topic is particularly sensitive in South Africa

⁴⁵⁷ *ibid* p555

⁴⁵⁸ *loc cit*

⁴⁵⁹ *ibid* p556

⁴⁶⁰ *loc cit*

⁴⁶¹ *ibid* pp552-3

⁴⁶² *ibid* p557

and would have been even more so at the time of the article's writing (only eight years after the end of apartheid)⁴⁶³. The authors' inferences in relation to mooting and its lack of positive impact on student learning is subject to challenge also. Although it is difficult to do so without sight of the questionnaire used (it should be noted, however, that the article contains no reference to experiential learning theory), such a challenge can be mounted on the basis of flawed methodology, as the authors appear to acknowledge⁴⁶⁴, as well as on analytical grounds. The oft-quoted dictum that "absence of evidence is not evidence of absence"⁴⁶⁵ is relevant here, and as has been argued elsewhere, the fact that the results of an investigation do not support a proposition do not show without more that that proposition is false or ill-founded⁴⁶⁶. There is, therefore, fertile ground to challenge the legitimacy of the authors' inference by means of focussed research on this specific point.

Gillespie: "Mooting for Learning" (2007)

Gillespie's article expands upon, and incorporates, findings from a study conducted by Gillespie and Gary Watt⁴⁶⁷. The article commences with Gillespie's observations, based upon published articles and other sources, that mooting is generally considered to be a "fun" activity, rather than a serious component of legal education, which perception Gillespie sets out to challenge⁴⁶⁸.

The article begins with a summary of the study conducted by Gillespie and Watt, which was comprised of two pieces of quantitative research. The first stage of this research took the form

⁴⁶³ Though it should be noted that Wits maintained a committed position of resistance to apartheid throughout this period of South African history, and refused to implement a policy of segregating students by race (<https://www.wits.ac.za/about-wits/history-and-heritage/>) (last accessed 8th March 2021)

⁴⁶⁴ *supra* fn289

⁴⁶⁵ This dictum originates in Oliver, B.M *et al* (1971) *Project Cyclops: A Design System for Detecting Intelligent Alien Life*, NASA Technical Report CR-114445, p3, where it appears as a quote attributed to Professor Martin Rees.

⁴⁶⁶ Altman, D.J, Bland, J.M (1995) "Absence of evidence is not evidence of absence" 311 *British Medical Journal* 485.

⁴⁶⁷ Gillespie, A.A and Watt, G (2006) *Mooting for Learning*,: UKCLE. Warwick (summary available at <http://ials.sas.ac.uk/ukcle/78.158.56.101/archive/law/resources/teaching-and-learning-strategies/gillespie2/index.html> and <http://ials.sas.ac.uk/ukcle/78.158.56.101/archive/law/projects/past-projects/gillespie/index.html>) (last accessed 8th March 2021)

⁴⁶⁸ Gillespie *op cit* p21

of a questionnaire sent out to university staff asking them about mooting within their institutions. 58 responses (out of the 85 sent out) were returned⁴⁶⁹. In the second stage, further questionnaires⁴⁷⁰ were sent to those who responded to the first questionnaire. It is not clear how many of these were returned⁴⁷¹.

Following consideration of the results of “Phase I”, Gillespie infers a consensus that university staff took the view that mooting “if not a skill itself, is best used to develop skills” – albeit skills that are not necessarily “vocational” in nature, such as research and critical thinking skills⁴⁷². Gillespie goes on to explore the application of these skills within the format of a moot, concluding that mooting is not the only or indeed the only appropriate vehicle for the development of these skills within a legal education curriculum, and that the setting within which a moot takes place may indeed be a detriment to its teaching of skills – for example, the need to remain within the confines imposed by “black-letter law” inhibits the critical thinking ability of the student participants⁴⁷³. Gillespie goes on to propose ways in which mooting could be deployed in a law programme in order to use it “as a teaching and learning vehicle rather than as a mere assessment or development tool”⁴⁷⁴, such as problem-based learning or clinical education.

Gillespie goes on to discuss the use of moots in assessments, as was the case for 84% of the survey respondents who stated that they use mooting within their curriculum. Gillespie’s consideration of this data highlights again the use of mooting as part of the assessment of skills. However, Gillespie also identifies that “some institutions use mooting within a substantive module to teach more than the development of skills”, which Gillespie states that he has explored further through “qualitative research” (no further details are provided as to the form or methodology used for this)⁴⁷⁵. Gillespie discusses moots that formed the assessment of problem-based learning modules, and gives examples from interviews with university staff who state that while such an assessment method was “possibly cognitively more difficult” than

⁴⁶⁹ <http://ials.sas.ac.uk/ukcle/78.158.56.101/archive/law/resources/teaching-and-learning-strategies/gillespie2/index.html> (last accessed 8th March 2021)

⁴⁷⁰ *ibid* - “Phase II targeted those institutions which indicated that mooting takes place within their curricula. Two questionnaires were sent out...”

⁴⁷¹ Neither of the reports linked *supra* fn 467 contain any information to this effect

⁴⁷² Gillespie *op cit* p23

⁴⁷³ *ibid* pp23-7

⁴⁷⁴ *ibid* p28

⁴⁷⁵ *ibid* p32

a traditional coursework-based assessment, it appeared to be more positively received by the majority of the students taking it due to “issues such as motivation and enjoyment”, with the exception of “some weaker students” who appeared to have “misunderstood the work required for a moot” and consequently struggled⁴⁷⁶. Gillespie goes on to discuss the limited use of mooting by the institutions that did in fact make use of it within the curriculum (83% of such institutions reported that they only organised one moot)⁴⁷⁷ and identifies the potential inherent in mooting to provide formative feedback to students on their level of understanding of substantive law, stating that “the scepticism of placing vocational skills within the undergraduate curriculum [has] led to....the potential of mooting being lost”⁴⁷⁸.

Gillespie’s article is necessarily limited in its scope by its focus upon the observations by staff at the institutions surveyed, and as such it does not attempt to address the perceptions of the students involved in the mooting process. It contains a very limited degree of reference to experiential learning theory, mentioning this only in passing⁴⁷⁹. The article also does not make thorough reference to earlier literature on mooting, with no reference made to Lynch’s, or to Watson and Klaaren’s articles. Also, given that Gillespie’s argument propounds a deployment of mooting in higher education similar to that which is the subject of Keyes and Whincop’s article, the fact that that earlier article is only referred to once⁴⁸⁰ is peculiar.

Daly and Higgins (2010) “Simulating the Law”

Daly and Higgins’ short article follows on from a project organised by the authors that took place at Dublin City University in the 2006-7 academic year involving the integration of mock trials and mooting into the law curriculum. This included the use of a moot set in the International Court of Justice as part of the teaching of the postgraduate International Law and Use of Force module. The project was followed by a questionnaire, in which the students’ responses included observations that they had found the experience to be beneficial in that it allowed them to “experience [the law] in its proper setting”, as opposed to learning acquired “from books” alone, as well as being a generally enjoyable experience that provided them with training in transferable skills that they would not have otherwise acquired⁴⁸¹. The authors conclude that this makes it “clear that exercises such as moot courts...should have a

⁴⁷⁶ *loc cit*

⁴⁷⁷ *ibid* p33

⁴⁷⁸ *ibid* p35

⁴⁷⁹ *ibid* p28

⁴⁸⁰ *ibid* p30

⁴⁸¹ Daly and Higgins *op cit* p80

prominent place in the modern curriculum” but acknowledge the pedagogical and organisational challenges presented by such an innovation⁴⁸².

The extreme brevity of Daly and Higgins’ article necessarily results in the omission of details that might have been useful in order to evaluate the validity of the research referred to therein. There is no reference to, or explanation of, the methodology involved, or of the number of students who participated in the study. With specific reference to my own research question, Daly and Higgins’ study does not address mootings from the perspective of undergraduate students. Also, it is not clear from the article which of the questionnaire responses quoted in the article refer to which of the two exercises (mooting and mock trials) involved in the project.

Gerber and Castan: “Practice Meets Theory: Using Moots as a Tool to Teach Human Rights Law” (2012)

Gerber and Castan’s article, the premise of which is explained in its title, commences with a survey of the then-available literature on mootings and its uses in education, and identifies that “what is lacking in the scholarship is an in-depth analysis of moots as a tool for deep doctrinal learning”⁴⁸³. Gerber and Castan state that mootings is a suitable vehicle to allow students to understand human rights law, because the function of mootings as a form of “deep” and experiential⁴⁸⁴ learning requires students to ensure a thorough understanding of the subject matter before presenting their submissions. Gerber and Castan also refer to the particular factor of motivation involved in respect of students taking part in human rights moot competitions, since as such activity is not usually part of the student’s university curriculum (unlike the moot activities that formed the basis of Lynch, Keyes and Whincop, and Watson and Klaaren’s research⁴⁸⁵), they identify that the factor of voluntary participation constitutes in itself an important factor contributing towards a positive learning experience for the student⁴⁸⁶.

The authors place particular emphasis on moot competitions as a vehicle for students to learn human rights law by reference to what they consider to be “a dearth” of cases involving a practical application of human rights law by contrast with other areas of law such as contract and tort law. The effect of this, Gerber and Castan consider, is that student mooters are able

⁴⁸² *loc cit*

⁴⁸³ Gerber & Castan *op cit* p300

⁴⁸⁴ Kolb (cited *supra*) is referenced on this point (*op cit* p301)

⁴⁸⁵ *op cit*

⁴⁸⁶ Gerber & Castan *op cit* p301

to devise, in effect, their own body of case law out of their moot submissions, and in so doing prepare themselves for potential future roles as human rights advocates⁴⁸⁷.

The authors describe the formats of various human rights moot competitions⁴⁸⁸, culminating in a discussion of the Castan Centre Human Rights Moot Competition⁴⁸⁹ operated by a research centre within Monash University, of which one of the authors was the Deputy Director⁴⁹⁰ and which is named after her father, a prominent Australian human rights barrister⁴⁹¹. Reference is made to research conducted by the authors in the form of a survey of students who took part in the competition, which reports that 90% of the respondents “felt more comfortable incorporating human rights into legal arguments than before they participated in the moot”⁴⁹². This, along with qualitative data in the form of two quoted responses from students, is used by the authors as evidence to demonstrate that the moot competition “is providing students with practical experience in using human rights arguments, which is likely to make them more comfortable and knowledgeable about using such arguments once they enter practice”, and “provide[s] students with deeper knowledge, skills, and confidence regarding human rights law and its application”⁴⁹³.

As with several earlier articles⁴⁹⁴, Gerber and Castan’s article is focussed on a particularly discrete form of moot activity, making it very difficult for their findings to be generalizable, particularly given the lack of methodological information provided (not least the size of the sample). The authors appear to be alive to the possibility of the financial reward involved in the moot competition under review having made an impact upon the motivation of the students who took part⁴⁹⁵: however, this issue is not expanded upon in their research, at least as recorded in the article. Finally, it is difficult to escape the inference of positive bias in respect of the competition and its educative potential present as a result of the personal attachment by one of the authors to the Centre that organises the moot competition.

⁴⁸⁷ *loc cit*

⁴⁸⁸ *op cit* pp301-6

⁴⁸⁹ *op cit* pp307-9

⁴⁹⁰ *op cit* p301

⁴⁹¹ <https://www.monash.edu/law/research/centres/castancentre/about/roncastan> (last accessed 8th March 2021)

⁴⁹² Gerber and Castan *op cit* p309

⁴⁹³ *loc cit*

⁴⁹⁴ Lynch *op cit*, Keyes and Whincop *op cit*, Watson and Klaaren *op cit*

⁴⁹⁵ *loc cit*

Krupová *et al*: “Do moot courts belong to high schools?” (2013)

This article is based upon, and incorporates, quantitative data obtained following a survey conducted with a group of 30 high school students who took part in a moot court organised by undergraduates on a Street Law programme at Charles University, Prague⁴⁹⁶. The data includes overwhelmingly positive results in favour of mooting as a “beneficial teaching method”, and that the students taking part “consider[ed that] their legal knowledge positively improved” and “gained awareness of [a] real justice system”⁴⁹⁷, but that the majority (75%) of respondents reported that the experience had not “changed [their] relationship to the law...which students later explained was as a result of having a positive approach to the law already”⁴⁹⁸.

This is another article involving research focussed upon a discrete form of moot activity, and as such one involving research that it is difficult to extrapolate. The distinguishing feature of this activity is that the primary focus of the learning experience is the student organising the moot, rather than the participants in the moot.⁴⁹⁹ Also, although the authors do not explain in detail the format and content of the moots that were organised, some of the content referred to suggests that these resembled what from an English law school perspective would be commonly understood as belonging to a mock trial, rather than a moot⁵⁰⁰

Boylan-Kemp: “The role of mooting in modern-day legal education” (2013)

Boylan-Kemp’s research remains unpublished, but it is summarised in a series of slides that were presented to the Society of Legal Scholars Conference in 2013. The research is considered here because it is positioned specifically as a successor to Gillespie and Watt’s 2006 research⁵⁰¹ in analysing the implementation of mooting in higher education from a UK perspective, and, like that earlier project, is publicly funded (in this case by the Higher Education Academy)⁵⁰². Also, it is submitted that the proposals with which the research concludes are so radical in nature that they merit consideration.

⁴⁹⁶ Krupová *et al* pp406-7.

⁴⁹⁷ *ibid* pp408-9

⁴⁹⁸ *ibid* pp409-10

⁴⁹⁹ *ibid* p406

⁵⁰⁰ *ibid* pp410-11.

⁵⁰¹ Boylan-Kemp *op cit*

⁵⁰² *ibid*

Boylan-Kemp's aims were to identify whether mootng had been used more widely in higher education since Gillespie and Watt's research was carried out, to consider whether mootng should be used in assessments and if so, what it should be used to assess, and to explore whether mootng "should be used as a primary teaching tool"⁵⁰³.

Boylan-Kemp's research amounts to an analysis of quantitative data relating to modules taught at Nottingham Law School and for which mootng forms part of the assessment strategy: specifically, the Year 1 Contract Law and Year 2 Criminal Law modules (which are compulsory), and a Mootng module which students may elect to study in their 3rd (and final) year of study. The data displayed, and Boylan-Kemp's summary thereof, demonstrates more successful results in respect of the Year 1 and 2 moot assessments than in relation to the assessment of those modules by exams, in the form of a higher proportion of students passing the modules with 1st and 2:1 class results, and a lower proportion with lower grade results, or failing the assessment and higher grades overall in respect of the mootng assessment components of the modules. There is also recorded data showing the assessment results of a group of fifteen students who studied the Final Year Mootng Module, as well as those students' results in respect of their results in the Year 1 and 2 moot assessments. These students' results (with one exception) demonstrate higher grades in respect of the Year 1 and 2 moot assessments than in respect of the Final Year Mootng Module assessment.

Boylan-Kemp's conclusions from this data are that mootng "provides high achieving students with the potential to achieve better marks" while at the same time not disadvantaging "mid-range grade classification students"⁵⁰⁴, that mootng "provides an incremental learning approach that is of benefit to the students"⁵⁰⁵, and that a standalone mootng module "is not as effective for student learning as embedding mootng into a substantive law module". Following this, Boylan-Kemp recommends that mootng should be a mandatory assessment for all students of substantive law modules, and should be used to replace "some of" the "more traditional forms of assessment (i.e. coursework and examination)"⁵⁰⁶.

As noted above, these are radical proposals. Boylan-Kemp's research does not, however, contain sufficient data to support their implementation. The data relating to the comparison of the assessments for the Years 1 and 2 modules does not make clear what the particular

⁵⁰³ *ibid*

⁵⁰⁴ *ibid*

⁵⁰⁵ *ibid*

⁵⁰⁶ *ibid*

differentiation was between the results of the assessed moot and the exams in the cases of individual students. This leaves Boylan-Kemp's analysis open to challenge in that it may be that some of the students who obtained a higher grade in the moot assessment nonetheless failed that assessment, and that some or all of these students were "mid-range students" who were "disadvantaged" by this mode of assessment. It is very difficult to assess the level of "difficulty" in respect of an exam as compared to a moot, and so to attempt to extrapolate a conclusion from the results that the results of the moot assessments were overall better than those relating to the exams because of the mode of the assessment seems an impossible task. It may have been the case that the results of the exam were worse because the students chose to devote more time and effort towards preparing for the moot than for the exam, in the light of the greater degree of motivation that has been recognised⁵⁰⁷ as being attached to mooting than other forms of learning in higher education, with a possible conclusion (given that Boylan-Kemp does not advocate the complete removal of written exams) that assessed moots are an unwelcome distraction from exams for students who tend to struggle with this mode of assessment. Alternatively, the written examinations may have been flawed, or perceived to have been by the students taking them, so as to account for a poorer performance than might otherwise have been the case. Also, research indicates that students perform better in oral assessments than written assessments generally⁵⁰⁸. It may therefore be that the results of Boylan-Kemp's research are explainable by the mere fact that the moots were oral assessments, rather than their being moots, and that the advantages claimed by Boylan-Kemp could be made in respect of an oral presentation or *viva voce*. Overall, Boylan-Kemp's interpretation of the results is very much subject to challenge in respect of the absence of qualitative data from the students involved, and a gap exists calling for consideration of this issue.

Marsh and Ramsden: "Reflections on a high school mooting competition" (2015)

This article, written by two members of academic staff at The Chinese University of Hong Kong ("CUHK"), is focussed upon a moot competition ("The CUHK Moot Cup") contested between high school students aged 15-18⁵⁰⁹. The competition was designed by the authors with a view to "enhanc[ing] the learning environment of a law degree" and providing "a renewed focus on matching the capacities of prospective candidates to the demands of law school"⁵¹⁰. The

⁵⁰⁷ *supra* fn448, 476

⁵⁰⁸ Huxham, M, Campbell, F, and Westwood, J (2012) "Oral versus written assessments; a tale of student performance and attitudes" 37(1) *Assessment & Evaluation in Higher Education* 125

⁵⁰⁹ March and Ramsden *op cit* p327

⁵¹⁰ *ibid* p324

preparation for the competition involved “three intensive days” of teaching on the area of law involved⁵¹¹, following which the competition was contested over two days between the students, who were organised into teams with two members in each. The authors set out positive reflections on their experience of the competition⁵¹². The authors also conducted quantitative research in the form of a Likert scale-based online survey, to which one member of each of the 21⁵¹³ participating teams responded. The full results are not given in Marsh and Ramsden’s article, but they report positive feedback from the students on the experience of the moot having “enhanced their knowledge” of, and “given them insight into” the law involved⁵¹⁴. The authors also quote qualitative feedback from the students, which include comments that the “immers[ive]” and “experiential learning”⁵¹⁵ nature of the exercise involved helped them to develop their understanding of the law in preparing them for their university studies. The authors’ concluding remarks echo this, with the caveat that “experiential learning methods are not swiftly abandoned wholesale in favour of ‘chalk and talk’ teaching upon arrival”⁵¹⁶.

Notwithstanding the discrete nature of the activity researched by Marsh and Ramsden, it is difficult to extrapolate a wider application of the results of their research without full details of the student responses. Worth noting, also, is that only half of the participating students responded to the survey, and the conclusions arrived at lack consideration of the views of the individual team members. The article also lacks consideration of what is meant by “experiential learning” in this context. A further relevant consideration is that the moot competition was preceded by an intensive teaching programme that took place over a short period of time. This is uncommon in higher education, and it is difficult to assess the results of the research without identification in the research results of whether the students’ responses are directed at the teaching programme, or the moot itself, and to what extent their experience of the latter was affected by the former.

⁵¹¹ *ibid* p328

⁵¹² *ibid* p330

⁵¹³ *ibid* p331 (cf *ibid* p330: “The Moot Cup competition received applications from 56 high school students, split up into 28 teams....”)

⁵¹⁴ *ibid* p332

⁵¹⁵ *ibid* p334

⁵¹⁶ *ibid* p333

Pattinson and Kind (2017) “Using a moot to develop students’ understanding of human cloning and statutory interpretation”

This article concerns a moot that took place as part of an interdisciplinary research project at Durham University designed to investigate the understanding of societal issues through the medium of law⁵¹⁷. The project involved a group of 51 16-17 year-old AS-Level students from comprehensive schools in North-East England⁵¹⁸. The project was primarily informed by the House of Lords’ ruling in *R (Quintaville) v Secretary of State for Health*⁵¹⁹ that the technique of human cloning fell within the scope of the Human Fertilisation and Embryology Act 1990. The project included debates (in which the students were asked to represent fictitious political parties), workshops, and lectures on basic aspects of English law, as well as relevant ethical and scientific issues, in particular a lecture by an expert in the relevant field⁵²⁰. The project culminated in a moot set in the Supreme Court using the facts of the *Quintaville* case (the students involved were not told the basis for the moot case, nor had they studied law prior to this project⁵²¹). The students were provided with advance materials including sections of the relevant legislation and extracts from the *Quintaville* judgment, and then were divided into teams and asked to prepare skeleton arguments and oral submissions in support of the party that they had been instructed to represent.

The authors conducted research to evaluate the effect of the moot upon the students’ understanding of cloning. This took the form of two questions about cloning⁵²², which the students were asked to answer on three occasions (before the moot, immediately after the moot, and approximately six months after the moot), as well as semi-structured interviews with the students approximately six months after the moot⁵²³. The analysis of the results in respect of the responses to the questions shows that a greater percentage of students gave correct answers after the moot than before, but when asked again after the six-month delay there were fewer correct and more incorrect responses than in the pre-moot phase⁵²⁴. The quoted interview responses include positive observations from the students in respect of the

⁵¹⁷ Pattinson and Kind *op cit* p111

⁵¹⁸ *ibid* p125

⁵¹⁹ [2003] UKHL 13 (cited *ibid* fn 5)

⁵²⁰ <https://www.ncl.ac.uk/chabi/people/profile/maryherbertnclacuk.html#background> (accessed 8th March 2021)

⁵²¹ *ibid* p115

⁵²² *ibid* p127

⁵²³ *ibid* pp126-7

⁵²⁴ *ibid* p128

perceived benefits of working as part of a team alongside people with whom they had not worked previously, and in respect of perceived enhancements to their confidence, research, and organisational skills⁵²⁵.

As with the research included in Marsh and Ramsden's article, the discrete nature of Pattinson and Kind's project make it difficult to extrapolate the emergent findings. This discreteness is manifest particularly in respect of the subject of the research, and to the circumstances of the academic instruction preceding the moot. Also, although the students' interview responses contain references to their having perceived themselves to acquire an increased understanding of the scientific and ethical issues involved in the project, none of the data referred to (aside from the quoted response that the "coexisting then overlapping" of the "two worlds" of science and law was something that the student in question "loved seeing"⁵²⁶) addresses the pedagogic benefit of the moot exercise specifically. Indeed, this may not have been possible to measure, given that the students involved had no experience of legal education prior to the project.

Billings: "Evaluating the Pedagogic Value of Mooting and 'Nooting'" (2017)

Billings' article aims to address the outcome set out in its title by drawing upon research conducted by the author (an Associate Professor at The University of Queensland) in respect of student experiences of two inter-varsity activities organised at the Administrative Appeals Tribunal (AAT)⁵²⁷: the Moot Competition, and the Negotiating Outcomes on Time ("NOOT") competition. Although these activities are not compulsory, Australian students can refer to them to demonstrate that they have met the Threshold Learning Outcomes (TLOs) necessary for them to graduate⁵²⁸ which evaluation Billings prefaces with the hypothesis that such events promote deeper student learning and reflection on the student experiences of the activities in which they have been involved, and the applicable legal procedures.

Billings reviews literature relevant to simulation-based learning, and refers to the potential uses of mooting as a method of teaching within this sphere. It is noted that "aside from the

⁵²⁵ *ibid* pp130-1

⁵²⁶ *ibid* p130

⁵²⁷ Described as "the peak Australian tribunal...an independent, accessible, user-friendly alternative to the courts for resolving matters arising out of government decision-making" (Billings *op cit* pp688, 690)

⁵²⁸ *ibid* p688. The correlation between the competition judging criteria and applicable TLOs is set out at *ibid* pp 697 and 706-7.

work by Lynch, and Keyes and Whincop respectively, scholars have lamented the dearth of empirical research⁵²⁹ in this area.

After a consideration of the NOOT process (which is outside the scope of this review, as it is not a moot court exercise), Billings goes on to explain the format and process involved in the AAT Moot Competition. The Competition requires the students participating to scrutinise the case papers that form the background to the proceedings before the AAT, conduct relevant legal research, and then file and serve written submissions⁵³⁰ in advance of making oral submission before the moot court, which is comprised of AAT officials⁵³¹

Billings goes on to refer to empirical research into the student experiences of mooting and NOOTing. The research process⁵³² involved sending a Likert scale-based survey⁵³³ to 24 mooters, 18 of whom responded. The survey data records highly positive responses to all the questions posed, with mean average results of between 4 and 5 (4 being “agree” and 5 “strongly agree”) to all but one⁵³⁴ of the questions posed. Of particular relevance for the purposes of this review are questions asking the respondents to evaluate the extent to which the moot “deepened [their] legal knowledge and understanding of administrative justice” (mean result 4.78), “deepened [their] understanding of the differences between administrative and judicial review (mean result 4.44), and “prompted acquisition of knowledge and understanding of niche areas of public law” (mean result 4.65). Billings acknowledges the limitations of this survey with regard to its small population and selection bias⁵³⁵, but states that the survey “provides valuable empirical support for the claims made in this article about the value of the AAT moot competition”⁵³⁶. The survey also contained an opportunity for mooters to record their own qualitative observations about the competition, certain of which are quoted by Billings. Particularly relevant to this review is the quoted response that the moot was particularly valuable “as (unlike exams) there could be no “fudging” of knowledge and I

⁵²⁹ *ibid* p694 (Gillespie, and Watson & Klaaren, are also cited)

⁵³⁰ *ibid* pp709-10

⁵³¹ *ibid* p705

⁵³² *ibid* pp713-4. The data and analysis thereof as it relates to NOOTing will not be referred to below.

⁵³³ The survey questions are set out *ibid* pp720-1

⁵³⁴ “Q11: Opportunity to acquire, develop and display an appreciation of lawyer’s professional duties” (mean result 3.76)

⁵³⁵ *ibid* pp715-6

⁵³⁶ *ibid* p716

had to take responsibility for my own learning”⁵³⁷. Billings concludes that the Moot Competition is a “highly efficacious learning device[.]” and that his research “reveal[s] that students highly appreciate and value the particular educational benefits of experiential learning activities”⁵³⁸.

As with the articles referred to above, Billings’ article is focussed on a particularly discrete form of moot court activity - Billings distinguishes the AAT moot competition procedure from that in operation in respect of “traditional moots”⁵³⁹. The AAT moot competition is also particularly germane to Australian legal education in terms of its credit-bearing nature. The fulfilment of the “Threshold Learning Outcomes” necessary to graduate through participation in the AAT moot has as of this writing no equivalent in English legal education. While there has been a recently-introduced requirement similar to the TLO in the form of the Threshold Standard⁵⁴⁰ that must be met to qualify to practise as a solicitor, the Solicitors Regulation Authority’s requirement that this standard can be met only by passing the Solicitors Qualifying Examination (SQE)⁵⁴¹ affords no scope for qualification by any method comparable to the AAT competition.

Turner, Bone, and Ashton: “Reasons why law students should have access to learning law through a skills-based approach” (2018)

This article, written by three academic staff at the University of Brighton, is focussed upon the potential for mooting and other “skills-based activities” to enable law graduates to fill gaps that were identified in the 2013 Legal Education and Training Review relating to “employability” and “professionalism”⁵⁴². The authors discuss, with reference to relevant literature on the subject, the argument that exists in legal education between the concept of a law degree as a form of liberal study with a focus on “knowledge for knowledge’s sake”⁵⁴³, and the principle that prospective lawyers should be trained in attaining professional responsibility and communicating effectively before they enter the legal profession⁵⁴⁴. Ultimately, with reference to experiential learning theory, in particular Kolb’s conception of learning as a continuous

⁵³⁷ *Ibid* p717

⁵³⁸ *Ibid* pp719-720

⁵³⁹ *Ibid* p719

⁵⁴⁰ <https://www.sra.org.uk/threshold> (last accessed 8th March 2021)

⁵⁴¹ <https://www.sra.org.uk/sra/policy/sqe/> (last accessed 8th March 2021)

⁵⁴² Turner, Bone, and Ashton *op cit* p1

⁵⁴³ *ibid* p4

⁵⁴⁴ *ibid* pp2-3

process of transformation⁵⁴⁵, the authors conclude that a model of teaching law that deploys skills-based activities can “meet the needs/views”⁵⁴⁶ of both sides of the argument about the role of legal education.

The authors explain the background to their research, which involved students who had studied short optional courses in mooted, negotiating, and interviewing. The courses took the form of 2-hour workshops held once a week over the course of a month, culminating in their entering “various regional and national competitions”⁵⁴⁷. The research into the experience of these students contained three stages⁵⁴⁸:

- a pre-course questionnaire asking the students to “consider the expected benefits” of taking part in the course⁵⁴⁹, to which 64 out of 80 possible students responded. The responses in respect of the mooted aspect of the course included “understanding more legal concepts”; ‘adding depth to my knowledge’;[and] developing...research and analysis skills”⁵⁵⁰ as factors identified by the students as matters that motivated them to take part in the course, and “building legal arguments and researching’, ‘knowing the law thoroughly’”, and “preparing and finding material’ as “aspects of the course that have the potential to create unease”⁵⁵¹

- a post-course survey, to which 20 responses were received. The authors attribute this drop in response rate to the students being given the option of either completing the questionnaire immediately at the end of the final workshop, or returning it at a later date, the inference being that those who stated that they would take the latter course of action did not in fact do so⁵⁵². Responses to this survey identified benefits of the course as making it “useful to understand the law from a more practical perspective”, as well as “developing research skills”, and “bec[oming] more familiar with court etiquette”⁵⁵³. Also, in a Likert scale question asking the

⁵⁴⁵ *supra* fn160

⁵⁴⁶ Turner, Bone, and Ashton *op cit* p4

⁵⁴⁷ *ibid* p5

⁵⁴⁸ *ibid* pp5-6

⁵⁴⁹ *ibid* p6

⁵⁵⁰ *ibid* p8

⁵⁵¹ *ibid* pp8-9

⁵⁵² *ibid* p6

⁵⁵³ *ibid* p10

respondents to rate each workshop activity in respect of the extent to which the students found them “most useful/enjoyable”, “role play” was ranked highest⁵⁵⁴

- a focus group involving six student participants. The authors acknowledge the limitations in respect of generalisability and transferability arising due to the likelihood that these students were “the most motivated of their cohort”⁵⁵⁵. Matters identified in the focus group included that the course would assist “applying...legal knowledge to practical situations”⁵⁵⁶.

The authors conclude that the positive response to the research from the students and staff involved⁵⁵⁷ demonstrates that a short course programme of this nature performs a valuable function in contributing to the experience of learning in legal education by “giving students choice over which areas they wish to delve deeper into and offering lecturers a new way to engage with students outside set contact teaching time”⁵⁵⁸.

