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Understanding law through simulated learning – A study of student perceptions of mooting

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Abstract

Mooting (also referred to as "moot court") is a type of mock courtroom exercise that takes place in many law schools. In 2018-19, for the purposes of completing a Professional Doctorate in Law at Northumbria University, I organised a series of moots among student research participants and interviewed them about their experience of mooting. The purpose of this was to understand, through the lens of experiential learning theory, from the perspective of the student participants, what is involved in preparing for, participating in, and receiving feedback after a moot; the differing perceptions of students involved in a moot experience, and to analyse the learning experience of the students taking part in the moots. This article is a summary of the research that I undertook, what I learned from it, and how the experience of that research can inform further development of teaching and learning.

Introduction

Before commencing this study, 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 a result of their preparation for and performance in the moot, a greater understanding of the substantive law involved in the moot problem than they had believed to be the case for them beforehand. My intention behind this study, therefore, was to answer the question of *how students' experiences of, and approaches to mooting affect their learning of substantive law and understanding of the law*. To begin to do this, it is necessary to understand how mooting has played, and still does play, a role in legal education.

The origins and development of mooting in legal education

The first recorded moots took place in the Inns of Court and Chancery, which are believed to originate in 1292, following a writ issued in that year to authorise attendance at court by "a certain number, from every county, of the better, worthier, and more promising students" (Jacobs, 1936, p. 71). 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". Both involved an expectation that students attend the nearby courts, "readings" (a combination of lectures and seminars), and moots (Jacobs, 1936, pp. 57-58). 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 barristers, but none of the ten (Baker, 2003, p. 453) Inns of Chancery survive.

The origin of the moot system is unclear, but it has been suggested (Walsh, 1899, p. 417) that it arose out of the system of "disputations" held in universities before the establishment of the Inns. One of the meanings of the term "to moot" at that time referred to pleading a case in court (Baker & Thorne, 1989, p. xlix), 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 dispute (Brand, 1992, p. 58).

The practice of such exercises comprised the barristers' training and took approximately ten to twelve years (Brand, 1992, p. 58). Mooting was an essential part of a barrister's qualification (Prest, 1967, p. 310) and 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" (Wilson, 1553, p. 38). However, by the seventeenth century, these exercises came to be of decreasing importance, in favour of study based upon "the proliferation of printed texts" (Prest, 1967, p. 313) that were by then available to those seeking to learn the law. The exercises continued to be practised, but by the mid-eighteenth century, they "had dwindled away" to "meaningless forms" (Holdsworth, 1972, Volume XII p. 79).

In light of concerns for the future of the legal system and the safety of the public generally, in 1846, a House of Commons Select Committee recommended that universities should teach and award degrees in English law (Select Committee on Legal Education, 1846, p. xlvii), which should be distinct from the routes to professional qualification administered by the Inns of Court and (for solicitors) the Law Society law (Select Committee on Legal Education, 1846, p. lxi). However, students still had the option of qualifying as 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 barrister (Gower, 1950, p. 141).

Amid this reform, the moot system remained neglected. It was noted that while "interesting evidence upon the point" was given, mooting "received scant notice amidst the numerous larger issues which were dealt with in [the Select Committee's] reports (Walsh, 1899, p. 420). 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" (Walsh, 1899, p. 425). Despite adjurations (Walsh, 1899, p. 424; Pollock, 1903, pp. 259-260) that the moot system becomes a compulsory part of English legal education, it would re-enter English legal education 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 thrive (Walsh, 1899, p. 421). English universities, in fact, adapted to this before the Inns, mooting having been conducted at the University of Cambridge before 1889 (Pollock, 1889, p. 227), and similar initiatives were taken up by student-run societies at other universities (Bathurst, 1943, p. 11). 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" (Gower, 1950, p. 189) from the moots organised by the University of London's college law societies. Elsewhere, the first inter-university moot court competition opened to English universities, the Philip C. Jessup International Law Moot Court Competition, commenced in 1960 (Brown, 1978, p. 333).

There has since been an "explosion" (Dickerson, 2000, p. 1224) of inter-university moot court competitions, with more than twenty competitions open to students (*Get*

Mooting: Rundown of Competitions, 2023). At the 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 curriculum (Gillespie & Watt, 2006). 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" (Snape & Watt, 2010, p. 13).