Turner *et al* go further than the authors cited above in drawing upon experiential learning theory to inform their conclusions, and their recommended proposal is founded on a well-considered application of the theory to the research that they have conducted. However, the reported results of the research do not make clear what specific findings were made in respect of mooting. The degree of importance afforded to the various factors identified in the survey, and in respect of what activity, is not stated⁵⁵⁹, making it difficult to identify the extent to which the students’ involvement in mooting contributed to the high approval rating given to “role play”. Nor is it clear how many students reported the reflections set out in response to the post-course survey, or in what order of preference (the reflections are not ranked)⁵⁶⁰. Also, other than stating that 30% were (postgraduate) Common Professional Examination students⁵⁶¹, the stage of their studies that the majority of the students who took part were at is not identified, making it impossible to triangulate responses to the survey in respect of the other learning experiences that the respondents may have had throughout their studies of law.

⁵⁵⁴ *ibid* p11

⁵⁵⁵ *loc cit*

⁵⁵⁶ *ibid* p12

⁵⁵⁷ *ibid* pp15-16

⁵⁵⁸ *ibid* p13

⁵⁵⁹ *ibid* p11

⁵⁶⁰ *ibid* p10

⁵⁶¹ *ibid* p6

Kammerer (2018) “Undergraduate Moot Court: Student Expectations and Perspectives”

Kammerer’s article is based upon a web-based survey that he conducted into the experiences of students participating in “intercollegiate” (ie: inter-varsity) moot court competitions, responses to which were received from 66 colleges.

As well as questions on the factual details of the participants educational and mooting experiences, the respondents were asked why they had chosen to participate in mooting and what benefits they perceived to have derived from the experience. Kammerer notes that only 16 complete responses were returned: it is not clear how many of the incomplete responses included responses to this category of questions.

Of this category of responses, Kammerer observes that the most popular answers given in respect of the question as to which academic skills the respondents considered to have been improved by mooting were “critical thinking” and “public speaking”, as well as positive comments on how involvement in mooting enabled development of the ability to “synthesise” legal research and enhance the skill of “critical thinking under pressure”, although Kammerer acknowledges that the mention of “critical thinking” as an example response may have exerted a “social bias” upon the respondents who cited this as having been affected by their moot experience⁵⁶².

The most popular response to the survey question asking respondents why they participate in moot court was “Increased Knowledge of Legal Argument”, although Kammerer concedes that a technical error in respect of this section of the survey may have “complicated” analysis of this field of responses⁵⁶³. Kammerer also reports on responses identifying the “educational benefit” of mooting, and the additional work commitment involved, although acknowledges that the responses to the latter question “should be treated with caution” given that it was unclear which of the respondents undertook moot court as an assessed component of their programme of study⁵⁶⁴. The 18% of the respondents to the survey who were at the time studying law, or had graduated from law school gave a unanimous response that they had

⁵⁶² Kammerer *op cit* p191-2

⁵⁶³ *ibid* p193

⁵⁶⁴ *loc cit*

found their moot court experience to be beneficial, which Kammerer concludes to be a “reflect[ion of] the utility of moot court in teaching students to read and analyse cases”⁵⁶⁵.

Kammerer’s research, being primarily a quantitative study, contains limited evidence of how the respondents perceived their moot court experience by reference to the rest of their educational experiences. Additionally, given the nature of the United States higher education system, wherein Law is studied at postgraduate level, it is difficult to determine, on the basis of the information provided in the article, to what extent (if any) the students’ prior moot court experiences informed their understanding of the substantive law that they were required to study. Finally, the recognised technical and methodological flaws in the survey, along with the lack of detail as to how many respondents had responded to specific sections of the survey, make it difficult to draw representative or generalisable conclusions from it – particularly with regard to the learning experiences of students outside the United States, where the system of legal education is significantly different to that in the United Kingdom.

Kammerer (2020): “Coaching and Teaching Competitive Moot Court: Comparing Faculty Approaches”

Kammerer’s study that culminated in this article is positioned by Kammerer as a continuation of his earlier research into student experiences of moot court⁵⁶⁶. The focus of this study is upon the experiences of staff at American universities and colleges who coach or instruct students taking part in moot court competitions, designed to explore differing practises between moot court coaches, and potential problems for staff relating to potential conflicts between their roles as teacher and moot coach⁵⁶⁷. The study took the form of semi-structured interviews with six moot coaches from different United States college political science departments⁵⁶⁸.

All the respondents reported that moot court constituted a taught component of the programmes of study at their respective institutions, with students receiving grades for participation. The respondents acknowledged the challenging nature of this activity, both with regard to their own perceptions and as observed on the part of their students. A particular feature of the United States college system remarked upon concerned the difficulties observed by the respondents in relation to the time spent in travel and preparation involved in moot court activities, and consequent pressure upon the respondents relating to their regular employment

⁵⁶⁵ *loc cit*

⁵⁶⁶ Kammerer (2018) *op cit*

⁵⁶⁷ Kammerer (2020) *op cit* p500

⁵⁶⁸ *loc cit*

review. Kammerer goes on to state that further research is called for in relation to the impact of moot court involvement upon a moot coach's career prospects, particularly the effect upon the time available for them to conduct academic research⁵⁶⁹. Kammerer identifies as relevant to this concerns reported by some the respondents as to perceived lack of institutional support⁵⁷⁰.

Kammerer reports that all the respondents gave examples of benefits that they regarded moot court as providing for the participants⁵⁷¹, including improvements to critical thinking and self-confidence, specifically in respect of the observation by one of the respondents that the effect of these improvements was such that "other professors on campus can easily spot the moot court students"⁵⁷². He concludes that "There seems to be clear agreement from faculty, in this limited sample, of the educational benefits of moot court as a pedagogy tool"⁵⁷³, while recognising that some of the respondents reported a perceived demotivating effect upon students of not performing as well as they had hoped to in the competition, as well as recognising that "if an instructor is not careful...the educational goals and the learning outcomes can get lost in the competition"⁵⁷⁴.

As with Kammerer's previous article, the application of this study is limited by its focus upon specific features of United States higher education, as well as upon the specific role of the moot coach/tutor. That being so, the points made in the article relating to the student experiences carry limited weight in the absence of data from the students themselves by way of triangulation (there is no indication that any of the students referred to were themselves respondents to Kammerer's earlier study). Finally, the article makes no reference to experiential learning theory in support of its conclusions relating to the relationship between moot participation and academic learning.

Conclusion - Response to Objective 3 (" To draw conclusions from the empirical research carried out to date into mooting in legal education") and Identification of Gaps in the Literature

⁵⁶⁹ *ibid* p502, 503

⁵⁷⁰ *ibid* p503

⁵⁷¹ The findings are summarised *ibid* p507

⁵⁷² *ibid* p503

⁵⁷³ *ibid* p504

⁵⁷⁴ *loc cit*

The table below sets out a summary of the literature relating to empirical studies of mooting, along with a summary in respect of each study’s conclusions, as well as aspects in which the studies demonstrate evidence of gaps in the literature.

Study	Research	Conclusion(s)	Gaps
Lynch “Why do we Moot?”	Focus group interviews with twenty students	Students perceived mooting to be of value, particularly as formative assessments	<p>Study informed by group views only – points made by individuals left underexplored.</p> <p>Students’ experiences of moots were in the context of summative assessments - particular “tension”</p> <p>Experiential learning theory underexplored/consideration not up to date.</p>
Keyes and Whincop “The Moot Reconceived”	Questionnaires (100) followed by two focus groups attended by “an average of five” students	Moots are recommended for use as formative assessments	<p>Insufficient consideration of “traditional” mooting- perceived “problems” possibly subjective/fact sensitive</p> <p>Focussed significantly on skills as opposed to learning substantive law</p>
Watson and Klaaren “An Exploratory Investigation Into The Impact of Learning in Moot Court”	17 questionnaires and two “in-depth but informal” interviews	Mooting offers an alternative way to understand the law, but there is no evidence that mooting is beneficial in helping develop legal understanding.	<p>Students’ experiences of moots were in the context of summative assessments - particular “tension”- also particular local factors</p> <p>Experiential learning theory unexplored</p>

			No positive empirical evidence in support of conclusions
Gillespie "Mooting for Learning"	Two "phases" of quantitative research involving questionnaires sent to university staff (58 responses to Phase I, responses to Phase II not specified), unspecified "qualitative research"	Moots are recommended in order to provide formative feedback to students in respect of substantive law	No consideration of student perceptions Limited reference to experiential learning theory and other literature on mooting
Daly and Higgins "Simulating the Law"	Questionnaires sent to student participants in mock trial and moot exercises	Mooting should form part of the teaching curriculum	Lack of methodology Mooting-specific results not clear Unit of research in respect of mooting was not undergraduate students.
Gerber and Castan "Practice Meets Theory: Using Moots as a Tool to Teach Human Rights Law"	Surveys sent to, and two qualitative responses from, students who had participated in the Castan Centre Human Rights Moot Competition	The moot competition enhances students' legal understanding and preparation for practising law	Difficult to generalise Lack of methodology Potential bias

Krupová <i>et al</i> : “Do moot courts belong to high schools?”	Surveys returned from 30 high school students following moot court participation	The moot participation was considered by the students involved to have “positively improved” their knowledge of the law, but did not “change [their] relationship to the law”	<p>Focussed on discrete activity – difficult to generalise.</p> <p>Research focusses on experience of moot organisers</p> <p>“Moot” may be more akin to mock trial.</p>
Boylan-Kemp: “The role of mooting in modern-day legal education”	Results of students’ moot-based assessments.	Mooting should become a compulsory element of all law programmes, and should replace “some of the more traditional forms of assessment”	<p>Insufficient data in support of conclusions.</p> <p>No qualitative data to support conclusions as to student perceptions of mooting and effect upon assessment results</p>
Marsh and Ramsden: “Reflections on a high school mooting competition”	Likert scale-based online survey of student participants in the CUHK Moot Cup– 21 responses, some qualitative comments	Mooting enhances students’ legal knowledge and understanding, and should be used as part of the teaching of substantive law.	<p>Findings based upon discrete event – difficult to generalise</p> <p>Limited reference to experiential learning theory</p> <p>Responses lack individual student input</p>
Pattinson and Kind “Using a moot to develop students’ understanding..”	51 student respondents asked two questions at three stages of the study, semi-structured interviews	The moot helped the students involved understand the relevant scientific subjects, although that understanding was not recalled six months later.	<p>Findings based upon discrete event – difficult to generalise</p> <p>Limited reference to experiential learning theory</p> <p>The effect of the moot upon the students’ legal (as opposed to scientific) understanding was not examined.</p>

<p>Billings: "Evaluating the Pedagogic Value of Mooting and 'Nooting'"</p>	<p>Likert scale-based survey of student participants in the AAT Moot Competition -18 responses, some qualitative comments</p>	<p>Mooting provides students with practical opportunities to enhance their legal knowledge and understanding</p>	<p>Focused on discrete activity – difficult to generalise.</p>
<p>Turner, Bone, and Ashton: "Reasons why law students should have access to learning law through a skills-based approach"</p>	<p>Research with students who had studied short optional skills (including mooting) courses – 64 pre-course questionnaire responses, 20 post-course survey responses, focus group with 6 participants</p>	<p>A short course programme of this nature makes a valuable contribution to the experience of learning in legal education</p>	<p>Mooting-specific results not clear</p> <p>Lack of detail re. number of responses to survey</p> <p>Responses to survey cannot be triangulated in respect of other learning experiences</p>
<p>Kammerer (2018) "Undergraduate Moot Court: Student Expectations and Perspectives"</p>	<p>Web-based survey into students' experiences of intercollegiate moot court competitions, 66 responses received (16 of which were complete)</p>	<p>Intercollegiate mooting is of benefit to preparation for postgraduate law study and practising law</p>	<p>Methodological and technical errors</p> <p>Lack of detail as to number of respondents</p> <p>Focus upon specific experience of higher education peculiar to the USA</p>

Kammerer (2020) "Coaching and Teaching Competitive Moot Court: Comparing Faculty Approaches"	Interviews with 6 moot coach/tutors	Intercollegiate mooting provides a pedagogical and personal benefit to students, although involvement in competitions can adversely affect coach/tutors' career progression, and student motivation (depending upon the competition outcome)	Responses to survey cannot be triangulated in respect of student perceptions Limited reference to experiential learning theory Focussed on discrete activity – difficult to extrapolate
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The gaps evident in the literature can be demonstrated by reference to the terms used by Golden-Biddle and Locke to describe the ways in which a reviewer can complete the tasks of "Constructing Intertextual Coherence" and "Problematizing the Literature"⁵⁷⁵.

The literature is "linked by disagreement"⁵⁷⁶. The literature does not arrive at a consensus as to the most suitable application of mooting in legal education. The conclusions to the articles reviewed differ greatly on this point, including proposals that mooting be mandated as part of compulsory study and assessment⁵⁷⁷, that it ought to be integrated into the teaching of substantive law as a means for providing formative feedback⁵⁷⁸, that it is best situated as part of a separate skills-based module⁵⁷⁹, that it is particularly beneficial if it forms part of a voluntary inter-varsity competition⁵⁸⁰, and that it provides no real educational benefit at all⁵⁸¹.

The literature is "inadequate"⁵⁸². The literature does not address the specific experience of mooting by first-year law students, particularly those at English universities, in the context of their other learning experiences.

The literature is also inadequate due to its being insufficiently underpinned by an understanding of experiential learning theory. This inadequacy is apparent when reviewing the literature in the light of the observations on this subject in what appears to be the first

⁵⁷⁵ *ibid* p26 and pp35-37

⁵⁷⁶ *supra* fn 209

⁵⁷⁷ Boylan-Kemp *op cit*

⁵⁷⁸ Keyes & Whincop *op cit*, Gillespie *op cit*

⁵⁷⁹ Turner, Bone, and Ashton *op cit*

⁵⁸⁰ Gerber & Castan *op cit*, Billings *op cit*

⁵⁸¹ Watson & Klaaren *op cit*

⁵⁸² *supra* fn213

published empirical study of mooting⁵⁸³. In this study, Lynch recognises that mooting is a form of experiential learning, and refers to Kolb's Experiential Learning Cycle in order to help understand the process of learning that can take place in a moot. This in itself demonstrates a gap in research into mooting that demands further investigation by applying Kolb's theoretical framework to the practice of mooting. Such a gap is emphasised by Lynch's subsequent comment that "there is very little written on the learning benefit of mooting"⁵⁸⁴.

However, none of the subsequent studies cited in this chapter have involved an investigation of this nature. Indeed, as set out in the table above, very few of the subsequent studies address experiential learning theory in any meaningful sense, and some do not mention it at all. The significance of this gap in understanding is particularly apparent when considered in the context of the modifications made by Kolb to his own description of the experiential learning process between the two editions of his book on experiential learning. In the first edition, the process of experiential learning is described as being that of "learning conceived as a four-stage cycle"⁵⁸⁵, while in the second edition Kolb qualifies this definition by stating that "[t]he learning cycle, of course, is not a circle but a spiral..."⁵⁸⁶. This point - which may have been informed by commentary on Kolb's theory as set out in the first edition of his book, specifically Moon's⁵⁸⁷ description of experiential learning involving a "self-reflective spiral of cycles" – marks a significant development in Kolb's conceptualisation of his theory.

I submit that this further demonstrates the inadequacy of the existing literature arising from empirical studies of mooting, insofar as these studies do not make a meaningful attempt to explore whether, and if so, in what way(s), this point can be seen to be reflected in a student's experience of mooting. This is because these studies place their focus upon an isolated experience of an individual moot, or mooting as an abstract concept, and attempt to interpret that experience once it has concluded. An objective of my research, therefore, is to fill this gap by conducting a study that explicitly ties together the iterative process of mooting, and the experiential learning journey engaged in by student mooters. I will revisit this point in the following chapter.

⁵⁸³ Lynch *supra* fn402

⁵⁸⁴ Lynch *supra* fn417

⁵⁸⁵ Kolb, D.A (1984) *Experiential Learning: Experience as The Source of Learning and Development* Englewood Cliffs, NJ: Prentice-Hall:, p21

⁵⁸⁶ Kolb *op cit* p61

⁵⁸⁷ Moon, J.A (1999) *Reflection in Learning & Professional Development* Reprint: Abingdon, Oxon: RoutledgeFarmer, p36

The literature is “incomplete”⁵⁸⁸. The literature does not contain qualitative research focussing upon the learning experiences of the individual students who took part in the moots that form the basis for the research. Although the quantitative methods deployed in the studies reviewed may have been satisfactory in order to answer the questions set therein, it will be submitted in the next chapter that more focussed qualitative research is necessary in order fully to understand and appreciate the nature of, and issues involved in, the student learning experience.

I conclude my literature review with a response to Objective 3 derived from the literature of a tentative proposal that students perceive participation in mooting to be beneficial towards their understanding of the law. In the next chapter, I will fulfil Objective 4 (“To set out the method and methodology that I will use to answer the principal research question”), with the aim of making a contribution to the literature on mooting as a form of experiential learning in legal education.

⁵⁸⁸ *supra* fn212

CHAPTER 3:

RESEARCH METHOD AND METHODOLOGY

In the last chapter, I reviewed the literature on mooting and other student performance-based forms of experiential learning. In this chapter, I will fulfil Objective 4 (“What method and methodology should I adopt in order to answer the preliminary research question?”) by setting out the methodology and method that I propose to use to investigate the phenomenon of mooting as a method of understanding substantive law by way of experiential learning.

Research Method

To collect data for this study, I chose to conduct a series of focussed interviews with moot participants. I intended to select a group of between six and twelve students, for the reasons given in the section on “Sampling and Data Saturation” below. The factors that I considered in deciding to use this method of data collection will be discussed in the section below.

The students that I selected to be interviewed were all in their first year of study. I chose to interview students from this particular group on the basis that the phenomenon under investigation concerns the experience of learning from the perspective of students who are new to the higher education system, and are less likely to have developed their own approach to learning the subjects taught in higher education than might be the case for more experienced students.

At Northumbria University, mooting does not form part of the curriculum on any of the Law programmes. First-year Law students can take part in mooting by joining the MARS Society⁵⁸⁹, a student-run society that organises moots based on a competitive league format between students which are judged by students in Years 2-4. It would have been possible to conduct this study by researching the students who took part in MARS moots. However, I decided instead to use as the basis for this study a series of bespoke moots, set around scenarios

⁵⁸⁹ <https://www.mynsu.co.uk/getinvolved/society/mars/> (last accessed 8th March 2021)

selected by, and in moots judged, by me. I made this decision to ensure confidence that the moots I selected were sufficiently demanding for the purposes of this study, to facilitate participation by students who may not necessarily have wanted to join the MARS Society, and to avoid what may have been perceived to be unwelcome interference by Law School staff in the operation of a successful student society.

The moots were all on topics concerning Criminal Law. I took the view that it was necessary that all the moots be in the same curriculum area so as to be able to maintain a consistent narrative throughout the interviews and minimise disruption to the student learning experience as the interviews progressed, so that the students could better recall and apply their recollection of their experiences in earlier moots.

I chose this area of law because in the interests of completing the study within the time scale imposed by the academic year, it was necessary to select an area of law in which the students have had some instruction in the first Semester of their studies. Of those areas of law⁵⁹⁰, I chose to set the moot problems upon topics relating to Criminal Law. I made this decision because this area of law lends itself more to mooting than the other topics taught during Semester 1 of the Year 1 Programme (Approaches to Law and Lawyering Skills, and English and European Legal Systems), both of which focus primarily upon pervasive legal and educational concepts, rather than the case law-based common law system which mooting aims to replicate and which Criminal Law is heavily focussed upon.

I planned to interview members of the group of students on three separate occasions throughout the academic year in order to collate samples of data representative of differing degrees of student involvement in mooting, asking questions of the students in each interview in order to assess their perceptions of mooting as part of their experience in higher education. My intention was to collect data following an initial moot, which dated would be revisited after the students had taken part in a second moot, then again when they had mooted a third time. In this way, the extent to which the students' involvement in mooting informed and made an impact upon their studies could be tracked throughout the course of the year. As explained in the previous chapter, my decision to design the research method in this way was informed by my desire to investigate the iterative nature of the experiential learning process involved in mooting by exploring the perceptions of the student participants throughout the learning experience, rather than the approach adopted in the extant literature of leaving this investigation until after the experience had concluded. The timeline of this process, which

⁵⁹⁰ <https://www.northumbria.ac.uk/study-at-northumbria/courses/law-llb-hons-uuslwz1/#modules> (last accessed 8th March 2021) – Contract Law teaching does not commence until Semester 2

took place in the 2018-19 academic year, is set out below, with amendments inserted to reflect alterations that were necessary to be made to this schedule in the light of events explained later in this chapter:

Week commencing (planned)	Actual dates	Activity
8 th October	8 th October	Open invitations for participants
22 nd October	1 st November	Close invitations for participants
29 th October	1 st November	Issue problem for Moot 1
19 th November	20 th and 23 rd November	Moot 1
26 th November	26 th - 28 th November	Moot 1 interviews
7 th January	7 th January	Issue problem for Moot 2
11 ^h February	14 ^h February	Moot 2
18 th February	18 th - 20 th February	Moot 2 Interviews
25 th February	25 th February	Issue problem for Moot 3
25 th March	27 th May	Moot 3
1 st April	27 th May	Moot 3 Interviews

Following my judging of each moot, I provided each group of students with feedback on their performance, based upon the notes that I took and my contemporaneous recollections of what had happened during the moot. Although this feedback (along with the notes upon which it is based) constitutes in itself data relating to the moot experience that is the subject of the interview, this data will not in itself be used to inform this study. This is because, as explained above, the focus of the study is upon the moot experience as constructed by the students taking part. Instead, this feedback will be used to inform the interview process, with the resultant data being a construct of the totality of the moot court hearing itself and the feedback that followed. As will be detailed below, the interview guide includes questions focussed upon the specific experience of the students' receiving feedback, and the interviews themselves

included at times explicit references to some of the points made in the feedback to the students so as to ensure (where appropriate) that they gave due consideration to this experience when answering the interview questions.

Epistemology

The principal research question that this thesis is designed to answer, as set out in Chapter 1, is: “*How do students’ experiences of, and approaches to, mooting, affect their learning of substantive law and understanding of the law?*” As explained in Chapter 1, and for reasons upon which I will expand below, the boundaries of this question will be determined by the perceptions of the student participants in the experiences of preparing for, participating in, and receiving feedback after a moot.

In the context of this question, I will define the term “understanding” to refer to the process whereby a student comprehends the meaning of the subject that they are learning⁵⁹¹, and “substantive law” as the “mass of statutes and case-law decisions”⁵⁹² that students on a law degree programme study.

It is necessary to set out the epistemology with which I will be attempting to answer the principal research question. The term “epistemology” has been defined as “the philosophical theory of knowledge – of how we know what we know”⁵⁹³. Epistemological positions have been categorised as belonging to two broad categories – specifically, positivism and social constructionism⁵⁹⁴.

Upon initially planning this study, my proposed research question was “*Does involvement in mooting improve students’ knowledge and understanding of the law?*” However, such a question adopts a positivist approach to the concept of learning and teaching which is at odds with the constructivist nature of the study that I am planning to carry out. It has also become

⁵⁹¹ Anderson, Krahwahl and Bloom *op cit* p70

⁵⁹² Kenny, P.H (2002) *Studying Law* London: Butterworths LexisNexis, p30

⁵⁹³ Scott, J and Marshall, G (2009) “Epistemology” *A Dictionary of Sociology* (published online 2015). Oxford University Press

⁵⁹⁴ Easterby-Smith, M, Thorpe, R., Jackson, P.R., Jaspersen, L.J., (2018) *Management and Business Research* (6th edition) Thousand Oaks, CA: Sage, p69

apparent to me, following research⁵⁹⁵, that a positivist approach is difficult to apply to research into the complexities that relate to the human interaction involved in education.

I determined to commence my research by asking the above question in order to understand in what sense mooting is part of the apparatus of higher education teaching, from my own perspective as a teacher who frequently organises moots, as well as a constructivist. The epistemological approach of constructivism (also defined as a “strong social constructionist”⁵⁹⁶ approach) is a variant of the epistemological position of constructionism, which is defined as the view that “all knowledge is contingent upon human practices, being constructed in and out of interaction between human beings and their world, and developed and transmitted within an essentially social context”⁵⁹⁷. Specifically, a social constructionist epistemological position posits that the “objectivated social world” can only be understood through the medium of language, which individuals use to erect an “edifice of legitimations”. The “logic” whereby individuals understand the world in which they participate is a construct brought about by this process⁵⁹⁸. This has also been described as adopting an “interpretivist” approach – a term used to describe an approach governed by a concern with understanding the nature of the world at the level of subjective experience, through the frame of reference of the participant within that world⁵⁹⁹. This approach is to be contrasted with the paradigm of “functionalism”, which is an approach to analysing social functions based upon the structure within which those functions operate⁶⁰⁰, and which thereby focusses on the study of observed facts and processes, rather than the social context in which they are taking place – such context being a key element in the research that I will be carrying out.

The constructivist position holds that *the “facts” themselves* upon which the “knowledge” is determined are in themselves the result of perspective⁶⁰¹. My experience of teaching students

⁵⁹⁵ Cohen, Manion and Morrison *op cit* p7

⁵⁹⁶ Easterby-Smith, M, *et al op cit* p73

⁵⁹⁷ Crotty, M. (1998) *The Foundations of Social Research: Meaning and perspective in the research process*. London: Sage. p42.

⁵⁹⁸ Berger, P.L and Luckmann, T (1967) *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* London: Penguin, p82

⁵⁹⁹ Burrell, G and Morgan, G (1979) *Sociological Paradigms and Organisational Analysis*. Reprint, Farnham: Ashgate 1998, pp-28-32

⁶⁰⁰ *ibid* pp56-7

⁶⁰¹ Schwandt, T.A (2017) “Constructivist, interpretivist approaches to human inquiry”, in *Handbook of Qualitative Research* (5th edition), eds. N.K Denzin & Y.S Lincoln: Thousand Oaks, CA:Sage, , pp 118-37, 125

and judging moots, and of observing the wildly different layers of meaning attributed by students to the same source material, has come to lead me to view with scepticism the contrary position of positivism, which holds that what is posited is the same as that which is observed⁶⁰². Rather, as has been noted⁶⁰³, the radical differences between meanings, combined with the interpretation of the teacher/observer of those perceived meanings constitutes a distinct “reality” constructed “intersubjectively”, which a reflexive researcher must recognise and interpret in turn.

An important aspect of constructionism is the idea that the perceived experiences of individuals constitute different “realities”⁶⁰⁴. In order to better understand the nature of these different “realities”, the importance of triangulation has been noted⁶⁰⁵. Of the various forms of triangulation that have been categorized⁶⁰⁶, I have made use here of “data triangulation” (ie: obtaining data from different kinds of sources). To this end, I collected data from interviews with some of the tutors of the students who took part in the study. Not only does this make for a richer data set, it also assists with the constructionist theory-building nature of the study in allowing for consideration of the “canopy of legitimations” constructed over the “institutional world”⁶⁰⁷.

My primary concern in crafting this research project has been to interpret and explore the different meanings attributed to and perceptions of the moot court process by the students taking part in it. It has been noted⁶⁰⁸ that although some research methods are specific to particular epistemological positions, other methods can be adapted in order to carry out research across a variety of perspectives. Specifically in the context of interviews, research conducted from a positivist perspective in order to “discover ‘facts’”⁶⁰⁹ might deploy a structured interview: however, a constructivist approach to research might use a semi-structured or unstructured interview in order to identify and find out more about differing perceptions of and meanings attributed to the topic being researched. This is one of the

⁶⁰² Crotty, M *op cit* p20

⁶⁰³ Cunliffe, A.L “Reflexive inquiry in organisational research: questions and possibilities” (2003) *Human Relations* 56(8) 983, 988

⁶⁰⁴ Berger and Luckmann *op cit* p14

⁶⁰⁵ Cohen, Manion and Morrison *op cit* p195

⁶⁰⁶ Denzin, N.K (1970) *The Research Act: A Theoretical Introduction to Sociological Methods*. Reprint, New Brunswick, NJ: AldineTransaction: 2009, p313

⁶⁰⁷ Berger and Luckmann *op cit* p79

⁶⁰⁸ Cunliffe, A.L “Crafting qualitative research: Margan and Smirchich 30 years on” (2011) *Organisational Research Methods* 14(4) 647, 659

⁶⁰⁹ *ibid*

several considerations that have led me to the decision to use semi-structured interviewing to carry out this research, as explained below.

Data Collection

The term “focussed interview” appears to have been devised by Merton *et al* for use in their manual of the same name⁶¹⁰, and used to describe an interview with participants selected based upon their involvement in “a particular situation”, informed by an interview guide devised by the interviewer and with a focus upon eliciting the participants’ “definitions of the situation”⁶¹¹

As has been pointed out above, it is inherent in the nature of this research project that it is informed by data that gives a rich account of the experiences of the research subjects. Having identified “key respondents in relation to the phenomenon under investigation⁶¹²” – specifically, the experience of mooting for first-year law students – I selected focussed interviews as the method of generating the necessary data.

The particular research method of using focussed interviews has been recommended for use when conducting research into respondents’ subjective experiences⁶¹³. Additionally, the interview method has been commended as a means of constructing knowledge between participants, thereby generating “*data* rather than *capta*”⁶¹⁴. This accords with my constructivist epistemological stance towards legal education and knowledge generally.

I have considered other qualitative studies in which the richest data obtainable has been self-generated by the phenomena being researched. In some such studies, participant observation has been the chosen method of research. One such study was carried out by Huw Beynon, who conducted research into working practices at the Ford motor car factory at Halesowen in 1967-69. Beynon justified his selection of this method by reference to his “hope...that by

⁶¹⁰ Merton, R.K *et al* (1956) *The focused interview: A manual of problems and procedures* Glencoe, IL: The Free Press

⁶¹¹ *ibid* p3

⁶¹² Quinlan, C (2011) *Business Research Methods* Cengage Learning: Andover, p289

⁶¹³ Merton, R.K and Kendall, P.L “The focused interview” (1946) *American Journal of Sociology* 541, p541

⁶¹⁴ Respectively Latin for “given” and “taken” (Laing, R.D (1967) *The Politics of Experience and the Bird of Paradise* Harmondsworth: Penguin, p53

constructing the rhythms of [the study] out of the actions of the people who worked for Ford...I would produce a lasting and authentic statement of their experience”⁶¹⁵.

However, the nature of the topic researched, and the subjects of the research, in my opinion lend themselves towards qualitative interviewing as a more advantageous method of research, in accordance with views expressed⁶¹⁶ in relation to the relative merits of these methods. Particular advantages that have been identified in respect of participant observation relate to the opportunities available to the researcher in order to gain a degree of immersion in the experience that the research subjects are taking part in without disrupting that experience⁶¹⁷. In my opinion, these perceived advantages are not sufficient to recommend participant observation for the purposes of this study, as my own experience in organising and judging moots has already allowed me to obtain the requisite degree of familiarity with the experience of mooting.

The particular advantages of focussed interviewing that have influenced my decision to use this method in order to carry out this study include the opportunity that focussed interviewing allows the researcher to identify and research matters that would not ordinarily be identifiable via participant observation. One reason for this is that the specific phenomenon being researched concerns the reconstruction by the research subjects of their recollection of the experience of mooting. It has become apparent to me that research⁶¹⁸ into such subject-generated phenomena cannot be conducted by participant observation alone.

Another consideration pertains to the constructivist foundation of my approach to research analysis, and the conceptualisation of the interview as a “topic in its own right”⁶¹⁹. It has been noted that framed in such terms, the interview constitutes a “culturally available way of packaging experience”⁶²⁰, which experience can then be subjected to analysis. Specifically, this study focusses not so much upon mooting as an experience in itself, but rather upon the experience of mooting as perceived by the students taking part in it, which is not a phenomenon that commonly arises out of a moot, or if it does, does not in a form explicitly

⁶¹⁵ Beynon, H *Working For Ford* (1973) Second Edition, Reading: Pelican, Preface to the Second Edition p21

⁶¹⁶ Bryman *op cit*, pp 494-497

⁶¹⁷ *ibid* p493

⁶¹⁸ *ibid* p494

⁶¹⁹ Silverman, D *Interpreting Qualitative Data: Methods for analysing talk, text and interaction* (2006) 3rd edition Sage: London, p135

⁶²⁰ Kitzinger, C (2004) “Feminist approaches “ in Seale, C., Gobo, G., Gubrium, J..and Silverman, D. (eds) *Qualitative Research Practice* London:Sage p128

identifiable enough to allow for the degree of analysis necessary for a study of this type. A further advantage of focussed interviews over participant observation is that it allows for a reconstruction of the events that the interview focusses upon in order to obtain further data in the form of the interviewees' reflections on those events.

The advantages and disadvantages of interviews as a method of data collection by comparison with questionnaires have been noted⁶²¹. The reasons for my choosing to use interviews as a method of data collection for this study are that interviews allow the researcher to answer questions concerning the purpose of the interview and to clarify ambiguities on the part of the respondents, in a way that cannot be done in questionnaires containing only closed questions, and that they allow for greater depth than with other methods of data collection. Also, the nature of the interview allows the interviewee to become more involved and hence more motivated than a respondent to a questionnaire, as more can be said during an interview about why it is taking place than can be said about a questionnaire in (for example) a covering letter⁶²²

Many different kinds of interview have been categorised⁶²³. It has been noted that the interviewer's choice of interview method will depend upon the openness of purpose, degree of structure, extent to which the interview is exploratory or hypothesis-testing, whether it seeks description or interpretation, and whether it is cognitive-focused or emotion-focused⁶²⁴. It has been noted⁶²⁵ that the structured interview is useful in situations where a researcher is aware of what he or she does not know and can therefore frame questions that will supply the knowledge required, whereas "the unstructured interview is the mode of choice" where the researcher is not aware of what he or she does not know, and relies on the respondents to tell him or her⁶²⁶. This latter observation accords with my intended use of interviews to obtain students' views about their involvement in moots.

⁶²¹ Cohen, Manion & Morrison, *op cit* p411

⁶²² Oppenheim, A.N *Questionnaire Design, Interviewing and Attitude Measurement* (1992) London: Pinter, pp81-2).

⁶²³ Patton. M.Q (2002) *Qualitative Evaluation and Research Methods* (3rd ed.) Beverly Hills, CA: Sage, p349

⁶²⁴ Kvale, S *InterViews: An Introduction to Qualitative Research Interviewing* (1996) Thousand Oaks, CA: Sage pp126-7

⁶²⁵ Cohen, Manion & Morrison *op cit* p412

⁶²⁶ Lincoln, Y.S & Guba, E. *Naturalistic Inquiry* (1985) Beverly Hills, CA: Sage p269 (cited *loc cit*)

During my initial planning of this project, I had intended to conduct group interviews. I took the view that the collaborative nature of the experience being researched required that it was particularly important that the members of the group were aware of what one another had to say about that experience when being interviewed⁶²⁷. However, upon reflection, I decided to conduct interviews with individual students. I took this decision as I was conscious, from my own experience of organising moots, that some students who choose to take part in extra-curricular activities involving public speaking such as mooting are extrovert personality types, and that there was a risk of group interviews becoming dominated by such students' views, which latter point has been acknowledged as a risk common to group interviews⁶²⁸. As it turned out, there was a significant imbalance in respect of the degree of dominance in terms of the personalities involved in the moots, which would most likely have made for difficulties in conducting group interviews.

The interviews deployed an interview guide process. The nature of an interview guide is such as to set out suggested areas for inquiry, as opposed to rigidly-scripted questions. I recognised the risk of curtailing the respondents' self-explorations and bringing about an abrupt break in the interview by "forcing a topic" or "cleav[ing] too closely" to the interview guide, and that when using the interview guide method, the interviewer should be primarily oriented towards the implications of the remarks made by the respondent, in reply to which questions can be improvised⁶²⁹.

My interview guide was based upon the translation of thematic research questions into interview questions⁶³⁰. In order to compose the interview questions, I considered the variables that I intended to measure in the study⁶³¹ and the format and mode of questions. I used open-ended rather than fixed/alternative (eg: "yes/no") questions, with the objectives that this mode of questioning would allow me to go into more depth or clear up misunderstandings if necessary, to test the limits of the respondents' knowledge, to encourage co-operation and help establish rapport, to make a truer assessment of what the respondents really believed,

⁶²⁷ Watts, M. and Ebbutt, D. (1987) "More than the sum of the parts: research methods in group interviewing" *British Educational Research Journal*, 13 (1) 25-34

⁶²⁸ Arksey, H and Knight, P (1999) *Interviewing for Social Scientists*. London:Sage, p76

⁶²⁹ Merton and Kendall *op cit* p554

⁶³⁰ Kvale *op cit* pp130-131

⁶³¹ Tuckman, B.W (1972) *Conducting Educational Research* New York: Harcourt Brace Jovanovich, cited Cohen, Manion & Morison *op cit* p415

and potentially facilitate unexpected or unanticipated answers, which could open up new avenues of enquiry⁶³².

During the interviews, I asked a question (eg: “Please tell me about your experience of mooting and how you feel it compares to other ways of learning about the law”) that introduced the topic, and then encouraged the interviewees to speak freely one by one about their experiences⁶³³, intervening where necessary with the objective of developing a scaffolded narrative on the interviewees’ experience of mooting within the context of their study of law, and in order to maintain the focus of the interview upon a constructivist approach to legal education in order to avoid discussion of positivist theory (eg: “finding” the law etc), explicitly signposting if necessary the constructivist nature of the study to the students taking part as the studies are repeated. In doing so, I took care to strike a balance between a reflexivist approach to an interview based upon my own theoretical perspective, and stifling interviewee responses. This approach was monitored during and after each interview⁶³⁴.

I followed up these initial interviews by interviewing the students’ seminar tutors using an adapted version of the interview guide⁶³⁵ using similarly-phrased questions put to the criminal law seminar tutors for the students who I had interviewed. This allowed for consideration of the value of the learning experience of mooting from the perspective of an expert in the subject of the experience, as well as for the application of a different perspective from the students’ subjective opinion in order to gauge what (if any) benefit the student has derived from this experience, so as to make for a richer set of data. I had planned to follow up each of the three interviews with a further interview with the seminar tutors – however, the nature of the Year 1 Law degree programme curriculum is such that the criminal law seminar programme concludes at the end of the first semester of the academic year.

The open-ended nature of the method that I used to collect my data is such that I had anticipated that differing views on the relevance of mooting to the teaching of law in higher education would emerge from the respondents, and that my own views on the subject would alter accordingly. Conversely, I anticipated that many of the interview participants’ responses

⁶³² Cohen, Manion & Morison *op cit* p416

⁶³³ Pedersen, B *et al* “Bridging the gap between interviewer and interviewee: developing an interview guide for individual interviews by means of a focus group (2016) *Scandinavian Journal of Caring Sciences* 631, p633

⁶³⁴ Gough, B “Shifting interviewer positions during a group interview study: a reflexive analysis and review” in *Reflexivity: A practical guide for researchers in Health and Social Sciences* eds. Finlay, L & Gough, B: Bodmin: Blackwell Science pp 146-160.

⁶³⁵ See Appendix II

to the interview questions would be predicated upon similar narrative constructs⁶³⁶, given the shared experience of the interviewees, and that additional questions would be necessary to attempt to elicit an accurate subjective account on the part of the interviewee. However, I am conscious that such an exercise can only ever glean an imperfect account of the interviewee's experience, since (as has been pointed out⁶³⁷), the recounting of an experience by means of language can only ever be a "trace" of the experience, as opposed to the experience itself.

The advantages of the interview guide approach are that by setting out in advance the topics and issues to be addressed in the interview, data collection is more systematic that would otherwise be the case, and gaps in data can be anticipated and closed. However, because the questions themselves are not prescribed in advance, the interview can remain conversational and situational, thus facilitating greater openness from the respondents. The weaknesses of this approach are that important topics can be omitted inadvertently, and the flexible nature of the approach can result in different responses⁶³⁸. There is also the ethical risk inherent in any educational research being conducted by a tutor of a group of students that the researcher's own views may influence the responses.

I am of the view that the weaknesses of this method can be surmounted insofar as they "layer up" to provide a particular type of evidence – specifically, the overall impression of that particular group of students' views on mooting, complete with the prejudices and values that each individual group member brings to the experience. This reinforces the warrant of the study insofar as it is informed by evaluation of a specific student set. I can identify a specific layer relating to the power dynamic between my own role and that of the student participants in the research. This requires exploration of the extent to which the research is informed by such a relationship, along with consideration of whether the effect of any such relationship is any greater than the covert power imbalance involved in any research being conducted by researchers with superior training or knowledge⁶³⁹.

A further advantage to be derived from this research method is that highlighted by Merton and Kendall: that it can be used to "interpret previously ascertained experimental findings"⁶⁴⁰ by

⁶³⁶Miller, J and Glassner, B (2011) "The 'Inside' and the 'Outside': Finding Realities in Interviews, in *Qualitative Research: issues of theory, method, and practice* (Silverman, D ed) London: Sage pp131-149, p133.

⁶³⁷ Denzin, N.K (1991) "Representing lived experiences in ethnographic texts" *Studies in Symbolic Interaction* 12, pp 59-70, p68 (cited *ibid*)

⁶³⁸ Patton *op cit* pp343-344

⁶³⁹ de Laine, M (2000) *Fieldwork, Participation and Practice*. London: Sage p114

⁶⁴⁰ Merton and Kendall *op cit* p557

calling upon the participants to explain how they interpreted their own experience. Merton and Kendall refer to a particular aspect of the experience which the researchers had perceived as peripheral but which the interview showed that the study participants perceived to be of particular importance⁶⁴¹. I anticipated that similar divergence of interpretations of the moot experience would be drawn out during the interview process.

As to how best to record the responses given, I am conscious that it is important to strike a balance between obtaining as much data as possible and avoiding an environment that is threatening or intimidating for the respondents⁶⁴². To this end, I decided to record the interviews using a digital audio recorder, as this is less obviously intimidating than video recording, but less off-putting than having the interviewer make notes during the interview. It is also not susceptible to the risk of unreliability in the form of selective recall based upon the nature of human memory's being motivated in nature⁶⁴³ that would arise if the data collection relied upon my memory of the interview, particularly given my personal involvement with and investment in mooting.

Interview Guide

The template below, based on a format devised by Kvale⁶⁴⁴, sets out the areas for inquiry and the questions directed at eliciting responses from the study participants. The questions were intended as a guide only, and probes and prompts were used throughout the interview in order to elicit more detailed responses.

Potential themed areas for inquiry	Potential questions ⁶⁴⁵
Motivation/confidence	Can you explain what happened in the moot? You can interpret the phrase "what happened" however you like.

⁶⁴¹ *loc cit*

⁶⁴² Cohen, Manion & Morison *op cit* p424

⁶⁴³ Gadd, D "Making sense of interviewee-interviewer dynamics in narratives about violence in intimate relationships" (2004) 7(5) International Journal of Social Research Methodologies 383

⁶⁴⁴ Kvale *op cit* pp130-131. An amended version of this interview guide, which was used in the interviews with the tutor participants, appears at Appendix II.

⁶⁴⁵ *ibid* – "A good conceptual thematic research question need not be a good dynamic interview question. When preparing an interview it may be useful to develop two guides, one with the project's main thematic research questions and the other with the questions to be posed during the interview, which takes both the thematic and the dynamic dimensions into account".

	<p>How did you feel during the moot?⁶⁴⁶⁶⁴⁷</p> <p>Do you still feel the same way?⁶⁴⁸</p>
<p>Thinking about law/impact of mooting upon studies</p>	<p>Has your experience of mooting affected the other ways that you learn law?⁶⁴⁹</p> <p>Think about how you prepared for the moot. What do you think you derived from this experience?</p> <p>How do you think that this differed from your other learning experiences that you have had?⁶⁵⁰</p> <p>Think about how you responded to your opponent's case during the moot. What do you think you derived from this experience?</p> <p>Think about how you responded to the judge's questions during the moot, and the judge's</p>

⁶⁴⁶ *ibid* p130 – “It has been repeatedly emphasized that when designing an interview project, the “why” and “what” questions should be asked and answered before the question of “how” is posed”.

⁶⁴⁷ This area of questioning was be linked to the student's initial reflection on the moot experience that they were asked to record immediately following the moot (eg: (“😊”)

⁶⁴⁸ *ibid* p145 – “the interviewer attempts to verify his or her interpretations of the subject's answers in the course of the interview”.

⁶⁴⁹ This should include a discussion (if applicable) of the effect (if any) that “being trounced” by the moot opponents has had upon the student

	<p>feedback after the moot. What do you think you derived from this experience?⁶⁵¹</p>
<p>Attitudes towards studying law/what lawyers do</p>	<p>What⁶⁵² effect does having a similar experience to one experienced by lawyers in practice have upon your understanding of the substantive law involved in that experience?</p> <p>Do you feel that your experience of mooting helped you understand the substantive law⁶⁵³ involved in the moot?⁶⁵⁴</p> <p>Do you feel that your experience of mooting helped you understand how the law works in practice?</p> <p>Did you find your mooting experience to be confidence-building⁶⁵⁵?</p>

⁶⁵¹ These three questions are designed to elicit reflection on how different interactions drive learning

⁶⁵² *supra* fn 646

⁶⁵³ Unless further information is volunteered by the student, this question may need to be followed by probes designed order to elicit whether the student has indeed been able to obtain a deeper understanding on the part of the student in relation to a pertinent point of law arising out of the moot eg : “how did it help your understanding of [a particular point of law]?”

⁶⁵⁴ These questions are intended to explore the learning style adopted by the students, to develop the theory that experience results in a combination of “elementary learning forms” (apprehension, comprehension, extension and intension) from which can be produced “the highest level of learning” (Kolb, D.A *op cit* p102)

	<p>Did you enjoy mooting? <u>(final interview)</u></p> <p>Do you think that you will do more mooting during your studies? <u>(final interview)</u></p> <p>What area of law would you like to moot on in any moots that you may do in future?⁶⁵⁶ <u>(final interview)</u></p>
Reflection/conscious EL	<p>What do you believe has been the best way for you to learn about a subject up until now⁶⁵⁷? How successful for you has that method been?</p> <p>What do you read pre-seminar?⁶⁵⁸⁶⁵⁹</p>

⁶⁵⁶ This question is informed both by the commonly-held assumption that students prefer to moot on areas of law that students traditionally regard as more interesting or exciting than others – for example, criminal law as opposed to contract law or land law – and the finding during this study that the moot experience motivates students to conduct deeper research into points of law that they were hitherto uncomfortable or unfamiliar with.

⁶⁵⁸ Potentially more sensitive questions have been left towards the end of the interview so as to reduce risk of “resent[ment]” (Wilson, M & Sapsford, R (1996) “Asking questions” in Sapsford, R & Jupp, V (eds) *Data Collection and Analysis* London: Sage and The Open University Press, pp93-123 p105)

⁶⁵⁹ This line of questioning is founded upon Kolb’s “elementary learning forms” (*supra* fn 654). Considered in such terms, students’ pre-seminar reading might be categorised as “AΔE” (apprehension transformed by extension – ie: the student’s reflection upon what they have read in a text or case report) or “AΔI” (apprehension transformed by intention ie: the students’ reflection upon their own notes or recollection of a lecture).

	<p>Why did you read case law when preparing for moots, but not for seminars? <u>(Final interview)</u>⁶⁶⁰</p> <p>What changes could be made to seminars that would encourage you to read cases? <u>(Final interview)</u>⁶⁶¹</p> <p>Has your approach to studying changed/ (2nd interview) changed since the first moot?⁶⁶²</p> <p>Did you think about the moot after it had finished? If so, what were your thoughts?⁶⁶³</p> <p>What will you change next?</p> <p>Do you think that any of your personal experiences may have had a particular effect upon your approach to studying?⁶⁶⁴</p>
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⁶⁶⁰ This question, and the one below, was included in the final interview following comments by some students in earlier interviews that they had not read any case law before preparing to moot.

⁶⁶¹ *supra* fn656

⁶⁶² This line of questioning is intended to explore the student's preferred learning style (Kolb *op cit* pp114-116) and whether this has altered following their experience of mooting.

⁶⁶⁴ This question requires the respondents to reveal their personal details, and as such has been left until the end of the interview (Aldridge, A and Levine, K (2001) *Surveying the Social World: Principles and Practice in Survey Research*. Buckingham: Open University Press, p119). Data generated by responses to this question was used when analysing the data in order to elicit "deviant cases" (Robinson, W.S "The Logical Structure of Analytic Induction" (1951) 16(6) *American Sociological Review* 812, p813)

The question relating to the students' post-moot thoughts was designed to elicit responses in relation to the experiential learning reflective cycle ("AΔI"). It was followed by probes – for example "will you research differently/do you understand better the principle-based nature of law/what resources did you use/will you use/read these resources differently?"

I anticipated that the answer to the question "What will you change next?" would be determined to an extent by the student's learning style. For example, a student with a convergent learning style would most likely use their reflections upon the practical experience of mooting when engaging in their next learning experience, a student with a divergent learning style will be more likely to reflect upon the theory-based knowledge acquired during the moot, an assimilation-based learner will be more likely to reflect upon the process of preparing for and performing in the moot rather than upon the actual content of the moot itself, whereas a student with an accommodative learning style may draw upon the responses of the other moot participants to their own performance, or may disregard the experience entirely as they see fit.

Sampling and Data Saturation

It is important to note that this study calls for a "non-probability sample" – in other words, a sample that targets a particular group in full knowledge that it represents only that group, and not a wider population⁶⁶⁵. The sample of students who will be taking part in this study were not representative of a wider student population, but only of those students who wanted to take part in mooting as an extra-curricular activity. Such a form of sampling has been described as a "judgment sample", which form of sampling has been recommended for use in several situations, such as the present study in which the nature of the variables involved (ie: first-year students who choose to moot) prohibits the drawing of a large sample⁶⁶⁶.

The process of my selecting a sample involved by necessity sampling by convenience, based upon the students that were willing and able to take part in the study. This type of sampling has been criticised as being "neither purposeful nor strategic"⁶⁶⁷, and a type of sampling that should only be decided upon as a last resort "after strategically deliberating on how to get the most information of greatest utility from the limited number of cases to be sampled"⁶⁶⁸. The nature of the phenomenon under investigation is such that the number of students able and

⁶⁶⁵ Cohen, Manion & Morrison, *op cit* p155

⁶⁶⁶ Manning, P.K (1982) "Analytic Induction" in *Handbook of Social Science Methods* eds Smith, RB & Manning, P.K pp 273-302, p292-3

⁶⁶⁷ Patton *op cit* pp241-242

⁶⁶⁸ *ibid*

willing to take part in extra-curricular mooting is limited due to the constraints and demands imposed by their academic programme of study. This necessarily makes for a limited, self-selecting sample. Although this is indeed a form of sampling by convenience, it would be impossible to investigate the phenomenon in question by any other means, as if I were to make use of a different type of sampling, I would have to sample from students who were not subject to the conditions previously mentioned, the operation of which is a necessary element of the phenomenon under investigation.

With regard to data saturation, it has been noted that while there is “no one-size-fits-all method”⁶⁶⁹, some recommendations have been given as to how many interviews should be included in a qualitative study in order to ensure saturation, ranging between six and two hundred. It is noted, however, that none of these recommendations are supported by evidence⁶⁷⁰. The guiding principles identified have been to ensure that the data culminates at a point where “no new information or themes are observed”⁶⁷¹, and that data saturation should be determined not necessarily by the size of a sample, but by how “thick” (ie: the amount of data) and “rich” (ie: “many-layered, intricate, detailed, nuanced...”) is the data derived from those samples⁶⁷². I am of the view that the amount of data derived from the interviews I conducted with the students and their tutors, and the detail contained in those interviews (as explained in Chapters 4 and 5 below) is such as to amount to data saturation in respect of providing data that is sufficiently “rich” and “thick” to provide a warrant for the final conclusion that I have drawn.

Piloting

The importance of carrying out pilot interviews in order that the interviewer can gain experience in carrying out interviews, as well as test how well the planned interview questions function in practice, has been noted⁶⁷³. I decided to pilot the interview guide by conducting pilot interviews with students in Year 4 of the MLaw Bar (Exempting) Law programme, all of whom had taken part in mooting during their studies, and recorded interviews with them about their experience of mooting.

⁶⁶⁹ Fusch, P.L & Ness, L.R (2015) “Are we there yet? Data saturation in qualitative research”
Qualitative Report 20(9) 1408, 1411

⁶⁷⁰ Guest, G, Johnson, A, and Bunce, L (2006) “How Many Interview Are Enough? An Experiment With Data Saturation and Variability” 18(1) Field Methods 59, p61 (cited *ibid*)

⁶⁷¹ Guest *et al ibid* p59

⁶⁷² Fusch & Ness *op cit* p1409

⁶⁷³ Bryman *op cit* p473

I derived several benefits from this exercise. On replaying the recording of my first pilot interview, I was conscious that I appeared to be prompting and probing more than I ought to have done, possibly due to a subconscious desire to generate richer responses, and with the likely opposite effect of subjecting the interviewee to pressure to give responses that that interviewee believed to be those that I was hoping to generate. With a view to the principle that in interviews “it is not the hammer that the craftsman focuses on, but the nail and the table”⁶⁷⁴, I resolved to modify my interview conduct, and the other pilot interview recordings contain a significantly lesser degree of intervention.

Another benefit of the pilot exercise relates to the questions in the interview guide. The opening question, in the original draft of my interview guide, was “What do you feel happened in the moot?” This question was intended to directly focus the student interviewee’s attention upon the moot in terms of its position as a form of experiential learning, and to put the interviewee “directly in touch with the experience being studied”⁶⁷⁵. However, the phrasing of the question served only to confuse the interviewee, requiring me to rephrase it in the language in which it now appears in the revised version of the answer guide. This question aims to investigate the same phenomenon, but from a more readily discernible starting point.

Finally, the pilot allowed me to experiment with data collection resources. I recorded the pilots via an mp3 recorder, and also with Otter⁶⁷⁶ a mobile phone application that automatically transcribes the words recorded. However, the transcriptions generated by Otter contain a great many inaccuracies, some alarming in nature⁶⁷⁷. Accordingly, I decided that little or no advantage would be derived by use of this software, as opposed to manually transcribing the interviews.

Ethics

As with any empirical research involving human participants, there are ethical considerations involved in this study. I recognised that an interview conversation by its nature involves asymmetry of power, as “the interviewer defines the situation, introduces the topics of the

⁶⁷⁴ Kvale, S *op cit* p107

⁶⁷⁵ Keeton, M & Tate, P, eds. (1978) *Learning by Experience - What Why, How*. San Francisco: Jossey-Bass, cited Kolb *op cit* pxviii

⁶⁷⁶ <https://otter.ai/login> [last accessed 8th March 2021]

⁶⁷⁷ For example, the comment in Pilot Interview 2 (3.41) by the interviewee that the moot is “quite an independent thing – you’re not doing it with tutors” was transcribed by Otter as “...you know, doing it with shooters”

conversation, and steers the course through the interview”⁶⁷⁸. Additionally, it has been observed that in interviews generally the balance of power favours the respondents in so far as there is a lack of “sanctions”⁶⁷⁹ open to the interviewer by comparison with the respondent – for example, the respondent can end the interview early, whereas the interviewer cannot⁶⁸⁰. This observation is particularly acute in this context, given the scope for repercussions against the interviews in the form of student complaints against staff for apparently oppressive or repressive behaviour.

I considered that the problems caused by any power imbalance can be offset by the ways in which the normal interviewer-respondent relationship power dynamic is tilted in favour of the respondents in these interviews. The absence of “rapport between interviewer and interviewee” can be to an extent⁶⁸¹ negated in this context by the students’ foreknowledge of my position in the university structure and involvement in mootings based upon our past and future encounters. I am conscious that a good interviewer must be sensitive to the ethical dimension of interviewing⁶⁸², and to this end prepared as part of my application for ethical approval of this study information sheets and attached consent forms to be handed to each interviewee to ensure that the interviewees appreciate what the interview is about, its purpose, and that their answers would be treated confidentially.

Particular ethical concerns arise in respect of my study due to the fact that I was at all material times a lecturer employed at the university at which my study participants were enrolled as students. Such research has been described as involving “captive participants”⁶⁸³ who are at risk of participation in the research as a result of either direct coercion in the form of being led to believe that taking part in the research is a necessary requirement of their own programme of study⁶⁸⁴, or indirect coercion in the form of a desire to be seen to be making a positive

⁶⁷⁸ Kvale, S *op cit* p126

⁶⁷⁹ *ibid* p110

⁶⁸⁰ Brenner, M (1978) “Interviewing: the social phenomenology of a research instrument” in Brenner, M, Marsh, P and Brenner, M (eds) *The Social Contexts of Method* London: Croom Helm pp 122-139, p130.

⁶⁸¹ Lee, R.M (1993) *Doing Research on Sensitive Topics* London: Sage p108

⁶⁸² Bryman *op cit* p473

⁶⁸³ Ferguson, L.M, Yonge, O, and Myrick, F (2004) “Students’ involvement in faculty research: Ethical and methodological issues” 3(4) *International Journal of Qualitative Methods* 56, p58

⁶⁸⁴ *ibid* p59, Leentjens, A.F.G and Levenson, J.L (2013) “Ethical issues concerning the recruitment of university students as research subjects” 75 *Journal of Psychosomatic Research* 394, p396

contribution to their university's institutional research strategy⁶⁸⁵, and involve an abuse on the part of the lecturer-researcher of the fiduciary relationship with their students⁶⁸⁶. Further ethical concerns have been raised in respect of an "educational misconception"⁶⁸⁷ that can arise in the minds of student participants to the effect that participation in such studies conveys in itself an educational benefit, and that the purported pedagogical justifications for a lecturer's using their students as research subjects are baseless, with their real basis more likely to be "obtain[ing] a research pool with minimal cost in time and money"⁶⁸⁸

With regard to the latter concern, I took the view that the use of "captive" student participants in this study is justified on the basis that it is "committed by [my] research goals", specifically "the pedagogy of [my] discipline"⁶⁸⁹: in this instance, the viability of moot as a form of learning substantive law in the context of first-year law students. The concerns as to actual or perceived coercion in such cases, it is submitted, are mitigated in respect of my study by several factors. I was not in a "fiduciary relationship" with any of the student participants, insofar as I did not teach any of them or assess any of their work (and in the latter case, any work submitted by them for assessment would be done anonymously). Nor did I lead any of the participants to believe that participation in the study would confer any academic credit. I did inform the student participants in the Participant Information Sheets with which I provided them (along with Consent Forms) that they may derive an educational benefit from their involvement in the study: however, I made it clear to them that any such benefit would be personal to them as a consequence of their participation in the moot and subsequent reflection upon which the study was based, rather than as a result of the mere fact of participation in itself. I also made it clear to the student participants that participation in the study would involve an investment of time and effort on their part, and that they were able to withdraw from participation at any time: while it has been noted⁶⁹⁰ that such information may not in itself be enough to remove indirect coercion in respect of a study involving "captive participants", I submit that the fact that several of the participants in my study did in fact withdraw their participation suggests that this factor was not present to a significant degree.

⁶⁸⁵ *ibid* pp60-61

⁶⁸⁶ *ibid* p57

⁶⁸⁷ Leentjens and Levenson *op cit* p396

⁶⁸⁸ *ibid* p394

⁶⁸⁹ Ferguson, Yonge, and Myrick *op cit* p63

⁶⁹⁰ *ibid* p61

The importance of ethical review to mitigate against such ethical concerns has been noted⁶⁹¹. I obtained ethical approval for this study from my University Faculty Ethics Committee in February 2018. In submitting my request for approval, I had regard to the concern that there would be an appearance of power imbalance during these interviews by virtue of my being a member of academic staff teaching on a programme being studied by the student respondents. However, I noted that the moots in which the students involved would be taking part do not form part of any assessed modules studied by any of the students, and that the students could freely withdraw from the study at any stage and can access support from the university's Student Support staff if they felt distressed or upset.

In order to invite expressions of interest from respondents, I attended several Year 1 Criminal Law lectures and seminars and explained the nature of the study. I also disseminated paper copies of the Participant Information Sheet and attached Consent Form. These documents set out the potential benefits and detriments for the students of taking part in the study. They also explain to the students that their seminar tutors will be interviewed as part of the study, as well as containing assurances that their identity of all respondents will remain anonymous. I also sent invitations by email to the Year 1 students, with electronic copies of these documents attached. Copies of these documents, and the amended versions thereof with which the tutor respondents were provided, are provided at Appendix I.

It has also been noted that for a thorough consideration of ethical issues to be said to have occurred in any research involving human participants, consideration should be given during the process of writing up the research to the personal feelings of the participants⁶⁹². Although, for the sake of convenience, I have referred to the participants as "I [number]" in the following chapters, I should acknowledge that to refer to them as "interviewees" is perhaps misleading, such terminology generating as it does an impression of a process in which the interviewer puts questions in isolation to the interviewee, and draws conclusions from the interviewee's answers. Conversely, I should recognise that the conclusions that I have set out in the final chapter of this thesis are the result of a mutually creative process engaged in by the students who took part in this research, as well my own, and that (as will become apparent in the later chapters) the students' participation necessitated a degree of (in some cases particularly acute) emotional investment in the research project, and an examination of the ways in which the project had affected them personally. Equally, my involvement in this project has effected a significant change in my comprehension of the interplay between such issues and the

⁶⁹¹ *ibid* p62

⁶⁹² Cohen, Manion, & Morrison *op cit* p88

educative role of mooting, which I believe will affect my future teaching practice. I shall expand on this point in the final chapter of this thesis.