Recognised benefits of mooting include the opportunities for student participants to improve their ability to research and to recognise the importance of working well as part of a team. The latter has been recognised as a matter often given insufficient attention by a legal education system that emphasises individual achievements and encourages competition on this basis (Finneran, 2017, pp. 126-127). Additionally, mooting has been described as "a specific form of simulation which enables students to practise and develop a range of skills" (Wolski, 2009, p. 46), those being the need for students to manage their time effectively. In doing so, preparing them for the pressures that practising lawyers are subjected to (Dickerson, 2000, pp. 1217-1218) and creating an environment which will require law graduates to be confident and resilient in order to thrive (Parsons, 2016, p. 14); (Parsons, 2018, pp. 12-17). 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" (Dickerson, 2000, pp. 1217-1218), have been noted as transferrable attributes making involvement in moots advantageous to students seeking any employment (Dickerson, 2000, pp. 1226-1227). This is particularly important 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" (Kramer, 2007, p. 89).

Other acknowledged benefits of mooting include "the thrill or rush of competition", improvements to self-confidence (Ringel, 2004, p. 460), the opportunity to analyse and synthesise points of law arising out of the case law researched and to devote a degree of time to doing this that the time constraints of "normal classroom" instruction precludes, which has been described as "a skill critical to lawyers", and "something which we in the classroom increasingly deny our students" (Gaubatz, 1981, pp. 88-89). The ability to do this and to then express a clear oral or written understanding of "what may be very complex legal material", which mooting "nurtures", has been described as lying "at the heart of [lawyers'] skills as lawyers" (Snape & Watt, 2010, p. 13).

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" (Blatt, 1936, p. 417) or more damningly, "a mere game" (Gaubatz, 1981, p. 87). 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 substance (Gaubatz, 1981, p. 87), 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" (Wolski, 2009, p. 55). Thus, it fails to appreciate the demands involved in real case preparation, where the facts are far from clear (Gaubatz, 1981, p. 88) or may be "missing" (Wolski, 2009, p. 56) and in relation to which the outcome of "most appellate cases turn" (Kozinski, 1997, p. 189). Also, the fact that moot preparation requires students to focus solely 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 personal lives in helping them come to terms with those problems rather than risk an adverse effect to their careers (Hernandez, 1998, p. 78).

Many of these criticisms are more likely to arise because of the way that a particular university organises its mooting programme, rather than mooting itself, and can be resolved by a well-planned and implemented programme of study and "full, enthusiastic support" from the academic staff involved (Hernandez, 1998, p. 89). As such, mooting has much potential to be used in legal education not just as a vehicle for skills training or as a "fun" activity (Gillespie, 2007, p. 21) but as a method of teaching substantive law.

Literature review and theoretical framework

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 reflection and improvement (Wolski, 2009, pp. 51-52). The most influential exponent (Burridge, 2002, p. 30) 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" (Kolb, 2015, p. 49). A key characteristic of this theory relates to the distinction between "apprehension" and "comprehension" (Kolb, 2015, pp. 69-77), the former concept being the appreciation of an experience, while the latter being the ability to "create for [one]self and communicate to others a model of that situation that could last forever" (Kolb, 2015, p. 69). Knowledge as such is conceptualised 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 learn (Kolb, 2015, pp. 63-65). The research involved in my study of mooting is underpinned by the theoretical understanding of experiential learning as constructed by Kolb and informed by Kolb's theories when attempting to understand the role of mooting as a method whereby learning by experience occurs in legal education.

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" (Kolb, 2015, pp. 100-101) that an individual will make use of, as well as the "learning mode" used by the individual to deploy that form. Kolb states that the identification of these factors can be used to determine the "learning style" that best suits an individual.

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 allow it to endure and ensure a more meaningful effect upon the learner than the knowledge that has been acquired by way of "segregated learning" (Dewey, 1933, p. 48).