Data analysis methodology

Content analysis

I chose to adopt the methodological approach of analytic induction to analyse the data collected. In selecting this approach, I had regard to other methods of data analysis. One popular method is content analysis, whereby the researcher establishes a set of categories, and then counts the number of instances in the data in which examples of each category arise⁶⁹³. A necessary requirement of this method of data analysis is the creation of a set of categories that are sufficiently precise that these same categories can be used by others who may want to replicate the study⁶⁹⁴.

However, it has been noted⁶⁹⁵ that the “powerful conceptual grid” created by this method imposes a “physical constraint”⁶⁹⁶ upon the researcher, in that having established this set of categories, the researcher is then compelled to interpret the data in accordance with these categories, thereby overlooking “uncategorised activities”⁶⁹⁷ and restricting the potential of properly analysing the data obtained.

A further objection to adopting this method of data analysis relates to the theoretical basis of this study. The formulation of a defined list of categories presupposes a positivist approach to conceptualisation, adopting the positivist definition of a “concept” as “a mental integration of two or more units which are isolated by a process of abstraction and united by a specific definition”⁶⁹⁸, thus then allowing for the operationalisation of such concepts in the analytical process.

However, the social constructivist basis of this study requires that the concepts involved be regarded as fluid in nature and not subject to such strict definition, in the same way that the understanding of “knowledge” as a concept differs radically depending upon the individual who

⁶⁹³ Silverman *op cit* pp 165-169

⁶⁹⁴ *ibid* p166

⁶⁹⁵ Atkinson, P (1992) “The Ethnography of a Medical Setting: Reading, Writing, and Rhetoric” 2(4) *Qualitative Health Research* pp 451-474 at 458-459 (cited *loc cit*)

⁶⁹⁶ *ibid* p459

⁶⁹⁷ Silverman *op cit* p169

⁶⁹⁸ Rand, A (1975) *The Romantic Manifesto: A Philosophy of Literature* (revised edition) New York: Signet, p 17

is in possession of the “knowledge” referred to⁶⁹⁹. As an important part of this study involves investigation of the understanding of the process of acquiring legal knowledge, and therefore the concepts involved, from the perspective of law students, the positivist “conceptual grid” imposed by the content analysis method would most probably result in the research outcomes lacking the necessary depth and richness required of research grounded in social constructivism – as Silverman puts it, “the theoretical basis of content analysis is at best unclear and this means that, unfortunately, its conclusions can often seem trite”⁷⁰⁰.

Grounded theory

This method of data analysis involves the formulation of theories derived from the analysis of the data itself, which are then applied following further data collection. It has been described as a process of which its purpose is “theory construction, rather than description or application of existing theories”⁷⁰¹. The significant distinction between data analysis using grounded theory and traditional content analysis concerns the formulation of “categories” during the data analysis process itself by way of attaching “memos” to data, with the objective of using these memos to form the basis for a theory or theories about the data, a process referred to as “in vivo coding”⁷⁰².

The method then requires “theoretical sampling” in the form of additional data collection in order to check whether the foundations of the theory or theories are solid, and, if so, to develop them further by reference to the new data⁷⁰³, comparing the different theoretical constructs. This process should continue until “theoretical saturation” - a term used to define the point when the researcher decides that no further understanding of the concept(s) subject to enquiry can be developed by additional data analysis⁷⁰⁴.

As with content analysis, grounded theory contains features that may categorize it as positivist in nature. This is apparent in the title of the most influential text on grounded theory⁷⁰⁵, which implies that the theory itself was “discovered” by the authors, rather than its being a construct

⁶⁹⁹ Berger and Luckmann *op cit* p15

⁷⁰⁰ Silverman *op cit* p169

⁷⁰¹ Charmaz, K and Bryant, A (2011) “Grounded theory and credibility” in *Qualitative Research: issues of theory, method, and practice* (Silverman, D ed) London: Sage. pp 291-309, p292

⁷⁰² Rapley, T (2011) “Some pragmatics of data analysis” in *Qualitative Research: issues of theory, method, and practice* (Silverman, D ed) London: Sage. pp 273-290, p283

⁷⁰³ Charmaz & Bryant *op cit* p292

⁷⁰⁴ Schwant, T (2001) *Dictionary of Qualitative Inquiry* (2nd ed) Thousand Oaks, CA: Sage, pp110-111

⁷⁰⁵ Glaser, B and Strauss, A (1967) *The discovery of grounded theory* Chicago: Aldine

of their own design. A common description of grounded theory as involving theories that “emerge from the data”⁷⁰⁶ emphasises its basis in positivism, particularly the statement in the foundation text that in order to make use of the grounded theory method “[a researcher] should be sufficiently theoretically sensitive so that he can conceptualize and formulate a theory *as it emerges from the data*” [my emphasis]⁷⁰⁷.

More recent work on grounded theory, particularly by Kathy Charmaz⁷⁰⁸, has adopted a constructivist approach towards grounded theory, emphasising that “data do not simply reside in an external world, but instead reflect the particular conditions of its[sic] production”⁷⁰⁹. This approach adopts a constructivist position in regarding the theories as having been derived from the research participants’ perceptions of reality⁷¹⁰. However, I am conscious of the danger inherent in my own reflexivist position of being personally involved in the phenomena that are the subject of the research. In reflecting on my role in the phenomena under investigation, I am concerned that I may, were I to use grounded theory, devise categories that are grounded in my own perceptions of reality and thereby accidentally end up adopting a positivist approach at odds with the constructivist nature of the research. For this reason, I chose not to use this method of data analysis.

Narrative analysis

This method is based upon conceptualising the data as a story, and focussing the attention of the analysis upon the structure of the story⁷¹¹. Undoubtedly, there is a strong case to regard the interviews that will be analysed during this research as forms of story-telling, as indeed the phenomenon under investigation (the moots in which the students took part) can be regarded as being structured in the form of a story – indeed, the pattern of the folk tales that have formed the basis for influential writing on narrative analysis⁷¹²

Although, for reasons explained below, I will not be using this method of data analysis, the literature on this method contains some points that can be used to inform this research.

⁷⁰⁶ Charmaz & Bryant *op cit* p293

⁷⁰⁷ Glaser & Strauss *op cit* p46, cited *ibid*

⁷⁰⁸ Charmaz & Bryant *op cit*, Charmaz, K (2006) *Constructing Grounded Theory: A Practical Guide through Qualitative Data Analysis* London:Sage.

⁷⁰⁹ Charmaz & Bryant *op cit* p298

⁷¹⁰ Charmaz *op cit* p32

⁷¹¹ Silverman *op cit* pp170 *et seq*

⁷¹² Propp, V.I (1968) *Morphology of the folk tale* (2nd revised edition) ed. Wagner, L.A, Austin, TX: University of Texas Press (cited *ibid* p170)

Particularly of note is the conceptualisation of the data as a “network of stories”⁷¹³ that the researcher becomes part of when analysing the data. An inescapable aspect of the experience upon which this research is based concerns my role as the judge of the moots that the students took part in and reflected upon in the interviews following the moot. As part of the analysis of this research, I was required to reflect upon this element of the research subjects’ experience. Equally, it has been noted that “the *whats*” and “the *hows*” are of equal importance to interviewees in respect of the research process itself, as well as in the results of the research⁷¹⁴, emphasising the importance in attempting to elicit meaning from interviews of focussing upon the process out of which the interviewer has answered the questions, as well as the answers themselves.

Another principle derived from theory on narrative analysis relates to the concept of “sitedness”, or what has been described as “the social life of stories”⁷¹⁵. This acknowledges that the cultural background behind the events set out in the story can be just as important in relation to the message communicated by the story as the contents of the story itself. Indeed, the students’ accounts of their mooting experience were informed by their cultural or social environments, and I accurately predicted that it would be necessary for me to ask questions during the interview process in order to elicit responses that might afford an insight into the sitedness of the stories they are narrating.

Although this method of data analysis contains many useful elements that I went on to apply to the analysis of the data that I collected, I chose not to adopt the narrative analysis method entire. The theory behind this method is vested heavily in the familiar patterns of narrative structures, and literature on this method emphasises the importance for the researcher in identifying the “generalizable characteristics” of the narrative that can “move [the researcher] beyond the idiosyncrasies of individual accounts”⁷¹⁶. However, my particular interest in respect of this study lies not in the characteristics of the narrative, but in the particular distinguishing features of the individual students’ accounts of their experiences. In the interviews, the students’ accounts related to their common experience of having taken part in a moot – which

⁷¹³ Xu, S and Connelly, M “Narrative enquiry for school-based research” (2010) *Narrative Inquiry* 20(2), pp349-370, p360, cited in Gubrium, J.F (2010) “Another turn to narrative practice” *Narrative Inquiry* 20(2), pp387-391, p389

⁷¹⁴ Holstein, J.A and Gubrium, J.F (2011) “Animating Interview Narratives” in *Qualitative Research: issues of theory, method, and practice* (Silverman, D ed) London:Sage, pp 149-168, p151

⁷¹⁵ Gubrium, J.F *op cit* p390

⁷¹⁶ Gubrium, J.F and Holstein, J.A (2008) “Narrative Ethnography” in *Handbook of Emergent Methods* (Hesse-Biber, S.N and Leavy, P eds) pp 241-264, p245.

is a form of learning experience with a defined familiar structure intended to mimic the structure of an appellate court hearing. I was therefore concerned that focussing data analysis upon the structure of the narrative would not elicit much in the way of rich data that can be used to construct the meaning for the student interviewees of the experiences in which they have taken part.

Analytic induction

Analytic induction has been described⁷¹⁷ as a methodological approach that interprets the social world in a way that reflects assumptions about an “equation” between the researcher, the research participant, and the “framework of science”⁷¹⁸. It is a form of the inductive technique deployed in order to make statistical generalisations from a limited sample (for example, in opinion polls) – this has been referred to as “enumerative induction”⁷¹⁹. Studies involving analytic induction⁷²⁰ make use of a “judgement sample” in order to make “universal statements containing the essential features of a phenomenon”⁷²¹.

In researching the student experience of mooting, I am particularly interested in identifying student perceptions of any essential features of mooting that may have an impact upon the students’ learning experiences, but not with a view to propounding that the perceptions of these particular students typify the learning experience for all students, as a positivist approach to analysing the data might attempt. For this reason, I considered analytic induction to be of particular relevance when analysing the data, as this method attempts to make statements of universal application about a phenomenon, but not to propound that the characteristics of the phenomenon identified are “sufficient”, only that they are “essential” – in other words, that the statements derived may not apply equally to a different subject experiencing the same phenomenon due to differential characteristics⁷²². A working definition of analytic induction is that of “a nonexperimental qualitative sociological method that employs

⁷¹⁷ Manning *op cit* 275

⁷¹⁸ *loc cit.*

⁷¹⁹ Manning *op cit* 277

⁷²⁰ eg: Thomas, W.I and Znaniecki, F (1927) *The Polish Peasant in Europe and America* (2 vols) New York: Alfred Knopf; Lindesmith, A (1947) *Opiate addiction*. Bloomington, Indiana: Principia Press; Cressey, D.R (1953) *Other people’s money: A Study in the social psychology of embezzlement* Reprint: Belmont, CA: Wadsworth New York: Free Press: 1971, Bloor, M (1978) “On the Analysis of Observational Data: A Discussion of the Worth and Uses of Inductive Techniques and Respondent Validation” 12(3) *Sociology* 545

⁷²¹ Manning *op cit* p277

⁷²² Robinson *op cit* p217

an exhaustive examination of cases in order to prove universal, causal generalizations”⁷²³. The key feature of the methodology is that it strives to make a universal generalisation out of all of the examples of cases considered in order to claim that “all S(subject) is P (predicate)” – what has been referred to elsewhere⁷²⁴ as a “categorical statement”.

The development of the system of the analytic induction method has been described⁷²⁵ as deriving from the system of enumeratic induction used in analysing case history studies in the 1920s-30s, whereby researchers “ranked” responses to questionnaires on a pre-determined scale and developed theories from the rankings derived. The analytic induction method involves a similar process, but from a somewhat inverted inception in that the researcher will first come up with a “rough definition” of the phenomenon to be explained, followed by a “hypothetical explanation” of that phenomenon. With that in mind, the researcher will then study a single case of data in the light of that “hypothesis” in order to determine whether the hypothesis “fits the facts in the case”. If it does not, either the definition of the phenomenon or the tentative hypothesis will be revised in order to exclude the case. This process will continue throughout the examination of each case “until a universal relationship is established, each negative case calling for a re-definition or a re-formulation”. After a final hypothesis is arrived at, cases that do not fit within the definition of the phenomenon are examined in order to determine whether that hypothesis applies to them, so that the hypothesis can be said to be a scientific generalisation that describes conditions present when the phenomenon is present, but not when it is absent⁷²⁶. In Cressey’s study on embezzlement, his original hypothetical explanation of the phenomenon of embezzlement (being a crime committed by persons normally not in the habit of committing crimes) was that embezzlers believe the crime that they are committing to be a mere technicality – this was redefined following his examination of cases of embezzlement to state that embezzlers do in fact appreciate the criminal nature of their actions, but are able to rationalize that they are committing a crime, yet still abiding by the law. This hypothesis was arrived at after discounting for “deviant cases”, such those of individuals who had previous criminal records, or had lied in their job applications.⁷²⁷

⁷²³ Manning *op cit* p280

⁷²⁴ Churchill, Robert Paul (1990). *Logic: An Introduction* (2nd ed.). New York: St. Martin's Press.
p. 143

⁷²⁵ Manning *op cit* p280-281

⁷²⁶ Cressey *op cit* p16 (cited *loc cit*)

⁷²⁷ *ibid* p22 (cited Manning *op cit* p282)

Several disadvantages of analytic induction have been noted⁷²⁸, the most prominent theme of which being that the limited nature of the sample makes it inappropriate to use it to generate universal theories, and that its focus on case history makes it difficult to use the theories generated to predict behaviour in future cases. However, the latter criticism has been defended on the basis that analytic induction does not make any pretensions to predict behaviour in future cases, but only to explain the behaviour in the cases under examination. As observed by Cressey⁷²⁹, the fact that the original hypothesis had to be revised several times implies that that no conclusion can ever be “final”, as it must acknowledge that that conclusion itself will require further revision should other deviant cases emerge: the research involved must by its very nature be open-ended, and must “make.. no claims for the finality of [the] explanation, presenting it as simply most adequate for the sample in hand”⁷³⁰. This understanding of analytic induction has over time, developed into a rebuttal of the former criticism, as analytic induction has become conceptualised as a process not for generating universal truths, but rather for forming “descriptive hypotheses that identify patterns of behaviors [*sic*], interactions, and perceptions”⁷³¹. Likewise, I make no claims for the universal application of the theories derived from this research, but claim only that the findings can be used to explain the socially-constructed learning experiences of the students who took part in the study, which, like all human behaviour, cannot be “predicted”. It has been commented that such criticisms of analytic induction serve to demonstrate the positivistic leanings of those propounding them⁷³² by subjecting social science methodology to criticism used to scrutinise research in the natural sciences.

The method that I have used to conduct analytic induction of the data derived from this study is similar to that which was used by Bloor in his study of tonsillectomy practitioners⁷³³, and is set out below. It is necessary to preface my description of this method by explaining the reason for my use of the term “hypothesis” in what follows. I appreciate that it is unusual to use this term (as opposed to “tentative proposal”) within a qualitative study of this type that I have conducted. However, within the literature on analytic induction, this term is used (as a shorthand form of “hypothetical examination”). Accordingly, I will go on to use it as part of my

⁷²⁸ Manning *op cit* p287

⁷²⁹ Cressey *op cit* p157

⁷³⁰ Schuessler, K.F (1954) “Review of *Other People’s Money: A Study in the social psychology of embezzlement* by Donald R.Cressey” 6 *American Journal of Sociology* 604

⁷³¹ Gilgun, J (1995) “We Shared Something Special: The Moral Discourse of Incest Perpetrators” 57 *Journal of Marriage and the Family* 265-281, pp268-69 (cited Patton *op cit* 494)

⁷³² Manning *op cit* p295.

⁷³³ Bloor *op cit* p546

own description of this method of research, in order to identify how the description of the different stages of my own research correspond to the stages of the analytic inductive process, as recognised by the literature on this method.

- 1- Formulation of a provisional hypothesis based upon initial understanding of the phenomenon. Although some analytical induction studies have been premised on the aim of forming a new theory, and therefore avoided totally reference to existing theories⁷³⁴, the nature of the present study, along with my own experience of the subject under examination, precludes such “an open mind”⁷³⁵. Therefore, my provisional hypothesis in respect of the effect of mooted upon students’ understanding of substantive law is that it allows for development of their understanding of the law they are studying by facilitating the assimilation⁷³⁶ of substantive legal knowledge into a student’s practical experience.
- 2- I coded the data from the student interviews using open coding⁷³⁷ in order to generate a provisional list of characteristics common to the expressed perceptions of the students being interviewed.
- 3- The hypothesis was then re-examined in the light of the data gathered.
- 4- The “deviant cases” (ie: characteristics that do not exemplify the hypothesis) were then examined in order to see whether the provisional list of characteristics could be modified to include the deviant cases, or whether the hypothesis could be modified in order to discount the deviant cases.
- 5- The hypothesis was then reformulated and re-applied to the data, until a final hypothesis could be arrived at.
- 6- That hypothesis was then triangulated⁷³⁸ (where possible) by reference to the data obtained in the interviews with the tutors.

Categorisation and Analysis of Findings

As explained above, in order to analyse the data obtained in this study, it was necessary to attach codes to the responses given by the interviewees in order to come up with a provisional list of common characteristics. I organised these codes into categories. My initial list of

⁷³⁴ Lindesmith *op cit* p7, cited Manning *op cit* p291

⁷³⁵ Manning *loc cit*

⁷³⁶ Piaget, J (1970) *op cit*, cited Kolb *op cit* pp34-36

⁷³⁷ Cohn, Manion & Morrison *op cit* p561

⁷³⁸ Bloor *op cit* p550

categories was based upon the categorisation of questions in my interview guide; specifically, into matters relating to the students' perceptions of or attitudes to mooting, and their approaches and attitudes to studying law generally. In order to analyse these matters by reference to experiential learning theory, I subcategorised them into categories including those relating to the Forms of Learning and Learning Modes devised by Kolb⁷³⁹. The purpose behind my doing this was to identify which (if any) Learning Styles⁷⁴⁰ typified the student's approach to mooting, in order to generate characteristics associated with the perceptions about mooting (and the study of law generally) expressed by the students. The literature on mooting⁷⁴¹ identifies the effects of confidence and motivation in respect of mooting on the part of the students as factors significantly influencing their perception of mooting in relation to their studies. Accordingly, I included these factors in the list of categories also, as I took the view that it would be important to have regarded to such matters in generating characteristics for analysis purposes.

Having transcribed the interviews, I uploaded the interview transcripts into NVivo. With regard to the reflexivity inherent in my position as a researcher, I read the transcripts, in order to insert analytical memos recording my own thinking on the research in the light of my role as researcher and teacher⁷⁴²

Critique

In spite of the amendments made to the interview guide as a result of the pilot procedure, at times the interviews did not progress as smoothly as might ideally have been the case. For example, although I modified the phrasing of some of the questions in the interview guide following my experience of the pilot, it was still necessary at times during the interview for me to repeat some of the questions. This caused me during the interview process to reflect upon whether there was a need to amend the questions in the interview guide, and reflect upon whether the attendant risk of distorting the data obtained was justified in the light of the objective to be achieved, that being a potentially smoother-running interview. I decided not to do this, as I took the decision that these difficulties were attributable to the particular circumstances of the students being interviewed. The need for repetition was particularly apparent in respect of four out of the six student interviewees. In two of these cases, the students spoke English as a second language, which contribution to communication difficulties

⁷³⁹ Kolb *op cit* pp 101, 105

⁷⁴⁰ *ibid* p145

⁷⁴¹ Lynch *op cit* p93, Keyes and Whincop *op cit* p34, Gillespie *op cit* p32, Gerber and Castan *op cit* p301

⁷⁴² Saldaña, J (2013) *The Coding Manual for Qualitative Researchers* (2nd edition) London: Sage, p42

was apparent from their misunderstanding at times the meaning of words in general usage. For example, during the interview with one of these students (I4), confusion arose out of the student's misunderstanding the word "anything" to mean "everything", and in respect of the other student (I6), the use of the term "case" in the expression "that was not the case" was misunderstood to think that it referred to a particular court case. With regard to such considerations, I took the decision that any such communication difficulties could be ameliorated against by taking time to clarify such difficulties as they arose during the interview, by taking time to clarify to the students the meanings of the questions used, allowing them time to compose their responses, refraining from applying pressure to give a particular answer to questions, and, where necessary, explicitly recognising the circumstances giving rise to such difficulties, as has been acknowledged as necessary in any interview in order to acknowledge the power dynamic inherent in any interview situation in order to ensure that the interviewee was not left feeling oppressed at the end of the interviews⁷⁴³. For example, with regard to this latter concern, I asked follow-up questions of I4 explicitly relating to matters that she had raised concerning her experience as an international student on a study programme made up mostly of students who are British nationals, and explored with I6 the effect upon her studies of the racial prejudice that she disclosed to have experienced.

In another case (I2), the student appeared to be particularly nervous throughout the interview, and the need for repetition may have been attributable to his focus upon his experience of the moot. Again, rather than modify the interview guide questions, I took the decision to address this by taking particular care during the interview to ensure that the student was aware that I was actively listening to his responses by responding in turn ("right", "I see", "okay") a technique recommended as necessary not to show agreement with the speaker, but "to affirm that what he or she has said is being taken seriously"⁷⁴⁴. With regard to the points made above in respect of the power dynamic present in the interview, it is also worth noting that I deployed this technique particularly often during the interviews with I4 and I6, which may be attributable to a subconscious desire on my part to address the power dynamic discussed above as being particularly prevalent in relation to those students.

Another case involving repetition of questions arose in respect of a student (I5) whose responses to the interview questions were considerably longer than any of the other

⁷⁴³ Kvale, S (2006) "Dominance Through Interviews and Dialogues" 12(3) *Qualitative Inquiry* 480, 495

⁷⁴⁴ Talmage, J.B (2012) "Listening to, and for, the Research Interview" in *The Sage Handbook of Interview Research: The Complexity of the Craft* (2nd edition) Thousand Oaks, CA: Sage, pp295-305, 303

interviewees' (the transcript of this student's first interview was 11,657 words long: the next longest first interview (with I4) being 8,728 words, and the shortest (I2), 3,825). With regard to this interview, I again determined that the need for repetition arose not in respect of the phrasing of questions, but with regard to the time that the student spent answering these. I decided again that this was not a matter that required correction, but that could be addressed during the interview by way of "the artful use of silence"⁷⁴⁵ to allow the student to give a full response and subtly indicate the need for no need for further expansion.

I did not always "cleave too closely"⁷⁴⁶ to the interview guide throughout the interview, at times departing from it in order to ask questions to expand upon points made by the interviewees, or follow up the interviewees' responses with responses that did not take the form of questions. This was particularly prevalent in respect of the staff interviews, during which at times I responded to the interviewees' discussions of their teaching experiences with examples from my own teaching practise. This may have been due to the power dynamic discussed above in respect of the student interviews having been less present in respect of the interviews with staff. With this in mind, I was more comfortable during the interview to respond to the interviewees' statements with "practitioner redditions"⁷⁴⁷ in respect of my own teaching practice, with the aim of "enrich[ing]" the interview⁷⁴⁸, rather than create a risk impeding the potential for richer discourse, as has been recognised as potentially occurring in an interview that "rel[ies] solely upon unrelenting questioning"⁷⁴⁹.

As with any research, this study is subject to limitations. One of these arises as a result of the small number of student participants. This inevitably presents limitations in respect of attempts to present this study as representative of a broad student experience, although, as I have previously stated, such is not the purpose of a qualitative study of this nature. Also, it was not possible to conduct thorough triangulation of the students' perceptions of their learning experiences with those of their tutors due to some tutors' apparent unwillingness to be interviewed. A further limitation arose as a consequence of the Year 1 curriculum, in that the Criminal Law seminar programme ceased after Semester 1. This precluded further

⁷⁴⁵ *loc cit*

⁷⁴⁶ Merton and Kendall *op cit* p548

⁷⁴⁷ Dillon, J (1990) *The practice of questioning* London: Routledge, pp190-191, cited Wengraf, T (2001) *Qualitative Research Interviewing: Biographic Narrative and Semi-Structured Methods* Thousand Oaks, CA: Sage, p200

⁷⁴⁸ Dillon *ibid* pp176-177, cited Wengraf *ibid* p200

⁷⁴⁹ Wengraf *ibid*

opportunities to interview seminar tutors for the students after the moots and interviews that took place in Semester 2. In order to overcome this limitation, I considered arranging interviews with the student interviewees' seminar tutors in subjects taught during the second academic semester. However, I decided not to do this on the basis that such data collection would not be worthwhile, as such interviews would involve too many variables to allow for practical data analysis.

The most apparent distinction between the study as planned and the study that in fact took place is that only one contested moot between two teams of two students occurred during the course of the study schedule, due to personal circumstances affecting the students who had volunteered to take part in the study causing them to withdraw their participation during the course of the study, or (in the case of one student) not take part at all. This calls into question whether the study is capable of meeting its intended objectives. I concluded, however, that rather than distort the study, these matters in fact enrich its practical significance. From my experience of organising student moots, I have encountered numerous similar examples, and can state that had all the moots ran as they had intended to, the study could have been accused of lacking practical authenticity. Moreover, it is worth noting that the identified topic of the interviews is pragmatic, rather than empirical, in nature⁷⁵⁰, and thus it is of less importance that the moots that were intended to take place did not take place as planned, than that the students being interviewed all acquired experience in mooting.

In conclusion, I have set out in this Chapter my responses to Objective 4 by explaining, with justification, the method and methodology involved in my study. In the next two Chapters I will fulfil Objective 5 by discussing the research I undertook in order to study the phenomenon under investigation, and the findings that resulted from this research.

⁷⁵⁰ *op cit* p77

Chapter 4

Findings and Analysis (Part 1)

In the previous Chapter, I fulfilled Objective 4 by setting out the methodological considerations relevant to my study, and the method that I used to conduct my study. In this Chapter, and the next, I will respond to Objective 5 by setting out the findings from that study in respect of the students' expressed perceptions of their experiences. In these Chapters, I will also provide some indication as to the conclusions that I have drawn from analysing those findings, which will be set out in full in Chapter 6 as a response to Objective 6.

The process set out in this chapter represents the first part of "Stage 2" of the analytic inductive method explained in the previous chapter. The second part of this "Stage" of the analytic inductive method involves generating characteristics common to the expressed perceptions of the students being interviewed. I will set out the outcomes of this process in the next chapter.

Phases of the Study

As I explained in the previous chapter, the study took place in three Phases. I will refer to these as Phase 1, 2, and 3. I had intended that all the student participants would moot once in each Phase, and then be interviewed after each moot. However, this did not happen, due to circumstances that I will go on to refer to below.

Matters arising prior to Phase 1

Prior to Phase 1, eight students had agreed to take part in the study. These students were organised into four teams of two students, and were instructed to prepare a case for one of the parties in the moot problem, which concerned the law on grievous bodily harm. However, one of the teams assigned to present the case for the respondent in their moot withdrew from participation a week prior to the start of the moots, stating that they were "not willing to continue", as their involvement in the moot process had caused them to become "stressed and not able to keep up with other studies"⁷⁵¹. Accordingly, the two students (designated I1 and I2 below) who had been designated to present the case for the appellant were required

⁷⁵¹ Email from student to Ross Fletcher (9th November 2018)

to present their case without an opposition team present. This took place on the 20th November 2018.

In the other moot, one of the appellant team members (designated I5 below) informed me orally on the day before the moot that his partner was unable to take part in the moot due to illness, which his partner confirmed by email the following day⁷⁵². Accordingly, I5 agreed to present the appellant case on both grounds of appeal. Additionally, one of the respondent team members in that same moot (designated I3 below) emailed me to express an intention to withdraw from the study due to other commitments⁷⁵³. After a discussion with me the following day, she agreed to take part in this particular moot, provided she was able to leave the moot early (to start work at her part-time job) and to go on to be interviewed about this experience. The organisation of the moot was such that I3 presented the case for the respondent on one of the pleaded grounds of appeal before leaving, following which I5 responded to her submissions, then presented the case for the appellant on both grounds of appeal, to which I4 responded.

Following the moots, I interviewed all five students who had participated about their experience of mooting. Before considering my findings arising out of the matters discussed in these interviews, one matter calls for consideration as a finding relating to something that was *not* mentioned. This relates to an incident that occurred prior to the 23rd November moot. I had instructed all participating students to email the judge (myself) and their moot opponents a list of the authorities upon which they intended to rely, as is common practice in moot competitions. Many moot competitions also require the participants to complete a case summary (sometimes referred to as a “skeleton argument”) setting out the essence of the submissions that they intend to make⁷⁵⁴, but I had not instructed the students to do this. However, I5 chose to do so, adapting a skeleton argument that he had used in a student-run mooting competition⁷⁵⁵.

It appeared that, upon receipt of I5’s skeleton argument, I4 misapprehended that there was now a requirement to submit a skeleton argument of her own. She emailed to me and I5 a skeleton argument that was heavily reliant upon I5’s to the point of exactitude in places⁷⁵⁶. I5

⁷⁵² Email from student to Ross Fletcher (23rd November 2018)

⁷⁵³ Email from I3 to Ross Fletcher (21st November 2018)

⁷⁵⁴ For example, see *The OUP & ICCA National Mooting Competition Rules 2019/20*, Paragraph 8 (<http://fdslive.oup.com/www.oup.com/academic/pdf/he/mooting/Rules.pdf> (last accessed 8th March 2021))

⁷⁵⁵ Email from I5 to I3, I4 and Ross Fletcher (22nd November 2018)

⁷⁵⁶ Email from I4 to I5 and Ross Fletcher (23rd November 2018)

responded with an email in which he castigated I4's conduct in inflammatory terms and threatened to withdraw from the study "in a cloud of anger and disgust" if I4 were not "criticised heavily"⁷⁵⁷. I telephoned I5 in order to explain that this episode was most likely the product of confusion and haste on the part of I4, rather than any intent to deceive. I5 calmed down during this discussion, and he agreed to retract his accusations and take part in the moot.

Subsequently, I5 emailed to apologise, and described his behaviour as "a hissy fit"⁷⁵⁸. I had anticipated, given the emotional effect that these events appeared to have had upon him, that he would discuss them in the interview that followed. However, he did not mention them at all. I found this omission to be of interest, given that very shortly prior to the moot these events had obviously been of considerable emotional effect, and I had been anticipating that they would be discussed in I5's interview. The reason why I5 did not mention them might be hypothesised as being that reflecting upon his personal reaction to the situation caused him embarrassment, or that with regard to the "intersubjectivity"⁷⁵⁹ of the interview situation, that I5 did not think that I was interested in hearing about it as it did not relate directly to the moot court experience itself. However, these explanations are doubtful in the light of I5's readiness in the interview to discuss matters of a very personal nature not related to the moot. A more likely explanation is that the "tension"⁷⁶⁰ involved in the experience was released once the experience was over, to be replaced by the tension involved in the experience of the moot itself, which itself recurred during the interview, while a recurrence of the tension involved in the pre-moot experience did not take place during the interview due to that experience having been of less significance for that student than the personal matters that were in fact discussed.