A review of empirical studies on mooting

My review of the literature that this study was devised to contribute to take as its starting point the structure suggested by Golden-Biddle and Locke (1997). The gaps evident in this sub-category of literature (Billings, 2017; Boylan-Kemp, 2013; Daly & Higgins, 2010; Gerber & Castan, 2012; Gillespie, 2007; Kammerer, 2018; Kammerer, 2020; Keyes & Whincop, 1997; Krupová et al., 2013; Lynch, 1996; Marsh & Ramsden, 2015; Turner et al., 2018; Watson & Klaaren, 2002) can be demonstrated by reference to the terms used by Golden-Biddle and Locke in describing how a reviewer can complete the tasks of "Constructing Intertextual Coherence" (Golden-Biddle & Locke, 1997, p. 26), and "Problematizing the Situation" (Golden-Biddle & Locke, 1997, p. 35).

The literature is "linked by disagreement" (Golden-Biddle & Locke, 1997, p. 33) 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 assessment (Boylan-Kemp, 2013), that it ought to be integrated into the teaching of substantive law as a means for providing formative feedback (Keyes & Whincop, 1997; Gillespie, 2007); that it is best situated as part of a separate skills-based module (Turner et al., 2018); that it is particularly beneficial if it forms part of a voluntary inter-varsity competition (Gerber & Castan, 2012; Billings, 2017), and that it provides no real educational benefit at all (Watson & Klaaren, 2002).

The literature is "inadequate" (Golden-Biddle & Locke, 1997, p. 37) in that it 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. It is also insufficiently underpinned by an understanding of experiential learning theory. This inadequacy is apparent when reviewing the literature in light of the observations on this subject in what appears to be the first published empirical study of mooting (Lynch, 1996, pp. 78-79). In that 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 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" (Lynch, 1996, p. 92). However, none of the subsequent studies cited above have involved any such investigation. Indeed, very few of these studies address experiential learning theory in any meaningful sense, and some do not mention it at all.

The literature is "incomplete" (Golden-Biddle & Locke, 1997, pp. 36-37). 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 to answer the questions set therein, more focussed qualitative research is necessary in order to fully understand and appreciate the nature of, and issues involved in, the student learning experience.

Having reviewed the extant literature that my study was intended to make a contribution towards, I formulated the tentative proposal that students perceive participation in mooting to be beneficial towards their understanding of the law. The method and methodology that I used to conduct the study are set out below.

Research method and methodology

My study was underpinned by a constructivist epistemology. This holds that *"the "facts" themselves* upon which knowledge" is determined are in themselves the result of perspective (Schwandt, 2017, p. 125). My experience of teaching students 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 observed (Crotty, 1998, p. 20). Rather, as it has been noted (Cunliffe, 2003, p. 988), 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.

To collect data for this study, I chose to conduct a series of focused interviews with moot participants. I intended to select a group of between six and twelve students, 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 were new to the higher education system, and therefore, less likely to have developed their own approach to learning the subjects taught in higher education than might have been the case for more experienced students.

My intention was to collect data following an initial moot, which would be revisited after the students had taken part in a second moot and 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. Following my judging of each moot, I provided each group of students with feedback on their performance based on the notes that I took and my contemporaneous recollections of what had happened during the moot.

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 improvised (Merton et al., 1956, p. 554).

During the interviews, I asked a question (e.g.: "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 experiences (Pedersen et al., 2016, p. 633). I intervened 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 to avoid discussion of positivist theory (e.g.: "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 on my own theoretical perspective and stifling interviewee responses. This approach was monitored during and after each interview (Gough, 2003).

I followed up these initial interviews by interviewing the students' seminar tutors using similarly phrased questions put to the criminal law seminar tutors for the students whom 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 to gauge what (if any) benefit the student derived from this experience, to make for a richer set of data.

Data analysis methodology

I adopted the methodological approach of analytic induction to analyse the data collected. Analytic induction has been described 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" (Manning, 1982, p. 275). It is a form of the inductive technique deployed to make statistical generalisations from a limited sample (for example, in opinion polls) – this has been referred to as "enumerative induction" (Manning, 1982, p. 277). Studies involving analytic induction (e.g.: Thomas & Znzniecki, 1927; Lindesmith, 1947; Cressey, 1953; Bloor, 1978) make use of a "judgement sample" to make "universal statements containing the essential features of a phenomenon" (Manning, 1982, p. 277).