Findings from Phase 1 interviews

Significance of courtroom setting and procedure

With regard to the findings arising out of the matters discussed in the interview, a particularly prevalent theme in the student interviews concerns the extent to which the students' perceptions of the moots in which they participated was influenced by the courtroom procedure and the use of courtroom etiquette involved in the moot. This is particularly dominant in the interviews with I2 and I4. Most of I2's responses to the interview questions, at least until approximately halfway through the interview (at which point I prompted him to reflect upon other matters relating to the moot that had affected him), were focussed upon the use of

⁷⁵⁷ Email from I5 to Ross Fletcher (23rd November 2018)

⁷⁵⁸ Email from I5 to Ross Fletcher (24th November 2018)

⁷⁵⁹ Wengraf *op cit* p288

⁷⁶⁰ Marrow *supra* fn243

courtroom etiquette in the moot, or began as a discussion of other matters before turning to address the subject of courtroom etiquette. It appeared that, at least for this student, the need to make significant alterations from the mode of delivery used in everyday conversations, or even in other study environments (for example, seminars) in order to perform the “rite of practice”⁷⁶¹ of the moot was the most significant aspect of the moot experience. Similarly, a particularly significant degree of emphasis was placed by I4 upon her reflection on the moot in respect of a particular stage in the moot where she had described a submission that she (mistakenly) believed her opponent to be making as “ridiculous”. This was followed by an intervention by the moot judge⁷⁶², who criticised her for both the tone and the content of this submission. However, her reflection in the interview upon this incident focussed entirely upon the criticism of the tone of her submission, which she acknowledged had been expressed in language that was not appropriate for use in a courtroom, and made no reference to the more fundamental error in respect of the content of her submission, even after I had pointed this out in the interview. As with I2, this demonstrates the influence which the need to depart fundamentally from language used in everyday conversation (the student described her use of the expression as suitable for use as part of “something like you, maybe you...[would say during an] argument with your friend in the street”⁷⁶³) had had upon her reflection on the moot as an experience, possibly to the detriment of other facets of the moot as a learning experience, at least for that student.

Influence of the moot’s adversarial character

The adversarial nature of the moot experience, in that students are required as part of their moot submissions to anticipate and respond to points made by the students representing the opposing party, also appeared to have had a significant impact upon the way in which the moot experience was perceived by some of the students involved in this Phase of the study. As explained above, I3 left the moot in which she took part before the other moot participants had made their submissions. She went on to state in her interview that “I didn’t...hear my opponent’s argument...so I don’t think I put together a particularly good argument”⁷⁶⁴, suggesting that her not having had the opportunity to respond to the explicit submissions made on behalf of the opposing party in the moot had had a negative effect upon I3’s perception of

⁷⁶¹ Burridge *op cit* p30

⁷⁶² I will refer to myself (in the role of the moot judge) in the third person throughout this chapter, so as to attempt to avoid confusion between my acting in this capacity and in the capacity of interviewer/researcher, in respect of which role I will use first person references.

⁷⁶³ I4, interview 27th November 2018

⁷⁶⁴ I3, interview 27th November 2018

her own moot experience. This suggests that the adversarial character of the moot is a significant aspect of the moot experience.

However, this may not always be the case. The degree to which the students' perceptions of this aspect of the moot experience varied is particularly apparent in respect of the interviews with I1 and I2, who (as explained above) had no opposing team in the moot in which they participated. I2 refers to this factor several times throughout his interview, and describes it as the "main concern"⁷⁶⁵ upon which he reflected at the end of the moot, going on to state that this factor meant he was not able to benefit from the "whole perspective"⁷⁶⁶ of the moot experience. However, I1's treatment of this aspect of the moot consists in its entirety of descriptions of the absence of an opposing team as something that "ended up being fine" and which he and his partner (I1) "worked around"⁷⁶⁷. Later in this chapter, I shall consider some possible explanations as to why these two students' perceptions of the same moot differ so greatly in this regard.

A similar contrast in perceptions can be seen when comparing the ways in which this same issue is addressed in the interviews with I4 and I5, who acted for opposing parties in the same moot. Here, I5 mentions only in brief the effect of the submissions made by his opponent upon his perceptions of the moot. In fact, I5 does not discuss the submissions themselves in any real detail, but only refers to them in the context of modifying his own submissions in his reply to I4's submissions, for the reason that he "didn't want to be too harsh"⁷⁶⁸ to a student who did not speak English as a first language, and who he considered to have lacked mooting experience compared to himself (he had participated in a "mini-moot" with the MARS Society⁷⁶⁹).

Conversely, I4's responses place a great deal of focus upon the extent to which I5's submissions influenced her perceptions of the moot experience. I4 describes her first reaction to listening to I5's submissions as becoming "nervous" and "scared"⁷⁷⁰ as a result of the pace of his delivery, and of his fluency in spoken English compared to her own. However, she then describes how she adapted her approach to listening to his submissions as they progressed, and recalls how she abandoned her unsuccessful attempt to listen to every word spoken by her opponent, and instead focussed upon the "key points" of his submission. I4 describes her

⁷⁶⁵ I2, interview 27th November 2018

⁷⁶⁶ *ibid*

⁷⁶⁷ I1, interview 26th November 2018

⁷⁶⁸ I5, interview 28th November 2018

⁷⁶⁹ *ibid*

⁷⁷⁰ I4 interview *op cit*

reflections upon the experience of the moot as having particularly influenced her decision to focus her career aspirations upon becoming a barrister, rather than a solicitor, having previously been undecided in this regard, and cites her experience of listening to and assessing how respond to her opponent's submissions as having been the predominant factor arising in the moot that had influenced this decision⁷⁷¹.

By way of explanation of the point above, I4 describes her experience of addressing her opponent's submissions as having "giv[en] me the experience [of] what I can feel in the real court"⁷⁷². Similar points are made by all the other interviewees. For example, I2 describes the moot judge's not having been as "lenient" as he had been anticipating prior to the moot as a way in which the moot experience had "given us a peek at reality"⁷⁷³. Of particular relevance is the manner in which this point was addressed by I3, which I will discuss below.

Perceptions of mooting as a student learning activity

The interrelationship between the moot and the other learning activities engaged in by the students was commented upon in several interviews. All the students interviewed gave responses stating how much more difficult they considered the mooting exercise to have been as compared to the other ways of learning law in which they had engaged up until that point. However, the reasons given for this differ between the students. Three of the students⁷⁷⁴ gave responses stating that they found the experience to have been particularly challenging due to the combination of demands involved, in respect of satisfactory case preparation, the requirement to compose a persuasive oral argument, and the ability to deal with judicial interventions. This latter point was emphasised by many of the students, in particular I5, who attaches particular significance to it by comparing the interventions by the judge in his moot to the interventions by the judges in MARS Society moots, in comparison to which he describes them as "more judicial" and "sound[ing] harsh....but..I believe that's the way that it's supposed to work"⁷⁷⁵. Similar points were made by I1, who describes favourably his perception that a judicial intervention during his moot was "a reality check to kind of be put in my place"⁷⁷⁶ by contrast with the generally commendatory approach that he had encountered in his experiences with educators up until that point.

⁷⁷¹ *ibid*

⁷⁷² *ibid*

⁷⁷³ I2 interview *op cit*

⁷⁷⁴ I1, I2, and I5

⁷⁷⁵ I5 interview *op cit*

⁷⁷⁶ I1 interview *op cit*

Conversely, I4, as mentioned above, describes the most difficult part of the moot experience for her as having been the challenge presented by her opponent's English competence. I4 describes the experience of dealing with the judicial interventions in a positive light, emphasising again the opportunities for her that the moot experience had provided her with in order to allow her to focus her career aspirations. I4 places particular emphasis in this regard upon the opportunity "to know my mistakes more earlier"⁷⁷⁷ in the moot court in order to become accustomed to judicial interventions before experiencing these in a real court, which experience she describes as having caused (at least according to her perception) "most of the lawyers" that she has observed in court to become "scared"⁷⁷⁸.

The interview with I3 (I4's moot partner) contains descriptions of particular challenges that she encountered prior to and during the moot, which she describes as having significantly affected her perception of the overall moot experience. I3 describes herself as having "never really...clicked"⁷⁷⁹ with I4, and states that she experienced difficulties in preparing for the moot due to conflicting schedules. I3 also describes her moot preparation as having been adversely affected by personal circumstances, particularly in respect of the demands of other academic tasks, with the result that she was left feeling that her "head and heart weren't fully in it"⁷⁸⁰ and stated that the moot experience "made me more stressed [be]cause it was something else to worry about"⁷⁸¹.

In order to attempt to draw any conclusions as to student perceptions of the moot experience, it is necessary to take such negative views into account. It is worth contrasting these expressed perceptions with the views expressed by the other interviewees as to their perceptions of the moot as a team activity. I4 attributes the difficulties in completing group preparation to her partner's busy schedule, and expresses regret that she was not able to feel fully part of a partnership during the moot⁷⁸². However, unlike I3, her responses about the moot experience are generally positive in nature. Similarly, I5, whose partner did not participate in the moot at all, gives entirely favourable comments in respect of the moot (he describes it as "the best learning experience I've had...in my life"⁷⁸³).

⁷⁷⁷ I4 interview *op cit*

⁷⁷⁸ *ibid*

⁷⁷⁹ I3 interview *op cit*

⁷⁸⁰ *ibid*

⁷⁸¹ *ibid*

⁷⁸² I4 interview *ibid*

⁷⁸³ I5 interview *op cit*

I1 and I2 were the only students to have participated as a team throughout this Phase of the study, and their interviews might be expected to place emphasis upon this aspect of the moot experience. However, although both interviews include discussions of their moot preparation, only I1 goes into a detailed discussion of the effect of working as part of a team upon the actual moot experience, describing himself as having felt under pressure to “do justice”⁷⁸⁴ to the moot submission that he and his partner prepared, particularly due to his perception of his partner having a greater degree of legal understanding than himself. Therefore, the significance of this aspect of the moot experience can be seen to vary dramatically between students depending upon the characteristics of the students involved.

Overall reflections on the moot experience

The comments made by the students in respect of the benefits that they considered themselves to have derived from the moot demonstrate a range of views. As noted above, I3 describes her experience of the moot in generally negative terms. However, she also refers to the fact that the “practical experience” of the moot, as opposed to the “theoretical” experiences of law via her other study activities “furthered [her] understanding” of the law involved in the moot, remarking that “there’s only so much you can learn by just reading, or...listening to someone tell you about it”⁷⁸⁵. This demonstrates the potential for beneficial learning experiences to be derived from taking part in a moot, even in situations in which the overall experience of the moot may be perceived to be detrimental in nature.

The remaining students express a variety of perceptions in respect of what they considered to be the beneficial elements of the moot experience. All students state that their involvement in mooting had helped increase their confidence in public speaking or talking about the law generally. Also, most of the students’ responses focus heavily upon the fact that the moot experience assisted their understanding of the importance of referring to case law in order to understand the law involved in the moot. Although I2’s responses were focussed heavily upon the significance of courtroom etiquette, he did discuss the fact that his moot involvement emphasised the importance of referring to case law, and stated that he valued the opportunity to gain confidence in using legal research databases. I1 gave similar responses, although unlike I2, he explicitly stated that he perceived the moot experience to have helped him understand and apply the law involved, in particular stating that he considered that the understanding of the case law that he was required to refer to in order to prepare for the moot “will stay with me” and that “after the moot, I’ll be able to...understand the judgments that are

⁷⁸⁴ I1 interview *op cit*

⁷⁸⁵ I3 interview *op cit*

in front of me and use what is appropriate in those judgments, and apply them to the case I'm trying to make"⁷⁸⁶.

I4's discussions on this point are primarily through the medium of reflections upon her moot opponent's performance, and in particular upon the extent to which her opponent made use of case law during the moot in order to support his submissions. She contrasts this with what she considers to be her deficiencies in this regard, and she acknowledges the importance of conducting legal research in relation to the points in support of both parties to the moot in order to prepare fully. Conversely, I5's responses focus heavily upon the benefits that he considers to have derived from the feedback he received from the moot judge, which he perceives as having allowed him to focus his attention upon pertinent features of points of law that he considers already to have adequately understood via the necessity to "boil down" (an expression he uses on five occasions during the interview⁷⁸⁷) the relevant law into a format suitable for submission during the moot.

Summary of findings from Phase 1 interviews

Overall, the theme that I consider to emerge from this Phase of the study is that the students involved all perceive the moot experience to be very challenging, but that they perceive themselves to have benefitted from the experiences overall in ways and to degrees that vary dramatically between students, and which were influenced by variables relating to their own personal perceptions about law, learning generally, and the other participants in their moot. It is also worth mentioning that I1 and I5, whose interviews contain the most detailed discussions of the benefits that they considered to have obtained from the moot, as contrasted with other learning experiences, both described themselves as having been heavily motivated to succeed in their law studies by upsetting personal experiences⁷⁸⁸. In the next chapter I will consider the significance of these factors, along with the other points referred to in this section, upon any conclusions that might be drawn from this study. For now, it is necessary to attempt to triangulate the perceptions expressed by some of the students taking part in this Phase of the study by way of reference to my interviews with their Criminal Law seminar tutors.

Findings from post-Phase 1 tutor interviews

I interviewed two seminar tutors, one of whom (T1) was the tutor for the Criminal Law seminar groups of which I2 and I4 were members, and the other (T2) was the tutor for I3's seminar

⁷⁸⁶ I1 interview *op cit*

⁷⁸⁷ I5 interview *op cit*

⁷⁸⁸ I1 interview *op cit*, I5 interview *op cit*

group. The other student participants' seminar tutors did not respond to my request to be interviewed for this study⁷⁸⁹.

Tutor perceptions of student understanding

The extent to which the seminar tutors perceive their students to have understood the substantive points of law involved in the seminars tends to be the most dominant theme in these interviews. I was particularly interested in the tutors' perceptions of this issue in order to triangulate this data in respect of that relating to the perceptions expressed by these students in respect of this issue during my interviews with them.

Both I2 and I3's seminar tutors state that these students appeared, based upon their participation in the seminar discussions, to have an adequate understanding of the law involved in the seminars. Representative comments include the observation that I2 "seems to have a good grasp of the law and how to approach it"⁷⁹⁰, and that I3 was "one of the stronger students in the group"⁷⁹¹. The tutors' bases for these perceptions appear to be their observations of the contributions made by these students during the seminars, which contributions both students' tutors describe as accurate in substance and of benefit in progressing the seminar discussions.

These observations are relevant when considering the data relating to these students' comments in my interviews with them about the relationship between the potential effect upon them of the moot experience, and their pre-moot understanding of the substantive law. I2's interview contains statements to the effect that he perceives himself to adequately understand the substantive criminal law. This perception appears to have been given credence by his seminar tutor's observations, thus reducing the possibility that the data arising out of his interview in respect of this aspect of the moot experience may be misconceived. Similarly, I3's generally negative account of her moot experience might have been attributed to her own lack of legal understanding, rather than to the issues that she describes in her interview. However, her tutor's observations serve to reduce the likelihood of such a possibility.

Conversely, the interview with I4's seminar tutor contains observations suggesting a lack of legal understanding in respect of fundamental points of law on the part of that student, a representative comment being that the tutor "was often having to...re-explain things...to her,

⁷⁸⁹ Email from Ross Fletcher to student participants' Criminal Law seminar tutors (16th November 2018)

⁷⁹⁰ T1 interview (I2), 6th December 2018

⁷⁹¹ T2 interview, 10th December 2018

because she didn't seem to really get it particularly easily"⁷⁹². In the tutor's opinion, I4's difficulties arose as a result "not necessarily [of] the concept[s], but [of] the way things are framed"⁷⁹³. The tutor explains that "usually after a couple of re-framings she can get right there"⁷⁹⁴, and attributes I4's difficulties in this regard to a combination of English language difficulties, and unfamiliarity with the culture adopted in English university tuition, particularly the Socratic model adopted in seminars, as compared to by-rote learning, which the tutor perceives to be a common difficulty experienced by East Asian students. These observations accord with the student's own descriptions of her difficulties during the moot⁷⁹⁵, as well as provide further insight into why the nature of the moot format may have presented an obstacle for her. I will return to this subject when attempting to draw conclusions from this study in the next chapter.

Tutor perceptions of students' group interaction

Like moot preparation, seminar-based learning involves being part of a group. I was interested to learn the perceptions of the seminar tutors in relation to the students involved in this study regarding this dimension of the seminar activity. I2 and I4's seminar tutor perceives both students' involvement in seminars to have been influenced by the approach adopted by the informal sub-group within their seminar group with which the students had chosen to situate themselves. In I2's case, the tutor describes this as having manifested itself in a reluctance to volunteer contributions to seminar discussions unless asked to do so⁷⁹⁶. In the case of I4, the tutor describes I4's difficulties in understanding the content in the seminars as having been common to the other students in her seminar sub-group, all of whom the tutor stated were not British in origin, and none of whom the tutor regarded as "able to pull each other up"⁷⁹⁷. These observations accord with views expressed by I4 in her interview regarding the importance for her of working as a member of a group in order to prepare effectively for seminars, as well as her expressed perceptions (referred to above) in respect of the importance for her of being able to complete the work necessary for the moot as a member of a partnership.

These findings call for further consideration in respect of the importance of a suitable group working environment in order for mooting to best facilitate student learning. The findings are of particular interest when compared to the perceptions expressed by the other seminar tutor

⁷⁹² T1 interview (I4), 11th December 2018

⁷⁹³ *ibid*

⁷⁹⁴ *ibid*

⁷⁹⁵ I4 interview *op cit*

⁷⁹⁶ T1 interview (I2) *op cit*

⁷⁹⁷ *ibid*

interviewed as to I3's approach to seminars. Unlike the other students considered in the tutor interviews, I3's seminar tutor perceives her to be more ready to volunteer contributions than the other members of the seminar group, and recalls an occasion in which I3 had commented to her on the reluctance of the other seminar group members to participate in group discussions, in which she referred to the other group members as "they"⁷⁹⁸ suggesting that she regarded herself as not part of, or as "other than" the other students in her seminar group. This apparent lack of congruity between effective seminar participation and group membership on the part of I3 should be contrasted with her own expressed perceptions about the moot, in which one of the reasons given for her negative impression of the moot experience was a failure to "click" with her partner.

Tutor perceptions of students' confidence

I also asked the tutors to comment upon their perceptions of the degree of confidence that was displayed by the students when expressing their legal understanding in seminars, and whether the tutors perceived there to have been any difference in this regard between the seminars that took place before the students had mooted, and those that took place after. Here, a range of differing perceptions were expressed. I2's tutor states that there was no observable distinction between the degree of confidence evident in respect of I2 in his contributions throughout the course of the seminars. This might be contrasted with I2's own perception that he had increased in confidence after the moot: however, the tutor pointed out that "he may personally feel more confident"⁷⁹⁹, notwithstanding that any increased confidence was not, in her opinion, apparent from I2's contributions to seminars. I3's tutor, however, was of the view that I3 appeared to have increased in confidence, based upon her participation in more recent seminars. As tempting as it may be to attribute this increase in confidence to I3's moot participation (in contrast to her own perceptions, referred to above), her tutor is careful to point out that this increase in confidence was not more noticeable in I3's case than in that of the other students, all of whom she regards as having "gradually grown in confidence" throughout the seminar cycle.

These perceptions make it difficult to attribute an increase in confidence in respect of legal understanding to moot participation. This is particularly the case when considering the perceptions of I4's seminar tutor in respect of this issue. I4's tutor states that during the seminars that took place after the date of the moot, I4 had made significantly fewer contributions to the seminar discussions than those prior to the moot, but also that those

⁷⁹⁸ T2 interview *op cit*

⁷⁹⁹ *ibid*

contributions that she had made suggested a more accurate legal understanding than was present from her pre-moot seminar contributions⁸⁰⁰. This accords with I4's own observations in her interview as to the importance of adequate preparation in order to develop an accurate legal understanding, and suggests an adaptation to her own learning style in order to accommodate this, a consequence of which is in fact *less* confidence in expressing views that may not be accurate.

It should be noted that this tutor had reflected prior to this interview⁸⁰¹ upon the questions that I had asked her in our earlier interview⁸⁰², and admitted during the interview that she had taken time to reflect upon whether there she could recall any apparent differences between I4's participation in seminar activities before and after what she now knew (following my references to it in our earlier interview) to be the date of the moot. However, this does not mean that these observations are unreliable, only that they emerge from a deeper reflection upon the subject of the interview than had been given in the earlier interview. It could be argued that this results in a more realistic, and therefore reliable, account of the subject of the interview than was given in the earlier interview.

It can be seen, therefore, that the interviews with the tutors following Phase 1 demonstrate clear triangulation in important respects, but also contain evidence of discrepancies. I will consider these in the next chapter, but for now it is necessary to consider the interviews with the students who took part in Phase 2 of the study.

Phase 2 findings

Phase 2 of the study involved a moot problem on the law of theft. Following I3's withdrawal from the study, I4 formed a new partnership with I6. I5 absented himself from this moot due to personal circumstances and I5's partner was again unable to take part in the moot due to illness⁸⁰³. This Phase therefore consisted of one moot, between I4 and I6 acting for the appellant, and I1 and I2 for the respondent. Further complications took place in the moot courtroom itself. Shortly before the moot was about to start, it became apparent that I1 and I2 had misunderstood their instructions, and had prepared a case in support of the appellant. It

⁸⁰⁰ T1 interview(I4) *op cit*

⁸⁰¹ *ibid*

⁸⁰² T1 interview (I2) *op cit*

⁸⁰³ Email to Ross Fletcher from I5's moot partner (13th February 2019), Email to Ross Fletcher from I5 (14th February 2019)

was therefore necessary to postpone the moot by an hour in order to allow them time to amend their submissions.

Differences in student approaches between Phases

In the interviews following the moot, the most dominant theme in the interviews with the students who had mooted in both Phases (I1, I2, and I4) relates to the modifications that the students had made in between the two moots. I1's comments highlight the perceived benefits for him of having been able to become aware of the basic elements of moot technique following the first moot, and that in his opinion, this enabled him to focus upon preparing and presenting the legal arguments necessary to support the case that he was intending to make in the moot. I1 states that in the second moot his having become accustomed to the format of the moot and to the fact that the moot judge would be putting questions to him had meant that he was able to deviate from his prepared submissions in order to improvise answers to the judge's questions (or, as he puts it, "wing it"⁸⁰⁴), whereas in his first moot, he stated that he "was too focussed on getting through my script and sticking to it"⁸⁰⁵. Similarly, I2 describes⁸⁰⁶ himself and his partner as having adapted their case preparation following the first moot to deploy a more thorough case analysis, and a more judicious selection of the case law to be referred to in the moot. I2 also refers to having consciously made physical adjustments during the moot on the basis of feedback following the first moot. He gives as examples of such adjustments his altering his tone of voice during the moot in order to place appropriate emphasis upon specific parts of his moot submissions. Similar adjustments were perceived to have been made by I4, who comments⁸⁰⁷ that, following her perceived difficulties in the first moot in understanding the submissions made by her opponent, she had become more attuned to the moot environment so as to better "pick up...the essence, or the legal point"⁸⁰⁸ of her opponents' submission in this moot. I4 also comments that she had made efforts to avert the difficulties present in her previous moot by arranging meetings with her moot partner to discuss the structure and content of their submissions in this moot, although it should be noted that (as I will discuss below) these arrangements did not appear to have produced the desired outcome.

⁸⁰⁴ I1 second interview, 18th February 2019

⁸⁰⁵ *ibid*

⁸⁰⁶ I2 second interview, 18th February 2019

⁸⁰⁷ I4 second interview, 19th February 2019

⁸⁰⁸ *ibid*

Influence of the moot's composition

A theme also prevalent in the interviews arises from the fact that the moot was, unlike the moots in Phase 1, contested between two complete student teams. I have referred above to I4's comments in relation to the amendments to her approach to the moot that she perceived herself to have made in the light of her previous moot experience. Also, I2 places special emphasis upon this feature of the moot in describing the extent to which he had perceived there to have been more of an incremental increase in his self-confidence in the second moot by comparison with the first moot⁸⁰⁹. The presence of, and submissions made by, the opposing team, were for I2 of particular importance in this respect, as he comments upon how they allowed him to make adaptations *in media res* to the submissions that he had planned in advance of the moot in order to take into account submissions made by the appellant team, or comments made by the moot judge. This experience of "thinking on [his] feet" was described by him as the most significant factor in his perceived increase in self-confidence that followed this moot. I6, like I4 in her first interview, places particular significance⁸¹⁰ upon the effect of the submissions made by her opponent (as well as the judge's feedback) in facilitating her recognition of errors in the submissions that she had made, and accordingly in enhancing her understanding of the points of law involved in the moot.

In the case of I1, this theme manifests itself in his repeated expressions of surprise at the outcome of the moot, specifically that although the respondent team were judged to have won according to the moot judging criteria, the points of law were decided in favour of the appellant team⁸¹¹. I1 recorded this particular point when noting his initial impressions following the moot, and in his interview went on to expand upon the significance of its effect upon him. I1 stated that he regarded this factor to be of particular significance due to the mental adjustments that he had made prior to the moot. These concerned his having erroneously prepared submissions in support of the appellant's case, before realisation of this error necessitated amending his submissions in order to present submissions for the respondent, which argued against the submissions that he had previously prepared. I1 describes himself as having been particularly surprised by the outcome of the moot, ending up as it did in favour of legal arguments that he describes himself as having been "trying to discredit"⁸¹², and states that when he had been preparing submissions in support of the appellant's case, he and his partner

⁸⁰⁹ I2 second interview *op cit*

⁸¹⁰ I6 interview, 20th February 2019

⁸¹¹ I1 second interview *op cit*

⁸¹² *ibid*

“weren’t expecting to win”⁸¹³. I shall expand upon some conclusions that may be drawn from this experience in the next chapter.

Influence of mimesis

All the participants in this round of moots commented upon the significance for them of the mimetic nature of the moot court experience. The ways in which this was significant for them varies between the moots. I6 places particular emphasis upon the courtroom setting and dress worn by the students when mooting, and states that these aspects of the moot, in her opinion, increased her comprehension of the duties of a practising lawyer, and describes the moot overall as “one of the best opportunit[ies]...to understand...the real skills for the lawyer” and “learn about what kind of lawyer I want to be”⁸¹⁴. I4 attaches special importance to the moot judge’s observation in the post-moot feedback that she had grown in confidence in between the moots, a facet of her development which she states in her interview she did not apprehend having taken place. However, she describes herself as having recognised, in between the two moots, the importance of advancing a legal, rather than “common sense”⁸¹⁵ argument in order to present a persuasive legal argument, and explores the possibility that the resultant presentation of such may explain her apparent increase in confidence. The similar comments made on this subject in the interview with her seminar tutor⁸¹⁶ are insightful in this respect.

Similar comments on the relationship between the mimetic nature of the moot experience and the nature of the student learning experience appear in the interviews with I1 and I2. I2 described this moot as an experience that helped him to understand the process whereby the substantive law is made⁸¹⁷, commenting that the learning experience of this moot produced a simulation of a real court hearing that attained a particular degree of authenticity absent from the first moot in which he had participated due to the presence of a respondent team, as well as its taking place in a mock courtroom, rather than the classroom where his previous moot took place. These features, I2 observed, were of special significance in facilitating the moot’s “reflect[ing] what it’s actually going to be like in the real world rather than a practise world”⁸¹⁸.

When asked whether the experience of this moot had made any difference to his understanding of the substantive law, I2 initially responded that it had not. This suggests that

⁸¹³ *ibid*

⁸¹⁴ I6 interview *op cit*

⁸¹⁵ I4 second in

⁸¹⁶ *supra* fn800

⁸¹⁷ I2 second interview *op cit*

⁸¹⁸ *ibid*

for I2, the learning benefit of the exercise was confined to an appreciation of the practical process of the courtroom by way of the mimesis that took place in the moot. However, following a discussion of the legal research that he had conducted in advance of the moot, and the points of law that he had considered it necessary to “delve into”⁸¹⁹ in order to prepare effectively for the moot, he responded that it had in fact helped him understand the substantive law involved.

The comments made by I1 in his interview suggest that for that student, it was the mimetic nature of the moot that most affected the way in which he understood the substantive law. On the subject of the moot as a way of learning the law, I1 also places particular emphasis upon the narrative format of the moot, which he perceives as making the knowledge required to act in the moot easier for him to remember, and discusses his intention to make amendments to his general learning and revision techniques in order to accommodate this. Also, I1 describes his empathy with the fictitious client for whom he was acting in the moot as making his experience of preparing for and participating in the moot “far more interesting and engaging than any other kind of learning experience”⁸²⁰, and comments with regard to the understanding of the points of law acquired in order to make his submissions in the moot as “a source to draw upon that I now have...that I don’t need to revise...because I’ve used it in that situation it’ll be with me”⁸²¹.

Perceptions of mooting as a team activity

Significant discrepancies arise in respect of the responses given in the interview in relation to the nature of the moot as a team activity. I1 and I2 both discuss the benefit that they perceive themselves to have gained both in preparing for the moot in advance, and in working together in order to prepare their submissions on the day of the moot after their error in preparing the incorrect submissions was brought to their attention. Both perceived that they derived a particular benefit in this regard from jointly discussing how best to respond to the questions that might be asked by the moot judge. Similarly, I4 and I6 both discuss the benefit that they perceived themselves to have gained in terms of feeling more prepared for the moot by rehearsing the submissions that they intended to make. I6 also makes particular reference to her feeling especially nervous prior to and during the moot as a result of having not mooted before, and that the presence of a more experienced moot partner allowed her to feel

⁸¹⁹ *ibid*

⁸²⁰ I1 second interview *op cit*

⁸²¹ *ibid*

“more...protected”⁸²² against the difficulties that she perceived herself to have been experiencing. However, she states that she remained conscious during the moot of having not been as involved in the experience as her partner. As with some of the students in the previous Phase of the study, I6 states that she was particularly motivated to study law by difficulties that she had experienced in earlier life. In I6’s case, this took the form of an interest in combating injustice brought about by the racism that she describes herself as having experienced and continuing to experience⁸²³. This gives rise to considerations of the extent to, and the forms in which, a moot experience can be affected by a student’s personal emotions. I will consider these in the next chapter.

I6’s perception that she and her partner were “a very good team”⁸²⁴ does not appear to have been shared by I4. I4 perceived her partner to have failed to apprehend the need to focus her moot submissions upon points of law, which apprehension she regards herself as having acquired following the first moot. She also recounts the stress that she experienced as a result of her partner’s not meeting with her at times that she believed them to have agreed to meet in advance of the moot in order to discuss their moot preparation. I4 also expresses frustration in respect of her perception of her partner’s adopting an approach to the task of mooting that differed significantly from her own perceived approach, perceiving her partner’s approach as focussing heavily upon the appearance of the moot court exercise (dress, venue) rather than adopting sufficient responsibility for preparing for and presenting moot submissions. This resulted in a negative perception of the experience for I4, who expresses the view that her team’s moot performance was of significantly poorer quality that she believed it ought to have been, and that the overall learning experience of the moot suffered as a consequence.

All participants in Phase 2 stated that they were looking forward to mooting in the final Phase of the study in order to build upon the experience that they had acquired in that moot and (where applicable) Phase 1. However, none of them did so. I1 and I2 withdrew participation, citing the need to focus upon other academic activities⁸²⁵, and following multiple postponements, I6 and I4 withdrew also for reasons that are not clear⁸²⁶. However, the remaining participant (I5) still presented his submissions as arranged. I will consider below the findings from the interview with I5 that followed.

⁸²² I6 interview *op cit*

⁸²³ *ibid*

⁸²⁴ *ibid*

⁸²⁵ Email from I2 to Ross Fletcher, 17th March 2019

⁸²⁶ Email from I6 to Ross Fletcher, 27th May 2019

Phase 3 findings

I5 was the sole participant in the “moot” that was the subject of this Phase of the study. His partner was again unable to take part, and so I5 prepared submissions in support of both grounds of appeal. He had prepared his case on the basis that there would be a respondent team present, but ultimately (as explained above) made these submissions unopposed.

Mooting as a transferrable learning experience

The application of the experience gained in mooting to other study activities was a theme present in several of the interviews with students following Phase 2, but it is the most prominent theme in this interview with I5. I5 gives several examples of the ways in which his mooting experiences have informed the other aspects of his studies. These include I5’s perception of the need to identify the *ratio decidendi* of a reported case in order to refer to it in support of a moot submission, which technique he describes as having deployed in revision for his then-recent Contract Law exam⁸²⁷. Similarly, I5 discusses his perception of the need to identify a theme uniting the *rationes* in factually dissimilar case law in order to compose a moot submission based upon that theme, as well as to understand the submissions likely to be made in response. This was perceived by I5 to have enhanced his understanding of points of substantive law underlying those themes⁸²⁸.

A final point identified by I5 as being of particular importance to the development of his understanding of substantive law relates to the common law system upon which much of the content of the law degree syllabus is based, particularly the subjects taught in Year 1. I5 observes that the requirement to have regard to the principles in support of both parties’ cases in a moot helped him to comprehend the principles that were taken into account by the judges who decided the cases that he was required to read in order to understand the subjects on his syllabus, in particular Contract Law. I5 comments that he perceived his mooting experience to have helped him comprehend the process whereby the Contract Law case law was decided, and that he thereby acquired a deeper understanding of the subject than students who had not mooted. Reflecting on the development of his learning in this regard, I5 states that prior to his experiences of mooting, his comprehension of this process had been inhibited by his understanding of the common law process involving an imposition of “the law”⁸²⁹. However, he states that after having mooted, he was able to appreciate the fact that the law that he had been learning was a product of a decision made following an adversarial process. I5 states

⁸²⁷ I5 second interview, 28th May 2019

⁸²⁸ *ibid*

⁸²⁹ *ibid*

that he perceives many of his fellow students not to have acquired this level of comprehension, and credits his attainment in this respect to his mooting experiences. I5 also perceived his interest in acquiring a fuller understanding of substantive law to have been enhanced by the feedback given by the moot judge after the moot, which he perceives as more conducive to development of the points that are the subject of the feedback than the feedback that follows submission of exams or coursework (he terms it as having “a broader feel”⁸³⁰). This is an interesting point, and one on which I will expand in the next chapter.

Perceptions of the role of the moot judge

I5 also places emphasis upon the role of the moot judge in assisting the development, through mooting, of his understanding of the law. This is apparent in his expansion upon a point made in his previous interview in respect of the degree of enhanced clarity that the judicial interventions during his moot facilitated him in attaining. I5 reflects upon what he regards as a common perception of judicial interventions in a moot as “scary” episodes involving the judge “trying to catch you out”. However, he states that he perceives judicial interventions as a fundamental aspect of the overall learning experience of the moot, as he regards them as helping mooters ensure a comprehensive understanding of the subject upon which they are making their submissions, by causing mooters to question the veracity of their submissions and develop their argument fully.

I5 expresses a belief that there is amongst mooters a common perception that the haecceity of judicial interventions is to make mooters uncomfortable. Although I5 was clear that he did not share this perception, he acknowledged the pressure that he felt under when subjected to the moot judge’s questions. I5 states that he recognised the value of this emotion as part of mooting as a learning experience. The nature of this observation was informed by a change that had taken place since I5’s first moot, as for personal reasons he had decided that he no longer intended to practise law as a career. I5 states that he regarded the dialectic exercise of listening and responding to the judge’s interventions as a valuable experience irrespective of the legal content that was involved, in that the experience he acquired of reflecting upon and composing and delivering responses to the questions the judge put to him could be put to practical use in “any high-ranking role”, such as involving negotiating a business transaction⁸³¹.

⁸³⁰ *ibid*

⁸³¹ *ibid*

The effect of personal circumstances

I5 spent a significant part of this interview discussing the personal matters that had affected his involvement in the study, explaining that the impact of these factors had increased in the time since the first Phase of the study, and had adversely affected his ability to prepare for his exams and other study activities also⁸³². However, I5 went on to describe himself as having been subjected to a greater degree of motivation to engage in mooting as a result of these experiences, and as welcoming the opportunity provided by involvement in mooting to focus his attention upon a study activity that he perceives as demanding a degree of focus and rigour greater than that required of other study activities. This, I5 states, he found to be part of the attraction for him of the opportunity to take part in mooting, along with the “*real* sense of achievement”⁸³³ gained after completion of the moot exercise, which he describes himself as acquiring irrespective of the outcome of the competitive element of the moot.

Comparison with the literature

As explained in Chapter 2, the literature on mooting is linked by disagreement as to the appropriate place for mooting within higher education. The findings discussed above in relation to the difficulties experienced by some of the student participants present an argument against the use of mooting as a compulsory teaching exercise⁸³⁴ or summative assessment method⁸³⁵. However, the findings demonstrate a perception of an improvement, or at least a perceived adjustment, in respect of understanding substantive law on the part of the student participants, supported by the observations of those tutors who participated in the study. This suggests that mooting has potential to provide an educational benefit⁸³⁶, and as such ought to be considered as a part of a Year 1 teaching curriculum, rather than confined to a voluntary inter-varsity competition⁸³⁷. I will expand upon these points in the next chapter when setting out the conclusions that I have drawn from this study.

Summary of findings

The above findings show a variety of perceptions on the part of the student interviewees in respect of the moot as a method of studying substantive law, including its being seen as a

⁸³² *ibid*

⁸³³ *ibid* (my emphasis)

⁸³⁴ *c.f* Marsh and Ramsden *op cit*

⁸³⁵ *c.f* Boylan-Kemp *op cit*

⁸³⁶ *c.f* Watson and Klaaren *op cit*

⁸³⁷ *c.f* Gerber & Castan *op cit*, Billings *op cit*

way of introducing students to the practical method whereby case law originates, as a method of familiarising students with the techniques and procedures used by practising lawyers, and as a way of learning about the law in its own right that is in some ways more effective than any other. These perceptions appear to be influenced by other views expressed by the students about their experience of mooting, including the degree of pressure that they felt themselves to be under to prepare for and make submissions in the moot, and their relationship with the other students involved in the moot and their perception of the moot judge. In the cases of some students, the most important effects upon their perceptions of mooting appear to have been a result of their attitudes towards their studies and their fellow students, as well as the effect of their lived experiences outside of the moot court, both as related to their studies and to their personal lives. In the next chapter, I will look at all these factors in order to see what amendments are to be made to the tentative hypothesis set out at the end of the previous chapter, and what other conclusions can be drawn.

CHAPTER 5

FINDINGS AND ANALYSIS

(PART 2)

In the last chapter, I commenced my response to Objective 4 by discussing my findings following this study in respect of the expressed perceptions common to the student participants in this study. In this chapter, I will conclude that response by deploying the analytic inductive method to generate characteristics common to those expressed perceptions. I will draw together these findings, and my analysis thereof, in order to reformulate the tentative hypothesis set out at the end of Chapter 3 and in so doing, arrive at a possible answer to my research question as derived from this study.

Analysis of findings from Phase 1

As explained at the start of the previous chapter, I examined the data arising out of the student interviews in order to categorise any student responses that appeared to illustrate an implementation of the “Learning Modes” set out by Kolb, in order to identify any “Learning Styles” that appeared to be adopted by the students. I had anticipated that the findings that emerged from this exercise would suggest that some students adopted a specific approach to their learning throughout the course of the study. In fact, the findings appear to suggest that the students who took part in the study modified their approach to learning as the study progressed. This is in accordance with Kolb’s theories about the process of experiential knowledge, which he describes as “autopoietic cognition”⁸³⁸ in that it is a process of learning that “interacts with its environment, recurrently renewing and recreating itself”.

Initial dominance of the CE and AE Learning Modes

As discussed in the previous chapter, the interview responses from the students who took part in Phase 1 of the study tended to focus heavily upon the physical environment of the moot, and the specific practical demands required in order to complete the tasks of preparing moot submissions, listening and responding to the opponent’s submissions, and addressing the

⁸³⁸ Kolb *op cit* p63

questions put by the moot judge. These tend to suggest a preponderance of adoption of the Learning Mode categorized by Kolb as “Concrete Experience” (CE). Kolb describes this mode as being typified by an approach to learning “concerned with the uniqueness and complexity of present reality, as opposed to theories and generalisations”, and in a more succinct form as “emphasis[ing] feeling as opposed to thinking”⁸³⁹. This accurately suffices as a heuristic overall summary of the approaches that the students participating in Phase 1 perceived themselves to be adopting during and after the moot process, as well as in respect of their academic learning generally.

The Learning Modes have been described elsewhere as “modes of experience”⁸⁴⁰, in that they can be described as parts of the process that an individual engages in during the “flow”⁸⁴¹ of any lived experience, and the process of recalling that experience involves reactivating that process. This has been described as particularly relevant to the CE mode, recall of which can involve the individual “often reexperie[n]c[ing] the situation as well as the emotions associated with it”⁸⁴². This was particularly evident in particular in the Phase 1 interviews with I3 and I4, who had perceived their moot experience to have been adversely affected by their relationships with their moot partners.

The next most dominant Learning Mode that appears to emerge from the responses by the students in this Phase of the study is “Active Experimentation” (AE). This Mode is described by Kolb as “emphasiz[ing] practical applications as opposed to reflective understanding” and “a pragmatic concern with what works as opposed to what is absolute truth”⁸⁴³. A tendency towards this Mode can be seen in the responses of all the students who took part in this Phase, which responses are all distinguished by an emphasis upon the educational and personal benefits that the students consider themselves to have derived from the fact of taking part in the moot in itself, irrespective of the outcome of the moot as a competitive exercise. Such an illustration of the AE Learning Mode in practice resembles a practical application of what Kolb refers to as the learner’s being “struck”⁸⁴⁴, a term used by Dewey in his theoretical observation that in order for a process of reflective learning to take place, it is necessary for a learner to encounter “a discrepancy requiring explanation”⁸⁴⁵. Such an event, Dewey points out, is not

⁸³⁹ *ibid* p105

⁸⁴⁰ *Abbey et al op cit* p481

⁸⁴¹ *loc cit*

⁸⁴² *ibid* 479

⁸⁴³ *Kolb op cit* p105

⁸⁴⁴ *Kolb op cit* p xxi

⁸⁴⁵ *Dewey (1933) op cit* pp149-150

merely a means whereby a learner acquires information, but in itself forms part of the process of the development of the learner's ability to learn⁸⁴⁶. The students' responses tend towards such a rationale as describing the way in which they each perceived a development to have taken place, or (to use Kolb's terminology⁸⁴⁷) how they had "transformed" following their experience of mooting.

Initial prevalence of AΔE Form of Learning

The dominance of the CE and AE Learning Modes, in Kolb's terminology, tend towards a Form of Learning described by Kolb as "Apprehension transformed by Extension" (or "AΔE")⁸⁴⁸. Kolb describes this as the transformation of the way in which a learner appreciates an experience as a result of the learner's concentration upon the physical situation, rather than thinking about the theories or concepts that may underlie that situation⁸⁴⁹. Upon consideration of the students' responses following Phase 1, such a Form of Learning does indeed appear to dominate the students' expressed perceptions of their own learning during this Phase, with much emphasis upon the physical task of participation in the moot, and the practical components of the moot that distinguish it from other learning experiences. Mention should be made in this context of the repeated references by I2 to his recognition of the importance of courtroom etiquette when taking part in a moot, and the extent to which this may be regarded as a heightened understanding of substantive law. Although the importance of "legal language" to "help convey" the "complex and solemn business" of the law has been noted⁸⁵⁰, it would not be appropriate within the scope of this study to categorise knowledge of such "language" as belonging properly to the same sphere of understanding as knowledge of substantive law, as the requirement to be satisfactorily conversant in such terminology is categorised as a component of professional legal training, rather than undergraduate law studies.

This approach to learning has been characterised by Kolb as an "Initiating Style" within Kolb's Learning Style Inventory⁸⁵¹, which Kolb describes as "characterised by the ability to initiate action in order to deal with experiences and situations"⁸⁵². It is useful to view the events of Phase 1 from such a perspective, as all the students who took part in this Phase described

⁸⁴⁶ *ibid* p150

⁸⁴⁷ Kolb *op cit* pp63-5

⁸⁴⁸ *ibid* p101

⁸⁴⁹ *loc cit*

⁸⁵⁰ Stephenson, M (2017) "Harry Potter language?' The Plain Language Movement and the case against abandoning 'legalese'" 68(1) Northern Ireland Law Quarterly 85, 90

⁸⁵¹ Kolb *op cit* p145

⁸⁵² *loc cit*

ways in which they made adjustments to their approach during, or prior to, the moot in order to take the steps that they perceived themselves to be necessary in order to surmount the challenges that they had taken on by engaging in this study. This is particularly relevant in the case of I4, whose assessment of her moot experience was, on the whole, negative. However, she still perceived herself to have derived from the experience a personal benefit which was the result of her own exercise of her initiative to take part in the moot, notwithstanding the various factors that she perceived as obstacles threatening to prevent her participation. Also of relevance here is Kolb's description of the "Accommodative" learning style (the precursor to the "Initiating" Style in Kolb's Learning Style Inventory as originally formulated) as "relying heavily on other people for information rather than on their own analytical ability"⁸⁵³. The presence of this characteristic is alluded to in I2's interview, specifically in his expressed perceptions that he regarded the moot experience to be incomplete due to the absence of an opposing team, perceptions not expressed by I1 (his moot partner, whose position in this regard will be considered below. Similarly, the extents to which I3 and I4's moot experiences were both adversely affected by what appeared to be difficult team dynamics suggests a tendency towards this characteristic, although events referred to below suggest that autopoiesis occurred in respect at least of this element of these students' approaches to learning.

Significance of tutor interviews

Before attempting to make any further propositions based upon the above conclusions, it is necessary to triangulate the relevant data in order to "fill in the resultant gaps"⁸⁵⁴ in the analysis, such gaps arising in respect of the students' perceptions of their own approaches to learning the law, and to their own understanding of the law. In order to do this, reference to the tutor interviews is necessary. The phenomena particularly relevant here concern the extent to which the tutors perceived the students to have appeared to apprehend the law involved in the seminars, and to have developed their confidence in expressing that apprehension. As pointed out in the previous chapter, none of the comments made by the tutors significantly contradict the perceptions expressed by their students in respect of this matter. The comments made by I2 and I3's tutors suggested that, in their opinions, those students' already satisfactory understanding of the substantive law did not appear to have been altered as a result of their moot experience.

⁸⁵³ Kolb *op cit* p115

⁸⁵⁴ Bloor *op cit* p550

On the subject of the “AΔE” transformation of the students’ learning brought about by their moot experience, reference should be made to the observations of I3’s tutor in respect of her conversation with that student, in which she distinguished herself from the other members of the group. While no comparable observations were made by I2’s tutor, this does not (as the tutor points out) necessarily disprove that a comparable development may have taken place in the case of that student also. The comments made by I4’s seminar tutor are also relevant here insofar as the tutor observed that, in the seminars that took place after the student had mooted, she was less likely to give incorrect answers to the seminar questions. This suggests that, although no evidence is available to suggest any positive development in respect of the student’s understanding of the law as a result of her moot experience, that experience may have had an effect of heightening her appreciation of the need to make such positive developments. A related development identified by the tutor is that of an accentuation in the student’s ability to recognise when a potential contribution to a seminar discussion may be inaccurate in nature, and to refrain from so making it, in a manner akin to that described by the student as a recognition of the need during a moot to avoid making submissions that may be legally inaccurate, notwithstanding that they may be “common sense”⁸⁵⁵.

I1’s transition to AΔE Form of Learning

While it was not possible to triangulate the data by way of a comparable exercise in respect of I1 and I5, some further observations may be made in respect of those students here, as in their expressed perceptions of their moot experiences differs in key respects from those of the other students involved in this Phase of the study. The distinction drawn between “apprehension” and “comprehension” in Kolb’s terminology is significant when considering the approaches to learning suggested in the perceptions expressed by I1 and I5. The perceptions expressed by both these students in relation to their experiences of mooted suggest that the process of their learning from this experience differs from that of the other students who took part in this Phase of the study. The significant distinction in respect of these students appears to relate to the way in which their experience mooted has affected what Kolb would term their “comprehension” of the substantive law that underlies the process of the moot, whereas the development of knowledge in respect of the other students predominantly concerns their “apprehension” of the process of the moot. As Kolb points out⁸⁵⁶, the theory of “two kinds of knowledge” has been the subject of much philosophical discussion, involving several different attempts at conceptual definitions. The conceptualisation and attempt at definition that I consider most relevant to the situation presently under investigation is William James’

⁸⁵⁵ I4 first interview *op cit*

⁸⁵⁶ Kolb *op cit* pp 70-71

distinction between “knowledge of acquaintance” and “knowledge-about”, the latter of which James characterises as the capacity of an individual in relation to the subject of the knowledge to “subject it to a sort of treatment and to operate upon it with our thoughts”⁸⁵⁷, which latter description serves as an appropriate description of the understanding of the substantive law involved in the moot reflected in the responses given by I1 and I5.

In respect of the interviews with I1 and I5, responses tending towards the Learning Mode defined by Kolb as “Abstract Conceptualisation” (AC) are evident to a degree not present in respect of the other students’ responses. Kolb describes this Learning Mode as involving “thinking as opposed to feeling”, and characterised by “a concern with building general theories as opposed to intuitive[...] understanding”⁸⁵⁸. Such considerations are relevant in respect of both students with regard to their interview comments to the effect that their experience of mooting required them to accentuate their clarity of focus upon the areas of law in question in order to express those submissions articulately and coherently, and at the same time facilitated an understanding of and recollection of the points of law involved in the moot.

Also evident in respect of I1 and I5’s expressed perceptions to an extent not present in relation to the other students is evidence of “Reflective Observation” (RO), a Learning Mode described by Kolb as involving “understanding the meanings of ideas and situations by carefully observing and impartially describing them”, “a concern with what is true or how things happen as opposed to what will work” and involving “looking at things from different perspectives and...appreciating different points of view”⁸⁵⁹. Both I1 and I5, particularly the latter, displayed evidence of this approach in their reflections upon how what they had understood the task of preparing for the moot to involve, and the changes that took place in respect of their perceptions of the moot and their own learning afterwards.

The tenor of I1’s observations suggests the presence of a much greater degree of development in respect of his comprehension of the substantive law involved in preparing for and participating in the moot than was evident from the interviews with I2, I3, and I4. These responses still, however, tend towards a Form of Learning best categorised as “AΔE”, insofar as I1’s perceived changes to his own understanding were regarded by him as having been activated by his physical involvement in the moot, and by the moot itself as a transformative experience. It should be noted here that I1 remarked during the interview that he had never

⁸⁵⁷ James (1890) *op cit* pp221-2, cited *ibid*

⁸⁵⁸ *ibid* p105

⁸⁵⁹ Kolb *op cit* p105

been to a court to observe a hearing in progress⁸⁶⁰. This lack of any practical observation of events closely approximating the experience of mooting will likely have had the effect that his own participation in mooting resulted in a particularly potent “jog to thinking”⁸⁶¹. I1’s comment that the points of law that he was required to learn and memorise for the moot “will stay with me”⁸⁶² evokes Walsh’s observation that moot experience enables a student “to obtain a grip upon the question he is invited to tackle...which he is not likely to lose”⁸⁶³. His overall categorisation within Kolb’s Learning Style seems to fit best within the “Balancing Style” category, which Kolb describes as “characterised by the ability to adapt” and balancing all four Learning Modes⁸⁶⁴.

I5’s transition to CΔI Form of Learning

Conversely, I5’s expressed perceptions suggest that, for him, the most significant development to have taken place as a result of the moots concerns his comprehension of the law involved in the moot, particular in respect of his expressed reflections upon the changes to the way in which he understood the law that he perceived to be necessary to make in order to sum up effectively those points of law for the purposes of deploying them in courtroom advocacy. Unlike the other students involved in this Phase, the most significant “discrepancy requiring explanation”⁸⁶⁵ appears to be the reconceptualization of the student’s own internal understanding of the moot, as opposed to the moot itself. This reflects what Kolb would describe as the “Comprehension transformed by Intention” (“CΔI”) Form of Learning. It is also noteworthy that I5 places much less emphasis than the other students upon CE. As has been noted, reflections involving this Form of Learning include “re-experiencing [a] situation as well as the emotions associated with it”⁸⁶⁶. Particularly of interest here is the observation that I5 appeared in advance of the moot to have experienced a particularly intense emotional reaction to the task of moot preparation⁸⁶⁷, but that this point was not addressed at all in his post-moot interview. The way that I5 appears in this respect to have “shifted” the “conceptual scheme” whereby he has understood this experience⁸⁶⁸ may be a product of his own previous mooting

⁸⁶⁰ I1 first interview *op cit*

⁸⁶¹ Dewey (1933) *op cit* p165

⁸⁶² I1 first interview *op cit*

⁸⁶³ Walsh *op cit* p426

⁸⁶⁴ Kolb *op cit* p145

⁸⁶⁵ Dewey (1933) *supra* fn 845

⁸⁶⁶ Abbey *et al*, *supra* fn 840

⁸⁶⁷ Emails from I5 to Ross Fletcher, 23rd November 2018, 24th November 2018.

⁸⁶⁸ Adams *et al*, *op cit* p480

experiences, or possibly a product of the ways in which he describes himself as having mentally processed the severe personal trauma in his personal life. In any event, the lack of emphasis upon CE as opposed to the other three Modes of Learning suggests a characterisation of I5 as having a “Thinking Style”, which Kolb describes as “characterized by the capacity for disciplined involvement in abstract and logical reasoning”⁸⁶⁹, an accurate description of I5’s perceived approach to the tasks of preparing for moots and other study activities, in the light of his perceived experience of personal problems contributed to by a past lack of discipline in relation to his studies⁸⁷⁰.

Consideration of deviant cases (Phase 1)

Before considering the findings following the remaining Phases of the study, it is necessary to apply the analytical inductive method described in Chapter 3 in order to determine whether it is necessary to revise the “provisional hypothesis” set out at the end of that chapter. Having drawn together the conclusions set out above, it is apparent that that hypothesis (that participation in mooting helps students develop their understanding of the substantive law involved) does not adequately account for three out of the five students observed. It is therefore necessary to consider whether any of the students whose characteristics are not exemplified by the hypothesis can be discounted for as being “deviant cases”, and on what basis. At this stage, it is necessary to have regard to some characteristics that might be obvious as being associated with certain of the three non-exemplified students:

1: Gender: The fact that both I3 and I4 were female gives rise to considerations of what barriers may exist for female students with regard to mooting, this being a system of legal training devised to train barristers at a time when only men were permitted to practise at the Bar. The prohibition on women joining the Bar was only removed in relatively recent times⁸⁷¹, and recent research has suggested that the legal profession remains, for women, a hostile environment⁸⁷². Accordingly, any research into legal education would be incomplete without consideration of what difference gender may have made towards a student’s learning experience, in the light of the feminist perspective that both the legal and education systems

⁸⁶⁹ Kolb *op cit* p145

⁸⁷⁰ I5 first interview *op cit*

⁸⁷¹ *supra* fn 387

⁸⁷² Sommerlad, H (2016) “ ‘A pit to put women in’: professionalism, work intensification, sexualisation and work-life balance in the legal profession in England and Wales” 23(1) *International Journal of the Legal Profession* 61

are “institutions of patriarchy constructed to perpetuate male power”⁸⁷³, points that have informed consideration of moot court practice in American universities⁸⁷⁴ in particular. However, as explained in the previous chapter, while the two individual female students’ perceptions of their mooting experience differ from those expressed by the male students, they in turn differ in other respects from each other, as well as sharing a common factor – the lack of apparent perceived benefit to understanding of the substantive law – with a male student (I2). Accordingly, the treatment of such cases calls for a more nuanced approach than discounting them based upon gender alone.

2: Nationality: The extent to which the experience of mooting can differ for students based upon their ethnic or national origin has been noted⁸⁷⁵. The participants in this study were not asked to identify themselves based upon such criteria, but I4 voluntarily stated that she is an international student. I4’s interview responses, as well as those of her seminar tutor, clearly set out factors relating to language and cultural barriers distinguishing her experience of studying law from that of “home” students. These factors can be legitimately regarded as having affected her experience of mooting. However, as I will explain in the next Phase when considering I6 (another international student), the effect of these factors cannot accurately be described as common to all international students, as the ways in which these two students appeared to have experienced their effect cannot be adequately explained solely on the basis of their being international students.

3: Presence of an opposing team: Notwithstanding I2’s assertions that the experience of the moot was for him an incomplete one due to the lack of an opposing team, and the accompanying implication that his case can be discounted for on this basis, this factor alone cannot serve to discount for his case due to (a) the participation in the same moot of I1, whose perceptions differ greatly from his in this regard, and (b) the expressed perceptions of I3 and I4, in whose moot there was an opposing team (albeit only one member of which in fact took part in the moot).

4: Divergence in Learning Styles: A comparison of the deviant cases shows that they all appear to adopt the Initiating style of learning, as opposed to the styles adopted by the students whose characteristics are exemplified by the provisional hypothesis. It could,

⁸⁷³ Auchmuty, R (2015) “Feminist Approaches to Sexuality and Law Scholarship” 15 *Legal Information Management* 4, p6

⁸⁷⁴ Morrison, M.N *op cit*

⁸⁷⁵ Watson and Klaaren *op cit*, Sands, J (2013) “The role and importance of mooting: the international student’s perspective” (unpublished conference paper) 30th January 2013

therefore, be argued that the deviant cases can be discounted on this basis. However, Kolb's conception of a Learning Style is such that it is a *description*, not a *cause*, of an individual's approach to learning⁸⁷⁶. Accordingly, it would not be appropriate to discount these cases upon that basis, given that the nature of an approach to learning, conceived of from a constructivist stance, is such that it will develop over time as a result of the individual's continually changing perception of their own understanding, as opposed to the positivist position that an individual's understanding is the product of a reaction to their external environment⁸⁷⁷. As will become apparent, the Learning Styles demonstrated in this Phase of the study by the participants did not remain static throughout the other Phases.

As none of these obvious reasons serve to discount for the deviant cases represented by these students, it is necessary, therefore, to consider what conclusions can be drawn from the findings of the other Phases of the study, in order to attempt to identify a way in which the hypothesis can be modified to account for these deviant cases, or to discount them.

Analysis of findings following Phase 2

I6 – Dominance of AΔI Form of Learning

When considering the findings from Phase 2 of the study, it is appropriate to make a distinction between the findings relating to the student who had not taken part in Phase 1 (I6) and those students who had (I1, I2, and I4). In I6's case, the strong focus in her responses upon the physical experience of the moot itself, and the importance of courtroom dress and procedure, suggest that for her, the dominant Learning Mode appears to be CE. This is particularly apparent when compared to the responses given by the other students in this Phase, in respect of whom there is much less of a CE emphasis. To an extent, this can be attributed to this being I6's first moot, and comparisons drawn with the responses given by the participants in Phase 1. However, it should be noted that the degree of emphasis in I6's responses upon CE, as opposed to the other Learning Modes, is much greater than that which took place in the Phase 1 interviews. Although some RO is present in I6's responses, the reflections tend to focus primarily upon elements that I6 considered to be absent from her moot participation, such as her not conducting sufficient relevant legal research, or a perceived lack of participation in the moot, as opposed to her reflecting upon what she in fact did with a view to making changes in the future.

⁸⁷⁶ Kolb *op cit* pp118-9

⁸⁷⁷ Hull, C.L (1930) *op cit* p512

An explanation - more plausible than the fact that it was her first moot- for this bias towards CE appears from the interview findings overall to be that for I6, the physical experience of the moot exerted a particularly powerful valence⁸⁷⁸. As pointed out by Lewin⁸⁷⁹, the effect of a valence can be both positive and negative. This appears to have been the case for I6 in relation to her moot experience, in that it appears to have been both positive in its effect of “transforming”⁸⁸⁰ her perception of understanding law, and negative in terms of its effect of creating an irruption in her approach to studying law that she appears to have found difficult to adjust to. The “powerful mix of elation and terror” that students are subjected to by taking part in a moot has been recognised by research elsewhere⁸⁸¹, and this seems to have been apparent in I6’s case.

The Form of Learning most evident from I6’s interview findings appears to be “apprehension transformed by intention” (AΔI), which is described by Kolb⁸⁸² as involving a combination of RO and CE in order to effect a transformation upon the learner’s apprehension of the subject matter by way of a reconceptualization of their own understanding. This is evident in I6’s recognition of the effect upon her moot experience of the perceived gaps in her own legal research, and recognition of the need to fill these gaps when preparing for subsequent moots in order to make a difference to the character of that experience⁸⁸³. Also apparent is I6’s perception of an increased level of difficulty in preparing for a moot, as opposed to a seminar, which she recognises as a change in her own approach brought about by her involvement in this moot.

I6’s perceived stance on the overall character of her learning experience appears to typify Kolb’s “Imagining Style”, described as “characterised by the ability to imagine possibilities by observing and reflecting on experiences”⁸⁸⁴. At this point, it is appropriate to acknowledge the extent to which I6’s personal experiences (which she acknowledges as having motivated her decision to study law⁸⁸⁵) may have affected her involvement in mooting. It has been recognised that the inevitable anxiety provoked by taking part in a moot, and the need to temper that

⁸⁷⁸ Lewin (1943) *op cit* p201

⁸⁷⁹ *ibid*

⁸⁸⁰ Kolb *op cit* p49

⁸⁸¹ Lynch *op cit* p88

⁸⁸² Kolb *op cit* p101

⁸⁸³ I6 interview 20th February 2019

⁸⁸⁴ Kolb *op cit* p145

⁸⁸⁵ I6 interview *op cit*

anxiety by exercise of the “critical detachment from personal commitment”⁸⁸⁶ expected of courtroom advocates, combined with “the stress of competition” and “other factors in a mooter’s personal life...may trigger a psychological state that is beyond their capacity to manage”⁸⁸⁷. This may have been so for this student, although it is impossible to arrive at such a definitive conclusion

Of relevance here, as with I4, is the fact that I6 is an international student who speaks English as a second language. The significance of such a factor has been noted elsewhere⁸⁸⁸, with reference made to the linguistic distinction between “basic inter-personal communicative skills”, and “cognitive-academic language proficiency” (“CALP”), proficiency in which latter attribute students speaking English as a second language may be slower to develop than native English-speaking students⁸⁸⁹. This, also, is likely to present a barrier to the understanding of law generally, as well as specifically within the context of the moot.

As was the case in Phase 1 for most of the students, there is no explicit or implicit acknowledgement of a change in respect of I6’s comprehension of the substantive law having been effected by her participation in the moot. The comments made by I6 suggest an intention to develop further to this end her apprehension of the law and legal studies brought about as a result of her moot experience. However, as stated in the previous chapter, she did not take part in any further moots. The reasons for this are not clear, but they appear to have been brought about by new or existing personal factors. It would be futile to attempt to dwell upon what transformative effect any such hypothetical moot may have brought about, but it should be acknowledged that cognitive or affective barriers have, in the case of this student, prevented the occurrence of any such potential transformation. I will expand upon these points below after considering the other students who took part in Phase 2.

I1’s transition to AΔI Form of Learning

In the case of I1, the distinction between his experiences of mooting in Phase 2, and Phase 1 appears to be the evidence of a much greater degree of RO upon his experience of mooting. This appears to have been contributed to by his preparing initially to represent the party that he was not instructed to represent, and the need to alter these preparations at short notice. As a consequence, I1 was required when preparing the “correct” moot argument to reflect upon the points that he had previously argued against. Mooting “off-brief” in this way is not

⁸⁸⁶ Thomas and Craddock (2018) *op cit* p322

⁸⁸⁷ *ibid* p336 (emphasis authors’ own)

⁸⁸⁸ Watson and Klaaren *op cit* p554

⁸⁸⁹ *ibid*

common practice in English university moot competitions, although it is in the United States. The practise has been criticised on the basis that it leaves students with a distorted impression of real courtroom practise⁸⁹⁰. Such criticism has been rebutted on the basis that the practise “will help students develop the useful habit of carefully analysing all sides of an issue before developing a final argument”⁸⁹¹.

In the case of I1, the effect of the (albeit accidental) implementation of this practise seems to have had the effect of a particularly vivid “discrepancy requiring explanation”⁸⁹². While the nature of this experience appears to have influenced heavily I1’s references to the CE learning mode in his interview reflections, its more noticeable impact is that it has increased considerably the extent to which he was required to adopt the RO Learning Mode in order to attempt to make sense of his experience by considering it from the perspective of both parties to the moot. Of particular significance for I1 appears to have been the outcome of the moot, at which point the judge decided the points of law against the party that he had originally prepared to argue in favour of, but ended up arguing against. The practice of “off-brief” mooting has been described as an example which “starkly illustrate[s]” the “incommensurability of values”⁸⁹³ required of a courtroom advocate, and the mental processing exercise carried out by I1 in attempting to rationalise his own sense of the “right” outcome of the moot, in accordance with his duty to represent his client, seems to have been particularly effective in challenging his understanding of the way in which case law is decided.

Of particular attention is I1’s observation that the moot was for him the most “interesting and engaging”⁸⁹⁴ experience that he had encountered during his legal studies to date as a result of his coming as a result of his moot preparation to empathise with his fictitious client. This raises an important point, in the context of those referred to in the authorities highlighted above, as to the seemingly contradictory purposes of the use of mooting as a “legitimate teaching tool”⁸⁹⁵ for undergraduate students to learn about the substantive law, as opposed to its being used as a vocational training exercise for aspiring lawyers. The evidence of I1’s experience suggests that in respect of the former purpose, the degree to which the mooter can empathise with their “client” makes for a richer learning experience, whereas in respect of

⁸⁹⁰ Kozinski *op cit* p185

⁸⁹¹ Hernandez *op cit* p74

⁸⁹² Dewey (1933) *supra* fn 845

⁸⁹³ Thomas and Craddock (2018) *op cit* p322

⁸⁹⁴ I1 second interview *op cit*

⁸⁹⁵ Hernandez *op cit* p74

the latter purpose, this same factor can detract from the “incommensurability of values”⁸⁹⁶ cited above as being an important aspect of professional legal training, which has been likened in this respect to “teaching paid assassins to aim better”⁸⁹⁷. This in turn evokes the argument that the role of a “liberal legal education” is “not aimed at preparing students for a particular job or profession”⁸⁹⁸. I will expand upon this point in the final chapter of this thesis.

Although I1 comments that this particular moot experience helped him to better understand the law involved in the moot⁸⁹⁹, the tenor of his responses suggests that, overall, the AC Learning Mode prevalent in this respect in his first moot is less dominant on this occasion. Rather, the trend is towards the two Modes referred to above, as well as AE. This latter Mode is demonstrated in I1’s expressed concerns as to the extent to which he considered his performance in this moot to have developed as a consequence of his experience in his earlier moot as well as the adaptations to their moot preparation made by himself and his partner. I1 also highlights as an important aspect of this moot his own readiness, based upon his perceived growth in confidence following his first moot, to actively experiment when making unscripted submissions in response to the judge’s interventions (or, as he puts it, to “wing it”⁹⁰⁰).

Overall, the predominant Learning Style demonstrated by I1 in this moot appears to be the Experiencing Style (“characterised by the ability to find meaning from deep involvement in experience”⁹⁰¹), and dominant Form of Learning the AΔI form. At first glance, with regard to the philosophical concept that one “ascend[s]” beyond “knowledge of acquaintance” to “knowledge-about”⁹⁰² (these latter concepts being equivalent to Kolb’s “apprehension” and “comprehension” respectively) this may appear to be a retrograde step in I1’s learning process. However, regard should be had to the concept of experiential learning as a spiral⁹⁰³, whereby the transformation of learning that takes place with each experience “describes the course of...learning and development”⁹⁰⁴. A conclusion can be drawn that the experience of

⁸⁹⁶ Thomas and Craddock (2018) *supra* fn 893

⁸⁹⁷ Hegland, K (1982) “Moral dilemmas in teaching trial advocacy” 32(1) *Journal of Legal Education* 69, p69 (cited *ibid*)

⁸⁹⁸ Guth, J, and Ashford, C (2014) “The Legal Education and Training Review: Regulating Socio-Legal and Liberal Legal Education?” 48(1) *Law Teacher* 5, p6

⁸⁹⁹ I1 second interview *op cit*

⁹⁰⁰ *ibid*

⁹⁰¹ Kolb *op cit* p145

⁹⁰² James (1890) *supra* fn 857

⁹⁰³ Kolb *op cit* pp63-5

⁹⁰⁴ *ibid* p63

this moot in fact represents a progressive step in I1's experiential learning development, and that transformation of the comprehension of the law involved may have played more of a dominant role in further moots.

I2's transition to CΔI Form of Learning

The operation of the experiential learning cycle is apparent in Phase 2 also in the case of I2, where the CE mode that dominated his reflections upon his initial moot is much less apparent. His comments in his interview draw to a greater extent upon the other three Learning Modes. His perceptions of the positive effect in this moot of the practical application of his experience in working as a team, as well as with regard to his personal growth in confidence between the two moots causing him to feel better able to state his points clearly, suggest the importance of AE. However, more prevalent in I2's perceptions of this moot are the RO and AC modes. The former is evident in I2's reflections upon his perceived necessity to reflect upon the submissions likely to be relied upon in this moot in order to advance either party's case, which for I2 is particularly relevant to this moot due to the presence of an opposing team. The latter mode presents itself in I2's descriptions of the efforts that he made to understand the points of substantive law in order to argue these effectively in the moot, these being points that he had not previously made significant efforts to comprehend, due to their not forming part of his Criminal Law exam⁹⁰⁵. Accordingly, the CΔI Form of Learning is evident in I2's approach, which fits Kolb's category of an "Analysing Style" ("characterised by the ability to integrate and systematize ideas through reflection" ⁹⁰⁶). I2's account represents the clearest example in this study of the practical operation of the experiential learning process, whereby "reflections are assimilated and distilled into abstract concepts from which new implications for action can be drawn"⁹⁰⁷.

I4's transition to AΔI Form of Learning

As was the case with I1 and I2, I4's expressed perceptions of this moot are influenced by comparisons between her experiences of this moot and of her previous moot, both with regard to her preparation for the moot, and her involvement in the moot itself. Although she expresses some strongly negative views (which I will refer to below) about some aspects of this experience, her interview also includes positive reflections upon this moot. These draw upon the RO and AE Learning Modes, primarily in relation to the ways in which the experience of her first moot has facilitated her capacity to amend the approaches that she adopted in the

⁹⁰⁵ I2 second interview *op cit*

⁹⁰⁶ Kolb *op cit* p145

⁹⁰⁷ *ibid* p51

first moot, and reflect upon what she has learned from those experiences. This can be seen in operation most clearly in relation to the changes that she describes⁹⁰⁸ making to her moot preparation, specifically with regard to meeting her teammate and to researching case law, as well as in respect of the moot performance itself, wherein she describes how her assimilation⁹⁰⁹ in relation to this experience assisted her ability to understand and respond to the points made by her opponents.

As with I6, I4's dominant Learning Mode appears to be AΔI. Her transformative learning experience in respect of this moot as opposed to the previous one appears to have been characterised by her apprehending by way of her reflections of, and experimentation based upon, her assimilation and accommodation⁹¹⁰ of her previous experiences in order to effect a greater understanding of the tasks necessary to participate in a moot. However, there is an absence of evidence in respect of her comprehension of the relevant points of substantive law having developed. This focus upon apprehension rather than comprehension is evident in I4's emphasis in her interview of the perceived importance of avoiding inappropriate language⁹¹¹.

Overall, the predominant Learning Style demonstrated by I4 in this interview is the Imagining style. This is particularly apparent in respect of the negative views expressed in her interview, focussed upon the difficulties that she experienced in working with her partner, which demonstrate a strong influence of the CE learning mode. The personal impact of this experience figures heavily towards the end of the interview, at which point I4's frustration and anxiety is evident as a result of her "reexperie[n]c[ing] the situation as well as the emotions associated with it"⁹¹². I4 suggests at one point that these emotions have given her cause to consider taking no further part in this study. Ultimately, I4 and I6 did not take part in the final organised moot. The reasons for this can only be speculated upon, although the likely impact of the difficulties expressed by I4 cannot be ignored. It is evident, however, that a degree of experiential learning development has taken place in I4's case, albeit not of the same character as occurred in relation to I1 or I2. Whether further moot involvement might have facilitated any such development is, again, only speculation, but the roles of affective and cognitive barriers in impeding any such potential development in I4's case must at least be acknowledged.

⁹⁰⁸ I4 second interview *op cit*

⁹⁰⁹ Piaget *op cit* p6

⁹¹⁰ *ibid*

⁹¹¹ I4 second interview *op cit*

⁹¹² Abbey *et al*, *op cit* p479

Consideration of deviant cases and revisions to preliminary hypothesis (Phase 2)

Having positioned within experiential learning theory the perceived experiences of the students involved in the first two Phases of the study, it is appropriate at this stage to attempt to identify any satisfactory explanation for the deviant cases presented thus far. As explained above, the significance of Phase 2 lies in the evidence of the experiential learning process in operation in order to exemplify the hypothesis in the case of some, but not all, of the student participants. While there is some evidence of that development in the cases of I4 and I6, and that the pedagogical effect of that development may well be positive, the principal conclusion in respect of these students (as with I3 in Phase 1) that may be drawn based upon the evidence presented is that their perceived learning experience was “of a different kind”⁹¹³ from that which they had experienced elsewhere in their studies.

Accordingly, it is necessary to attempt to identify any unifying theme that might suffice to explain the deviant cases involved in this study thus far. If anything, that appears to be the presence of *cognitive or affective barriers to learning*. The presence of *affective* barriers in the case of I3 is evident in respect of her reaction to her personal circumstances, as well as her interpersonal difficulties in working with her partner. This latter factor is apparent also in the cases of I4 and (based upon the comments made by I4, and in her decision to withdraw from the study⁹¹⁴) I6. Also evident in the case of these students are *cognitive barriers* impeding the comprehension of substantive law by way of either intention or extension as a result of the moot experience. These barriers may be due to lack of CALP, or may be a consequence of the affective barriers obstructing effective teamwork to the extent necessary for these students to develop such comprehension. In the case of I2, it is necessary to consider whether this characteristic describes his position following Phase 1. While there is no evidence in his expressed perceptions following that Phase of any affective barriers arising out of either his personal circumstances or his working relationship with his moot partner, I2’s focus upon apprehension rather than comprehension in this study may be due to *cognitive* barriers preventing the development of the experiential learning process for him at this stage. It is not clear from his interviews precisely what form these barriers may have taken, but there is some suggestion in both of his interviews, triangulated by the interview with his seminar tutor, that they may be due to a lack of confidence, manifesting itself what has been defined as “intellectual anxiety”⁹¹⁵ whereby a moot participant lacks confidence in “presenting a complex

⁹¹³ Watson and Klaaren *op cit* p556

⁹¹⁴ Email from I6 to Ross Fletcher, 27th May 2019

⁹¹⁵ Thomas and Craddock (2018) *op cit* p374

cognitive argument⁹¹⁶. The impact of this factor, it has been noted, can be reduced by “close analyses of the cognitive content of the mooter’s argument”⁹¹⁷. This appears to have been the case for I2, as suggested by his description of the additional preparatory work undertaken by himself and his partner in order for them to prepare their moot submissions. The consequent effect of this, it may be submitted, has been to facilitate the progression of his perceived understanding of the substantive law to a degree of comprehension not previously attained. It is submitted that further moot experience might have effected a similar transformation in respect of the other deviant cases.

Accordingly, my revised hypothesis is as follows:

The experiences of preparation for, and participation in, mooting, *will* effect a positive transformation of a student’s apprehension of the way in which case law is decided. These experiences *can* also effect a positive transformation of a student’s comprehension of the substantive law involved in the moot. However, the student *may* encounter *cognitive* or *affective* barriers that impede this transformation. The experience of participation in *additional* moots *may* enable the student to overcome these barriers, and thereby effect this transformation.

I will now consider the findings relating to Phase 3 in order to determine whether it is necessary to make any further revision to this hypothesis in the light of the findings from that Phase of the study.

Analysis of findings following Phase 3

I5’s transition to CΔE Form of Learning

I5’s expressed perceptions in respect of this interview draw less upon the actual experience of the “moot” that preceded it and more upon his observations of the differences that his experiences of mooting have made to his understanding of substantive law, as well as the ways in which he has accommodated his moot involvement into his personal life and the consequent benefit that he perceives himself to have derived from this. This demonstrates a particular dominance of the AC and AE Learning Modes in respect of the ways in which I5 has conceptualised his learning substantive law by way of his moot experiences as a vehicle for facilitating development in this respect, and in doing so implemented the CΔE form of learning. This suggests a further demonstration of the experiential learning cycle⁹¹⁸ in practice, whereby

⁹¹⁶ *ibid*

⁹¹⁷ *ibid*

⁹¹⁸ Kolb *op cit* p51

I5 has drawn upon his reflections of his prior moot experience to reconceptualise his understanding of the substantive law, and to actively experiment by using this in practice. The shift in terms of Learning Style is to the “Deciding” style, which Kolb describes as “characterised by the ability to use theories and models to decide on problem solutions and courses of action”⁹¹⁹. This ability can be seen in practice in respect of I5’s explicit discussion of his adaptation and application of his moot preparation in order to ensure a perception of sufficient comprehension to prepare for assessments.

Revisions to preliminary hypothesis (Phase 3)

It is now necessary to consider whether these conclusions necessitate any further revision to the provisional hypothesis set out above. I5’s case does not demonstrate, on the face of it, any characteristics of a deviant case in respect of the hypothesis as presented. However, it is necessary to consider one important factor that arises in relation to I5’s participation in this study. This relates to his personal circumstances, both in respect of his preparation for the Phase 3 moot as explicitly discussed in this interview⁹²⁰ and as the stated reasons for his non-participation in Phase 2⁹²¹. Clearly, these circumstances presented what I have referred to above as *affective barriers* to moot participation for I5. However, I5 appears not only to have “overcome” the difficulties presented by these circumstances, but to have in fact implemented them as part of the experiential learning process. It is, therefore, appropriate in this context to draw upon Piaget’s theory of knowledge as based upon the “continuous construction of new structures”⁹²², and revise the hypothesis, in the light of I5’s experiences, to refer to the *dismantling* of these barriers, and their *reconstruction* as components of the constructed learning experience.

The last sentence of the above hypothesis, therefore, should be revised as follows:

Further moot participation *may* enable the student to *dismantle* and *reconstruct* these barriers into an integrated part of the transformative learning experience.

Summary of analysis

In the last two chapters, I have set out my response to Objective 5 by explaining the two stages whereby I have analysed the data that I have obtained from this study. These have culminated in a final hypothesis to be applied in order to answer the research question posed at the start

⁹¹⁹ *ibid* p145

⁹²⁰ I5 second interview *op cit*

⁹²¹ Email from I5 to Ross Fletcher, 14th February 2019

⁹²² Piaget *op cit* p91

of this thesis, and thereby help to understand how mootings can be used as a method of teaching substantive law in higher education. In the final chapter, I will respond to Objective 6 by setting out the contributions that this study makes to the practice and theory of legal education, and the final conclusions to be drawn from this thesis.

CHAPTER 6:

CONTRIBUTIONS AND CONCLUSIONS

In the final Chapter of my thesis, I will fulfil Objective 6 by setting out the conclusions that I have drawn from the findings that I have set out in the last two chapters. In doing so, I will explain how I consider my research to have made contributions to the understanding of practice and theory that underpins the principal research question (*“How do students’ experiences of, and approaches to, mooting, affect their learning of substantive law and understanding of the law?”*) that I have aimed to answer in this thesis.

Contribution to Practice

I am of the view that the research I have carried out makes an original contribution to teaching practice. This is apparent from the ways in which this research fills several of the gaps that I identified at the end of Chapter 2 as existing in the existing literature relating to empirical studies of mooting in higher education.

First-year student experience of learning the law

One such gap exists in respect of the failure of the existing literature to address the specific experience of mooting by first-year English law students. As explained throughout this chapter, my research has focussed upon this particular experience, and culminates in a range of findings in respect of how the experience of mooting is perceived by the students involved to differ from the other learning experiences in which they are engaging during their first year of studying law. A significant finding in this respect concerns the emphasis placed by several students⁹²³ upon the formal courtroom vernacular required of students taking part in the moot in order to comply with courtroom procedure, which involves terminology and forms of address different from that adopted during seminars, which differ again from that used in students’ everyday conversation. Similarly, particular emphasis was placed upon the value of the moot by reference to its narrative format, which one student described as a format conducive to

⁹²³ I2, first interview, 27th November 2018; I4, first interview, 27th November 2018

learning the law involved, and which he would be deploying in order to adapt his other strategies for learning and revising points of law⁹²⁴

The research contained within my study can be distinguished from the existing literature in this area by the degree to which it focuses upon the relationship between the student participants' perceptions of their understandings of substantive law, and the perceptions of the same students by their seminar tutors. This is of particular relevance in respect of a student who expressed a perception of an adequate pre-moot legal understanding, support for which was given in the observations of that student by his seminar tutor⁹²⁵. Similarly, the qualitative research that I have carried out identifies tutor observations as to their perceptions of the depth⁹²⁶ or lack of depth⁹²⁷ of legal understanding demonstrated by their students in order to explore how these factors can inform team dynamics and thereby affect the learning experience of the moot.

The perceived effect of the adversarial character of mooting

A further distinctive feature of this research is its identification of the different approaches and perceptions of students, even within a moot partnership⁹²⁸, to the adversarial nature of mooting, and the extent to which the learning experience of mooting can be informed by the presence of an opponent, and the nature and content of the submissions made by that opponent⁹²⁹. This highlights as a particularly beneficial aspect of the moot experience the effect upon a student's own motivation of a perceived greater degree of competence in advocacy on the part of a moot opponent⁹³⁰. Related to this is the perceived benefit for a student lacking in understanding of the relevant law in obtaining access to an example of good practice through a moot performance by an opponent more adept in this respect⁹³¹.

An additional identified benefit is the positive impact upon a student's self-confidence that can be brought about due to that student's reflection upon their own ability to adapt their submissions during the moot, which was perceived to arise here⁹³² in the case of a student

⁹²⁴ I1 second interview, 18th February 2019

⁹²⁵ *loc cit*; T1 interview (I2), 6th December 2018

⁹²⁶ T2 interview, 10th December 2018

⁹²⁷ T1 interview (I4), 11th December 2018

⁹²⁸ I1, first interview, *op cit*; I2, first interview, *op cit*

⁹²⁹ I4, first interview, 27th November 2018; I5, first interview, 28th November 2018

⁹³⁰ I4, first interview, *op cit*

⁹³¹ *loc cit*

⁹³² I2, second interview, 18th February 2019

previously identified as lacking in confidence in applying legal understanding by both himself and his seminar tutor⁹³³. That student's self-confidence was perceived in turn by him to have made more of an incremental increase following his second moot⁹³⁴, particularly in respect of the amendments that he and his partner had had to make to their submissions due to their preparing the case for the incorrect party to the moot⁹³⁵, and to his own description⁹³⁶ of his adaptations that he made to his processes of case preparation in between the two moots. Conversely, the research highlights as a potential effect of the moot experience (specifically, the student's identification of the detrimental impact upon the moot of submissions that are legally inaccurate⁹³⁷) a reduced level of confidence in making inaccurate contributions towards seminar exercises, with a perceived consequential increase in accurate application of legal understanding⁹³⁸. Also of interest is the fact that the interviews contain limited reference to the outcome of the moot as having had any effect upon the students' learning experience, suggesting that concerns as to benefits to learning being outweighed by any disappointment involved in "losing" a moot may be misplaced. If nothing else, this research provides an example that contradicts the trend of media depictions of the current generation of students being resistant or hostile to criticism of their world view⁹³⁹.

The perceived effect of the judge's feedback

Related to this is the perceived benefit of the feedback available arising out of the judge's post-moot comments, upon which two of the students⁹⁴⁰ placed specific importance. Similar importance was attached by another student in his second moot of his experience of having had questions put to him by the moot judge in his previous moot, which experience he states enabled him to adapt a greater degree of flexibility in deploying his prepared submission⁹⁴¹. He also attached particular value to the experience in a later moot of answering the questions put by the moot judge, recognising this exercise (irrespective of its content) as a way of

⁹³³ I2, first interview *op cit*; T1 interview (I2) *op cit*

⁹³⁴ I2 second interview *op cit*

⁹³⁵ *ibid*

⁹³⁶ *ibid*

⁹³⁷ I4 first interview *op cit*

⁹³⁸ T1 interview (I4) *op cit*

⁹³⁹ See Mount, H. (2015) "It's time to say No to our pampered student emperors" *The Daily Telegraph*, 29th December. Available at <https://www.telegraph.co.uk/education/educationopinion/12073349/Its-time-to-say-No-to-our-pampered-student-emperors.html> [last accessed 9th March 2021] for a representative example.

⁹⁴⁰ I5, first interview *op cit*; I6 Interview, *op cit*

⁹⁴¹ I1, second interview *op cit*

developing a transferable skill⁹⁴². These perceptions emphasise the peculiar nature of mooting as a form of experiential learning that implements an element of didactic learning, which feature is not given much attention in the existing literature, but without which (from the perspective of at least some moot participants) the moot would be considerably less rich as a learning experience.

The perceived effect of extraneous factors upon the moot experience

My research is also distinguished by its focus upon the students' own perceptions of how their experiences of mooting can be significantly affected by the pressure brought about by factors extrinsic to the moots in which they are involved, as well as factors arising during the moot. Such factors include the potential adverse impact of a negative relationship between moot partners⁹⁴³, particularly when viewed alongside the finding in respect of a student in such a relationship (following triangulation) that a positive group working environment appeared to be perceived not to be of great significance towards effective seminar participation⁹⁴⁴, as well as the positive motivation in respect of student learning that can be brought about by a desire to make individual submissions in such a way as to "do justice" to work prepared as part of a group⁹⁴⁵. The research also identifies the impact upon a student's mooting experience that extrinsic factors can have. In the case of one student, her degree of emotional investment in her decision to study law may have been a factor contributing to her difficulty in working effectively as part of a team with her moot partner⁹⁴⁶. Conversely, there is evidence that such factors can have a positive influence upon the moot experience. This is particularly relevant to two students who describe themselves as having been motivated to study law by their experiences of dealing with upsetting personal experiences⁹⁴⁷. Based upon their perceptions as expressed in their interviews, these students appeared to have perceived themselves as having obtained the greatest benefit of the students interviewed in respect of their understandings of substantive law, a point which is of particular relevance in respect of one of the students, who describes his moot experience as having enabled him to acquire an understanding of the points of law that he "[will not] need to revise...because I've used it in that situation it'll be with me"⁹⁴⁸. Moreover, the other one of these two students describes

⁹⁴² I5, second interview *op cit*

⁹⁴³ I3 interview *op cit*; I4, second interview, 19th February 2019

⁹⁴⁴ T2 interview *op cit*

⁹⁴⁵ I1, first interview, 26th November 2018

⁹⁴⁶ I6 interview 20th February 2019

⁹⁴⁷ *loc cit*; I5, first interview, 28th November 2018

⁹⁴⁸ I1 second interview *op cit*

himself in a later interview⁹⁴⁹ as continuing to be affected by personal difficulties, but also continues to express his perceptions of mooting as the most effective method of providing a focus upon the study of law, as well as respite from his personal concerns. The dualistic nature of the pressures involved in mooting is an important point for anyone intending to make use of mooting as a teaching tool, particularly in respect of students with similar personal circumstances.

Also of significance in this respect is the impact of cultural and language barriers (which I have triangulated in this study by interviewing the seminar tutor for one of the students for whom these are relevant concerns⁹⁵⁰) and the potential, brought about by the degree of personal involvement necessary for effective moot preparation, to activate an emotional reaction to the moot environment, with consequential detrimental impact upon the learning experience⁹⁵¹.

Perceived positive impact upon understanding

A final distinctive feature of this research is the explanation given by the students involved, including some for whom the overall experience was perceived to be negative⁹⁵², for their perception of the moot as having had a positive impact upon their understanding of the law involved. Particularly of relevance here is the expressed perception that the tension exerted by the moot in respect of the points of substantive law involved contained a positive valence that would subsist after the conclusion of the moot⁹⁵³. I submit that these findings are of particular interest when considered in the context of the body of theoretical work which underpins them, the contributions made thereto by my research I shall go on to describe in the next section of this chapter.

A final contribution to practice can be seen in respect of the comments made by I1 relating to the opportunity provided by the moot experience to empathise with his fictitious client. These, I submit, present a strong argument for the potential deployment of mooting in undergraduate legal education to facilitate an affinity on the part of students with the ethical dimension of legal practise. It has been claimed⁹⁵⁴ that preparation of students for legal practise is not the proper role of “a liberal legal education”. However, it has been argued forcefully elsewhere that because a legal education is a prerequisite to a career in legal practice, for those students

⁹⁴⁹ I5, second interview, 28th May 2019

⁹⁵⁰ T1 interview (I4), 11th December 2018

⁹⁵¹ I6 Interview *op cit*

⁹⁵² I3 interview *op cit*

⁹⁵³ I1 first interview *op cit*; I2, second interview, *op cit*

⁹⁵⁴ Guth and Ashford *loc cit*

who intend to practice law, the tuition in ethics required in English legal education as part of the professional skills training courses required by the Bar and the Law Society “leave[s] future practitioners without the foundations for reflective judgment”, as they “focus primarily (and uncritically) on...disciplinary rules”, and as such “leave[s] future practitioners without the foundations for reflective judgment”⁹⁵⁵. The experience of I1 provides an example that can be drawn upon to infer that integration of mooting into an undergraduate degree programme can not only facilitate the development of the analytical and public speaking skills beneficial to careers in the law and elsewhere, but may also afford an opportunity for students to “discover [ethical] problems, rather than hav[e] them spoon-fed” and thereby facilitate “optimal learning”⁹⁵⁶ of those same ethical issues.

Contributions to theory

The role of mimesis in student understanding of the law

An important point arising out of my research relates to the application to the environment of learning law of the opportunity to empathise with a construct representing a lay client, and thereby attempt to gain a greater degree of comprehension of the point of law as it affects that person. This was perceived to be particularly important aspect of the moot by one of the student participants, and one which he perceived to make the moot experience “far more interesting and engaging than any other kind of learning experience”⁹⁵⁷. Further evidence of this facet of mooting can be seen in operation in respect of another student’s description of the transposition of the technique of having regard to the submissions made on behalf of both parties to a moot, which he identified as necessary to make persuasive submissions on behalf of the party that he had been instructed to represent in the moot. The student describes himself as having acquired by way of this technique a greater degree of confidence and aptitude in discerning the salient points of case law necessary to obtain a satisfactory result in his Contract Law exam⁹⁵⁸.

⁹⁵⁵ Duncan, N. J. and Kay, S. (2010). “Addressing Lawyer Competence, Ethics, and Professionalism” in Bloch, F. S. (ed.) (2011) *The Global Clinical Movement: Educating Lawyers for Social Justice*. (pp. 183-195). New York: Oxford University Press, p186, quoting Rhode, D (2003) “If Integrity Is the Answer, What Is The Question?” 72 *Fordham Law Review* 333, p340

⁹⁵⁶ Duncan and Kay *loc cit*

⁹⁵⁷ I1, second interview, 18th February 2019

⁹⁵⁸ I5, second interview, 28th May 2019

The research also contains evidence, as demonstrated in the case of another student, of how an understanding of points of substantive law can be transformed⁹⁵⁹ by the requirement imposed by involvement in a moot to prepare persuasive submissions in respect of those points⁹⁶⁰. It should be noted that evidence of a similar perception was not apparent in respect of this student in his first interview⁹⁶¹, nor by his seminar tutor in an interview following the first moot in which this student participated⁹⁶². It was also not apparent in respect of another student participant in an interview following her only moot⁹⁶³ or by that student's seminar tutor⁹⁶⁴. This, in my opinion, provides highly persuasive evidence that, in at least some cases, the theoretical benefits of learning by role-play can be applied to derive practical benefits for learners.

Application to moot practise of experiential learning theory

My research can be distinguished from the extant literature on this subject by reference to its explicit focus upon the application to the process of mooting of experiential learning theory, in its form as developed by David A. Kolb, as well as the theoretical foundations for this theory drawn upon by Kolb. This is demonstrated by the operation of a "system in tension"⁹⁶⁵ in respect of the rapid dissipation of the pre-moot disagreement between I5 and I4. The theory is also evident in respect of the Forms of Learning adopted by the student participants, which differ depending upon the approach towards the learning experience adopted by the student participants. For example, the "Comprehension transformed by Intention" ("CΔI") Form of Learning adopted by I5 describes the way in which he perceives his learning to have been brought about by his reconceptualization of the nature of the moot, rather than his physical involvement in the moot.

The contribution made by this study to the body of literature on experiential learning theory is evident also in the Learning Modes demonstrated by the students, which in Phase 1 of the study, and (particularly strongly) in the case of I6 in Phase 2, draw heavily upon the mode described as "Concrete Experience", described by Kolb as typified by "feeling as opposed to thinking"⁹⁶⁶. A tendency towards the "Active Experimentation" Learning Mode is also evident

⁹⁵⁹ Kolb *op cit* pp63-5

⁹⁶⁰ I2, second interview, 18th February 2019

⁹⁶¹ I2, first interview, 28th November 2018

⁹⁶² T1 interview (I2), 6th December 2018

⁹⁶³ I3, interview 27th November 2018

⁹⁶⁴ T2 interview, 10th December 2018

⁹⁶⁵ Marrow *supra* fn243

⁹⁶⁶ Kolb *op cit* p63

in this Phase of interviews, as the students go on to describe their perceived benefits of involvement in the moot irrespective of its outcome, typifying the moot as a “discrepancy requiring explanation”⁹⁶⁷. The study illustrates that it should not be assumed that evidence of engagement with the full experiential learning cycle will be apparent in the case of all participants in a moot, or indeed any learning experience. This is exemplified in that, while the “Reflective Observation” Mode of Learning is present in the cases of some⁹⁶⁸ of the participants in this phase through their reflections upon their understanding of the relevant substantive law both before and after the moot, such evidence was not present for the other participants in this Phase, nor in the case of I6 in Phase 2. These latter two modes are, however, clearly demonstrated in Phase 2 in the case of I4⁹⁶⁹, suggesting that, in the cases of some learners, multiple instances of the same kind of learning experience may be necessary for that learner to engage fully with the experiential learning cycle. It is also of relevance that in I1’s second interview⁹⁷⁰, he goes on to demonstrate an even stronger engagement with the RO Learning Form. This is a likely combination of his repeated exposure to the moot as a learning experience, and the particular change to that experience brought about by his being required (by accident, rather than design) in that moot to “moot off-brief”. While this practice has been criticised for lacking realism⁹⁷¹, its having made a significant contribution to the experiential learning process for at least this student suggests that a case can be made for its more widespread use as a learning method. In I5’s second interview⁹⁷², the operation of the experiential learning cycle is present also by reference to that student’s greater focus upon the “Abstract Conceptualisation” and “Active Experimentation” Learning Modes than in his previous interview in respect of the ways that he considers his moot experiences to have been accommodated into his personal learning methods, and personal life generally. My research can also be used to inform the body of literature on experiential learning theory in that I do not attempt to construct evidence of learning by experience in every case examined, but instead identify cases (specifically, I4 and I6) where this does not appear to have occurred, and provide theoretical explanations for why such a transformative effect does not appear to have taken place, as well as arguments for how such an effect might be realised.

The research demonstrates the ways in which the Learning Styles defined by Kolb can be used to describe the learning processes engaged in by student participants in a moot. This

⁹⁶⁷ Dewey, J (1933) *supra* fn 845

⁹⁶⁸ I1, first interview, 26th November 2018; I5, first interview, 28th November 2018

⁹⁶⁹ I4, second interview, 19th February 2019

⁹⁷⁰ *op cit*

⁹⁷¹ Kozinski *op cit* p185

⁹⁷² *op cit*

can be seen in respect of some of the barriers that the students perceived themselves to have experienced- for example, in relation to the Initiating Style demonstrated by several of the students taking part in the first moot⁹⁷³ and the Imagining Style demonstrated by I4 in her second moot⁹⁷⁴, and by I6 in her only moot⁹⁷⁵. My research demonstrates how the learning style adopted by a student can be a consequence of the relationship between the student and their moot partner, as seen in one student's evocation of perceived negative aspects of this experience⁹⁷⁶. This factor is also demonstrated to inform the basis whereby the student learning process can be understood, constituting as it does a perceived affective barrier to learning⁹⁷⁷.

It can also be seen through this research that that a Learning Style, rather than being a fixed personality trait, is a mutable concept that can change with the different experiences of the students. This is relevant when considering the perceived learning and experiences of the student participants in the study who mooted more than once, and particularly so in respect of I2, who in his second interview⁹⁷⁸ describes perceptions that accord with the adoption of an "Analysing Style"⁹⁷⁹ through the adoption of an "Comprehension transformed by Intention" form of learning.

Understanding the interplay between student learning and moot practise

A further relevant contribution to experiential theory is the explication through this research of how a student's perceived learning benefit from mooting can be informed by that student's personal accommodation of mooting into the fabric of the student's personal life⁹⁸⁰. This can be seen in the reflection by one of the student participants upon her having experienced in a moot the perceived detrimental effect of making a submission that lacked legal foundation, and the subsequent perception by her seminar tutor of an effort by the student to develop her practice as a learner in the light of this experience⁹⁸¹. Similar comments demonstrating what Kolb describes as "Apprehension transformed by Extension"⁹⁸² were made in interviews with

⁹⁷³ I2, first interview, *op cit*; I3, interview *op cit*; I4, first interview, 27th November 2018

⁹⁷⁴ I4, second interview *op cit*

⁹⁷⁵ I6, interview 20th February 2019

⁹⁷⁶ I4, second interview, 19th February 2019

⁹⁷⁷ I3 interview *op cit*; I4, second interview, 19th February 2019

⁹⁷⁸ *op cit*

⁹⁷⁹ Kolb *op cit* p145

⁹⁸⁰ *ibid* p146

⁹⁸¹ I4, second interview *op cit*. T1 interview (I4), 11th December 2018

⁹⁸² Kolb *op cit* p101

the seminar tutors of other student participants⁹⁸³. A similar phenomenon is apparent in respect of I5, which observation is described below.

A further example of the theoretical significance of this study can be seen in respect of the learning development experienced by two of the student participants⁹⁸⁴ through engagement in mooting in an apparent perceived transition in their understanding of the substantive law involved from “apprehension” to “comprehension”⁹⁸⁵, which can be explained by reference to the Learning Form categorised by Kolb as “Abstract Conceptualisation” (AC)⁹⁸⁶. Of significance also are the distinctions that can be drawn by reference to experiential learning theory between the learning processes that took place for those two students. Specifically, this relates to the Forms of Learning and Learning Styles adopted by these students. In the case of one student’s first moot experience⁹⁸⁷, this can be described as drawing heavily upon the “extension”⁹⁸⁸ to his learning brought about by his concentration upon his involvement in the moot process, and his adaptation of the four Learning Modes can be described as indicative of a “Balancing” style⁹⁸⁹. In that same student’s second moot, I identified evidence of the operation of Kolb’s concept of experiential learning as a spiral⁹⁹⁰ in order to explain the process whereby the student’s development in the dimension of “comprehension” in the first moot was drawn upon to inform the development of his “apprehension” of the substantive law through the adoption of the “Experiencing Style”⁹⁹¹ of learning in his second moot.

In the case of the other student⁹⁹², his perceived learning process primarily involves a reconceptualization of his own understanding, and can be described by reference to Kolb’s concept of “intention”, and an application of a “Thinking Style”⁹⁹³. The development of this student’s learning in subsequent moots can also be explained by reference to experiential learning theory, as in his second moot the student’s explicit description of his adaptation and application of his moot preparation to prepare for assessments⁹⁹⁴ suggests the deployment of

⁹⁸³ T1 interview (I2), *op cit*; T2 interview, 10th December 2018

⁹⁸⁴ I1, first interview, 26th November 2018; I5, first interview, 28th November 2018

⁹⁸⁵ Kolb *op cit* pp70-71

⁹⁸⁶ Kolb *op cit* p105

⁹⁸⁷ I1, first interview, *op cit*

⁹⁸⁸ Kolb *op cit* p101

⁹⁸⁹ *ibid* p145

⁹⁹⁰ Kolb *op cit* pp63-5

⁹⁹¹ *ibid*

⁹⁹² I5, first interview, *op cit*

⁹⁹³ Kolb *op cit* p145

⁹⁹⁴ I5, second interview, *op cit*

the “Comprehension transformed by Extension” (“CAE”)⁹⁹⁵ Form of Learning, and the “Deciding” Learning Style. An aspect of this development is the assimilation into the student’s learning process of the difficulties he has experienced in his personal life, which provides a counter-argument to the phenomenon described above.

Final Conclusions

At this point, it is necessary to revisit my research question (*How do students’ experiences of, and approaches to, mooting, affect their learning of substantive law and understanding of the law?*) and consider to what extent I have answered this by arriving at the final hypothesis set out at the end of Chapter 5⁹⁹⁶. To do so requires consideration of the gaps that I identified in Chapter 2 in respect of the existing literature on mooting, The gaps in the literature in respect of qualitative research into the student experiences of mooting as a method of learning, and of the mooting experience of first-year law students as underpinned by references to experiential learning theory have, it is submitted, been filled by the findings of and conclusions drawn from my research, as discussed in this and the previous Chapter.

It remains, therefore, to fill the gap outstanding in respect of the appropriate place for the implementation of mooting, conceived as a method of learning the substantive law, within the first year of a law degree. My research suggests that mooting *can* be beneficial in helping develop legal understanding⁹⁹⁷, and as such its implementation into the first year of a law degree programme should be considered. However, the qualifications to the hypothesis set out above suggest the presence of factors relating to mooting as a teaching tool that may prevent the efficacy of its use for that purpose. The presence of these factors in the case of the student who was the most enthusiastic⁹⁹⁸ about the moot process suggest that such risks may not be apparent to either tutors or students at the start of the moot process. The nature of moot preparation is such that a tutor has limited capability to take steps to remedy the

⁹⁹⁵ Kolb *op cit* p101

⁹⁹⁶ “The experiences of preparation for, and participation in, mooting, *will* effect a positive transformation of a student’s apprehension of the way in which case law is decided. These experiences *can* also effect a positive transformation of a student’s comprehension of the substantive law involved in the moot. However, the student *may* encounter *cognitive* or *affective* barriers that impede this transformation. *Further* moot participation *may* enable the student to *dismantle* and *reconstruct* these barriers into an integrated part of the transformative learning experience”

⁹⁹⁷ *c.f* Watson and Klaaren *op cit*

⁹⁹⁸ I4. This student’s enthusiasm was commented upon by her seminar tutor also (T1 Interview (I4) *op cit*)

difficulties caused by these risks in the same way as might be the case for a student experiencing difficulties in (for example) seminar preparation. These present arguments against mooting as a compulsory teaching exercise⁹⁹⁹ or summative assessment method¹⁰⁰⁰.

However, the advantages perceived by the students that mooting has over other teaching and assessment methods, in the light of their own perceived learning experiences, suggest an argument for adopting mooting as either, or both, of the following:

1: an alternative method of studying any, or all, compulsory modules on an undergraduate programme of study.

This would allow any students who elected to do so to choose to study some, or all, of the modules offered on a law degree by way of an introductory lecture to the fundamental components of each subject, followed by primarily self-directed moots on each subject area, judged by the module teaching team. Formative feedback¹⁰⁰¹ would be provided to each of the student participants by the tutor-judge following each moot, as well as in the form of the students' own post-moot reflections. Students would have the option of transferring to the "traditional" model should they experience unforeseen difficulties impeding their engagement with this model.

Clearly, this is a radical departure from the commonly-accepted approach to studying law, and would have significant implications relating to resources – particularly given that I do not advocate its becoming the sole mode of study. However, the educational and personal benefits to potentially be derived from its adoption are such that, I submit, any higher education provider with aspirations towards providing law students with a challenging, engaging, and research-rich learning experience ought to give meaningful consideration to its adoption.

2: the method, or one of the methods, of teaching or providing formative feedback¹⁰⁰² in an optional study module.

This is a less radical and less resource-intensive variant of Proposal 1 above, which would not involve such a significant alteration to the commonly agreed approach to undergraduate study of the law, but would also allow for students electing to do so, to take advantage of the benefits

⁹⁹⁹ *c.f* Marsh and Ramsden *op cit*

¹⁰⁰⁰ *c.f* Boylan-Kemp *op cit*

¹⁰⁰¹ *q.v* Lynch *op cit*, Gillespie *op cit*

¹⁰⁰² *q.v* Keyes and Whincop *op cit*,

highlighted by my study when learning an option that does not form part of the core degree curriculum.

These proposals bear consideration particularly in the light of the recommendations for future programmes of legal education¹⁰⁰³, which include a requirement that the first stage of a prospective solicitor's education include the assessment of "applied knowledge"¹⁰⁰⁴ of the law.

Of direct relevance here, in the light of the above conclusions, is the potential for mooting not only to teach such an attribute, but to facilitate the students' development of such an attribute to an extent not available by way of other teaching methods. The use of mooting to help students aspiring to become solicitors¹⁰⁰⁵ in their development of this attribute, either directly via proposal 1, or indirectly via proposal 2 above, should be given serious consideration by any prospective educator of future solicitors.

In addition to the findings that I have made from this study relating to the perceived learning experiences of the students involved and the contributions that these can make to the practise and theory of legal education, I also submit that the findings from this study should also inform the practical elements of any proposed moot-based educational developments. The findings that I consider to be of particular importance in this regard relate to the following:

The case-based nature of the common law system – this emerges from an observation by I2 that his involvement in mooting facilitated his apprehension of the common law system as being the result of cases decided in a courtroom as the result of human interaction and decision-making¹⁰⁰⁶. This makes the case for the implementation into such a study module of the requirement for students to reflect upon this discrete issue, as part of a formative assessment.

Mooting "off-brief" – the practise of requiring students to present (possibly at short notice) submissions in support of the opposing party in the moot scenario to that on behalf of whom they have invested time and effort in preparing to represent has been the subject of both positive¹⁰⁰⁷ and negative¹⁰⁰⁸ academic commentary. However, the examples of I1 and I2, who

¹⁰⁰³ Solicitors' Regulation Authority (2017) *Solicitors Qualifying Examination Draft Assessment Specification* (<https://www.sra.org.uk/globalassets/documents/sra/news/sqe-draft-assessment-specification.pdf?version=4a1acb>) (last accessed 9th March 2021)

¹⁰⁰⁴ *ibid* p5

¹⁰⁰⁵ *qv* Duncan and Kay *op cit*, c.f Guth and Ashford *op cit*

¹⁰⁰⁶ *supra* p146

¹⁰⁰⁷ Hernandez *supra* fn 891

¹⁰⁰⁸ Kosinski *supra* fn890

(albeit accidentally) engaged in this practise, of its perceived benefits¹⁰⁰⁹ support a proposal that some degree of engagement in this practise should form part of a mooted-based study module, albeit with perhaps an advance notification in the preliminary study materials to that effect in order that the students are not taken completely unaware by an instruction to this effect.

Tutor/judge feedback - examples from the perceptions of several students¹⁰¹⁰ demonstrate that they attached a particular perceived importance to the judge's feedback. This implies that any legal education provider contemplating the development of a mooted-based study module should take care to ensure that the moot judges are provided with clear guidance to assist them in delivering feedback to the student mooters that is of practical benefit to their development of legal understanding, as well as moot courtroom practice, and is sensitive to the ethical considerations raised by the power imbalance between the tutor/judge and student/advocate.

These proposals in turn give rise to considerations as to how best to implement into an undergraduate curriculum a method of student learning accessible by students who do not want to take up the option of mooted, but which, like mooted, facilitates attainment of the upper levels of Bloom's taxonomy¹⁰¹¹. Consideration could be given in this regard to the adoption in respect of at least some seminars in compulsory subjects of a method of instruction similar to the "Langdellian" case-law method originated by William Langdell at Harvard Law School and subsequently adopted widely in the United States of America's legal education systems. This system depends upon the students having read case law in advance of a teaching session, at which they are prompted to discuss their understanding of the sources that they had read. The minimal degree of instruction from the tutor upon which the method is premised resulted in strong criticism that "really nothing had been learned"¹⁰¹² by the students participating. However, the method was soon identified by some of those same students as being different in kind from the lecture-based method that they had been used to, insofar as Langdell's purpose was not "to state what the rules of law were, [rather than] to incite the [students] to find them by their own researches"¹⁰¹³. In effect, this is a practical demonstration of the helictical model of experiential learning as explained by Kolb.

¹⁰⁰⁹ *supra* pp164-5

¹⁰¹⁰ *supra* pp175-6

¹⁰¹¹ Anderson, Krahtwohl and Bloom *op cit* p70

¹⁰¹² Fessenden, F.F *op cit* p499

¹⁰¹³ *ibid* p508

The process through which this system was received in American legal education has been described as one of “condemnation, criticism, partial and at last entire adoption”¹⁰¹⁴. While an adoption of a similar system in the study of core modules in English legal education might be met with a similar initial reaction, the evidence of the American experience demonstrates the potential of the method for facilitating experiential learning and understanding in a group environment. This may in turn help realise the goals of deeper understanding of the law by students who might face cognitive or affective barriers preventing or impeding their realisation of these goals through mooting.

My conclusions would be incomplete without an explicit recognition of the changes effected by this research project upon my own understanding of the function of mooting as a potentially transformative experience for a law student to embark upon. The analysis of the findings from this study has allowed me to recognise that mooting can not only effect a positive development in a student’s understanding of substantive law, but can also perform a transformative effect upon them as a person. This recognition has, in itself, changed my own personal views on the transformative potential of mooting. As of this writing, I will be resuming my role as Mooting Co-ordinator, and intend fully to draw upon my experience of this study in recognising and facilitating the development through mooting of the students with whom I will be working. Key in this respect will be the importance that I have observed in this study of the progression through the experiential learning “spiral” that can be facilitated by repeated moot participation, and the validation given by the student participants to the educative benefit of robust feedback on the part of the moot judge.

In summary, I consider that my research makes the following contributions to the professional practice of law, in that it examines in a depth not present elsewhere in the literature:

- the significance of mooting as a learning experience as perceived by first-year law students, with particular reference to the significance for the students involved of the narrative format of the moot, and its mimetic nature, triangulated by way of reference to interviews with seminar tutors;
- the effect upon student motivation of the adversarial character of the moot, as observed to have resulted in both an increase and decrease in the confidence of the student participants, as well as the limited significance of the moot’s outcome;

¹⁰¹⁴ *ibid*, p512

- the interplay between students' personal experiences and their experience of mooting, and the range of effects that these can have upon their holistic experience of learning the law.

Areas for Further Research

As with any qualitative study, it is necessary to acknowledge the limitations of this research, and, in turn, to recognise the areas that might be the subject of further research. These are as follows:

- the limited number of student participants. While this study has generated a rich set of data, it merits consideration whether a similar study involving a broader sample of student participants would generate a more diverse range of data, or whether a greater degree of student involvement would make for a more homogenous learning experience;
- the fact that this study involved only one fully comprised and contested moot. My initial plan that the study would involve three such moots was disrupted by extraneous factors, and a further study not subject to such disruption would be useful to conduct in order to identify whether the perceived learning experiences of the student participants is further enriched by a greater degree of moot participation;
- thorough triangulation with the students' seminar tutors. As explained earlier, it was not possible to fully carry this out due to lack of responses to interview requests. Based upon the data obtained from the tutors who did take part, it is likely that full tutor involvement would generate a very rich set of data. Whether this would in fact be the case is a proposition that merits further investigation;
- moots on a different subject area. Due to the nature of the Year 1 teaching curriculum, all the moots in this study were on the subject of Criminal Law. Further research of a similar nature might be undertaken using moots in areas of law not commonly regarded as "immediately accessible"¹⁰¹⁵ to new law students (for example, Trusts and Equity)

¹⁰¹⁵ Mills, J (2017) "Why Criminal Law?" (<https://medium.com/think-cambridge-law/inside-a-cambridge-law-degree-why-criminal-law-5d0cb714ce9f>) (last accessed 9th March 2021)

in order to consider whether the student participants perceived their understanding of the relevant subject area to have been enhanced by their moot involvement;

- other types of experiential learning. In this study, I used mooting as the experiential learning vehicle to explore the understanding of substantive law by first-year law students. It would be interesting to see whether a similar learning process to that observed in this study were to occur in a similarly-organised study involving a different experiential learning activity.

At present, I am confident that this study is the most detailed study available of qualitative data relating to students' experiences of mooting as conceived as a form of experiential learning. It is important to point out that as with any study of this type, the hypothesis can only be presented on a provisional basis, as further research may arrive at different or contrary conclusions. This is, of course, true of all knowledge, conceived as a continuously constructed product of experience. The following quote sums up to perfection this concept, and the process of learning underpinning this study:

"We shall not cease from exploration

And the end of all our exploring

Will be to arrive where we started

*And know the place for the first time"*¹⁰¹⁶

¹⁰¹⁶ Eliot, T.S (1943) "Little Gidding" Harcourt Brace Jovanovich, Inc, and Faber and Faber Ltd, London (quoted Kolb *op cit* p31).

Appendix I

Student Participant Information Sheet



Study into Mooting as a Teaching Tool in Higher Education

Participant Information Sheet

You are being invited to take part in a research study. Before you make your decision, it is important for you to understand why the research is being done and what it will involve. Please take time to read the following information carefully.

Why am I being invited?

All Year 1 MLaw, LLB (Hons) and Law Plus students are invited to take part in this study.

What is the nature of this study?

This study is being carried out in order to look into how students' experiences of, and approach to mooting, affect their learning of substantive law and understanding of the law. The study will involve a group of between 6 and 12 students taking part in **3** moots on areas of law within the Year 1 curriculum.

How will the study be conducted?

Each student will be interviewed by the researcher (Ross Fletcher) following each moot, within which the student will be asked questions about the way in which they approached the moot and their thoughts on the experience of mooting. Each interview will last no longer than **60 minutes**. The seminar tutors for the students taking part will also be interviewed in order for the researcher to obtain an alternative perspective.

Why is this study being conducted?

Mooting is commonly regarded within higher education as an extra-curricular method of making the learning of law more enjoyable, or as a way of developing confidence in public speaking, rather than as a means of teaching law in itself. This study aims to explore whether mooting can, or should, be used as a teaching tool by investigating student experiences of moots considered as a learning experience in themselves.

If I take part in this study, what will I have to do?

You will take part in 3 moots during the course of the current academic year. Immediately upon completion of each moot, you will be asked to provide a very short impression of your views about the moot. After approximately a week following the moot, you will be invited to

attend an interview conducted by the researcher. During this interview, you will be encouraged to speak freely about your experience of mooting. The interview will be recorded and transcribed, and your responses to the questions asked during the interview will be used to inform the study. Light refreshments will be provided during the interview.

What are the possible benefits of taking part in this study?

You may find that your studies of law benefit from this opportunity to reflect upon your experience of mooting, as well as your experience of learning law generally. The opportunity to take part in mooting may also benefit your understanding of the law involved, as well as your legal research and advocacy skills, and ability to work as part of a team.

What are the possible disadvantages and risks of taking part?

Participation in this study will involve you spending time away from other activities, including preparation for the seminars or workshops that form part of your undergraduate law curriculum. You should not take part in this study if you think that you will be unable to make up for this lost time and that your undergraduate studies will suffer as a consequence.

This study is being conducted by a lecturer in the Law School. If you are uncomfortable with the prospect of revealing details of your personal learning experience to a member of Law School academic staff, you may decide not to take part in the study.

Many students are uncomfortable about taking part in mooting because they think that the experience will be stressful or demoralising. While every effort will be made to organise the moots involved in this study to prevent this, there is always a possibility that such will be the reaction by the students involved. If you think that this will be the case for you, you should decline to take part in this study.

What will happen if I take part in the study, but then decide that I no longer want to continue?

While the researcher would prefer that everyone who takes part in the study continues to be involved until all the interviews have been completed, all participants are free to decide that they no longer want to take part at any stage of the process. If you decide to do this, you will be invited to attend an interview to ask why you have decided no longer to take part, although you are not obliged to accept this invitation.

Will the interviews be confidential?

The fact of your participation in this exercise will be shared with your Criminal Law seminar tutor. Otherwise, the identities of all the participants in this study will be kept confidential.

How can I obtain further information about this study?

Email ross.p.fletcher@northumbria.ac.uk.

11th October 2018 (amended 16th November 2018)



**Northumbria
University**
NEWCASTLE

CONSENT FORM

Title of Study: Mooting as a Teaching Tool in Higher Education

Name of Researcher: Ross Fletcher

Please
initial
box

1. I confirm that I have read the information sheet dated 16th November 2018 for the above study. I have had the opportunity to consider the information, ask questions and have had these answered satisfactorily.

2. I understand that my participation is voluntary and that I am free to withdraw at any time without giving any reason.

3. I agree to take part in the above study.

Name of Participant

Date

Signature

Name of Person
taking consent

Date

Signature

Tutor Participant Information Sheet



**Northumbria
University**
NEWCASTLE

Study into Mooting as a Teaching Tool in Higher Education

Participant Information Sheet

You are being invited to take part in a research study. Before you make your decision, it is important for you to understand why the research is being done and what it will involve. Please take time to read the following information carefully.

What is the nature of this study?/ Why am I being invited?

This study is being carried out in order to look into how students' experiences of, and approach to mooting, affect their learning of substantive law and understanding of the law. The study will involve a group of between 6 and 12 students taking part in **3** moots on areas of law within the Year 1 curriculum. In order to provide an alternative perspective, the researcher (Ross Fletcher) would also like to interview the seminar tutors for the students taking part.

How will the study be conducted?

Each student will be interviewed by the researcher following each moot, within which the student will be asked questions about the way in which they approached the moot and their thoughts on the experience of mooting. Each interview will last no longer than **60 minutes**. The seminar tutors will also be interviewed using a similar format.

Why is this study being conducted?

Mooting is commonly regarded within higher education as an extra-curricular method of making the learning of law more enjoyable, or as a way of developing confidence in public speaking, rather than as a means of teaching law in itself. This study aims to explore whether mooting can, or should, be used as a teaching tool by investigating student experiences of moots considered as a learning experience in themselves.

If I take part in this study, what will I have to do?

You will be invited to attend an interview conducted by the researcher. During this interview, you will be encouraged to speak freely about your experience of teaching the student(s) in seminars. The interview will be recorded and transcribed, and your responses to the questions asked during the interview will be used to inform the study. Light refreshments will be provided during the interview.

What are the possible benefits of taking part in this study?

You may find that you gain a better understanding of the role of mooting in a law programme, as well as insight into the student learning experience.

What are the possible disadvantages and risks of taking part?

Participation in this study will involve you spending time away from other activities. You should not take part in this study if you think that you will be unable to make up for this lost time.

This study is being conducted by a lecturer in the Law School. If you are uncomfortable with the prospect of revealing details of your personal experiences to a fellow member of Law School academic staff, you may decide not to take part in the study.

Many students are uncomfortable about taking part in mooting because they think that the experience will be stressful or demoralising. While every effort will be made to organise the moots involved in this study to prevent this, there is always a possibility that such will be the reaction by the students involved. If you think that this will be the case for you, you should decline to take part in this study.

What will happen if I take part in the study, but then decide that I no longer want to continue?

While the researcher would prefer that everyone who takes part in the study continues to be involved, all participants are free to decide that they no longer want to take part at any stage of the process. If you decide to do this, you will be invited to attend an interview to ask why you have decided no longer to take part, although you are not obliged to accept this invitation.

Will the interviews be confidential?

The fact of your participation in this exercise will be shared with the student(s) in your your Criminal Law seminar group who is/are taking part in this study. Otherwise, the identities of all the participants in this study will be kept confidential.

How can I obtain further information about this study?

Email ross.p.fletcher@northumbria.ac.uk.

16th November 2018



CONSENT FORM

Title of Study: Mooting as a Teaching Tool in Higher Education

Name of Researcher: Ross Fletcher

Please
initial
box

1. I confirm that I have read the information sheet dated 16th November 2018 for the above study. I have had the opportunity to consider the information, ask questions and have had these answered satisfactorily.

2. I understand that my participation is voluntary and that I am free to withdraw at any time without giving any reason.

3. I agree to take part in the above study.

Name of Participant

Date

Signature

Name of Person
taking consent

Date

Signature

Appendix II

Tutor Interview Guide

Interview Guide- T1 (I2)

What were your impressions of [I2]'s performance in Criminal Law seminars before 20th November? –**Objectives** – weaknesses/strengths/any particular differences in performance from the rest of the group?

What were your impressions of [I2]'s performance in Criminal Law seminars after 20th November? –**Objectives** – weaknesses/strengths/any particular differences in performance from the rest of the group?

Additional questions to be included based upon the student's responses

How much tutor intervention is needed in seminars before [I2] contributes to the discussion?

Does/did [I2] appear to be nervous in seminars?

Does [I2] appear to be interested in the law involved/ understand the law involved/prepare thorough answers to seminar questions (eg. read cases)?

Does [I2] engage with discussions in seminars on points other than those contained in the advance materials?

Interview Guide- T1 (I4)

What were your impressions of [I4]'s performance in Criminal Law seminars before 23rd November? –**Objectives** – weaknesses/strengths/any particular differences in performance from the rest of the group?

What were your impressions of [I4]'s performance in Criminal Law seminars after 23rd November –**Objectives** – weaknesses/strengths/any particular differences in performance from the rest of the group?

Additional questions to be included based upon the student's responses

How much does [I4] contribute to seminars?/ Does [I4] appear to be nervous in seminars? Does [I4] appear to understand the law involved in the seminars?

Does [I4] appear to be well-prepared in seminars?

Does [I4] appear to understand your questions/ comments made by other students during the seminars? Has this changed since the 23rd November?

Does [I4] work well with other members of the seminar group? (supp question re. being international student?)

Does [I4] appear to think critically about the points of law raised in the seminars?

Does [I4] appear to have read the directed material in advance of the seminar?

Does [I4] ask you questions in seminars when she appears to be struggling?

Does [I4] appear to be adversely affected by stress/pressure in seminars?

Interview Guide- T2

What were your impressions of [I3]'s performance in Criminal Law seminars before 23rd November? –**Objectives** – weaknesses/strengths/any particular differences in performance from the rest of the group?

What were your impressions of [I3]'s performance in Criminal Law seminars before 23rd November? –**Objectives** – weaknesses/strengths/any particular differences in performance from the rest of the group?

Additional questions to be included based upon the student's responses

Does [I3] appear to be prepared for the seminars? Has she ever appeared to be unprepared?

Does [I3] work well with other members of the seminar group?

Does [I3] appear to deal well with pressure/ be confident in seminars/answer questions posed in the seminar/understand the law involved in the seminar?

What are your impressions of [I3]'s ability to research the law relevant to the seminars?

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