In researching the student experience of mooting, I was particularly interested in identifying student perceptions of any essential features of mooting that may have an impact on 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 characteristics (Robinson, 1951, p. 817).

The stages of the method that I used to conduct analytic induction of the data derived from this study are similar to that used by Bloor in his study of tonsillectomy practitioners (Bloor, 1978, p. 546, and are set out below.

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 reference to existing theories totally (Lindesmith, 1947, p. 7), the nature of the present study, along with my own experience of the subject under examination, precludes such "an open mind" (Manning, 1982, p. 291). For that reason, my provisional hypothesis, with respect to the effect of mooting on students' understanding of substantive law was that it allows for the development of their understanding of the law they are studying by facilitating the assimilation (Kolb, 2015, pp. 34-36) of substantive legal knowledge into a student's practical experience.

2. I coded the data from the student interviews using open coding (Cohen et al., 2011, p. 561) to generate a provisional list of characteristics common to the students' expressed perceptions.

3. The hypothesis was then re-examined in the light of the data gathered.

4. The "deviant cases" (i.e., 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 triangulated (Bloor, 1978, p. 550) (where possible) by reference to the data obtained in the interviews with the students' tutors.

Analysis and discussion

The study took place in three phases, in which the student participants mooted and were then interviewed about their experiences.

The dominant theme in Phase One of the study (in which five students participated – I referred to these in my notes as "I1-I5") was that all the students involved perceived the moot experience to be very challenging, but that they perceived 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. Also to be noted is that there are two interviewees whose interviews contained 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 due to upsetting personal experiences.

Following these interviews, I attempted to triangulate the perceptions expressed by some of the students taking part in this phase of the study by way of reference to interviews with their Criminal Law seminar tutors. I was able to interview 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 group. 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 included the observation that I2 "seems to have a good grasp of the law and how to approach it" (T1 interview (I2), 6th December 2018), and that I3 was "one of the stronger students in the group" (T2 interview, 10th December 2018). The tutors' bases for these perceptions appeared to be their observations of the contributions made by these students during the seminars, which both students' tutors described 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 about the relationship between the potential effect upon them of the moot experience, and their pre-moot understanding of the substantive law revealed in my interviews with them. I2's interview contained statements to the effect that he perceived 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 regarding 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 contained observations suggesting a lack of legal understanding with respect to 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, because she did not seem to really get it particularly easily" (T1 interview (I4), 11th December 2018). In the tutor's opinion, I4's difficulties arose as a result of "not necessarily [of] the concept[s], but [of] the way things are framed" (T1 interview (I4), 11th December 2018). The tutor explained that "usually after a couple of re-framings she can get right there" (T1 interview (I4), 11th December 2018), 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. These observations accord with the student's own descriptions of her difficulties during the moot (I4 interview, 27th November 2018), as well as provide further insight into why the nature of the moot format may have presented an obstacle for I4.

I2 and I4's seminar tutor perceived 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 so (T1 interview (I2), 6th December 2018). In the case of I4, the tutor described 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" (T1 interview (I4), 11th December 2018). These observations accord with views expressed by I4 in her interview regarding the importance for her of working as a member of a group 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 with respect to the importance of a suitable group working environment for mooting to best facilitate student learning. The findings are of particular interest when compared to the perceptions expressed in respect of I3's approach to seminars by the other seminar tutor interviewed. Unlike the other students to whom reference was made in the tutor interviews, I3's seminar tutor perceived 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" (T2 interview, 10th December 2018), 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.

Tutors were also asked 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 stated 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" (T1 interview (I2), 6th December 2018), 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 was 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 regarded 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 stated 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 contributions that she had made suggested a more accurate legal understanding than was present from her pre-moot seminar contributions (T1 interview (I4), 11th December 2018). 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.

Before considering the findings following the remaining phases of the study, it is necessary to apply the analytical, inductive method to determine whether it is necessary to revise the "provisional hypothesis" set out above. Having drawn together the above points in respect of Phase 1, 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 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:

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 times following the coming into force of the Sex Disqualification (Removal) Act 1920, and recent research has suggested that the legal profession remains, for women, a hostile environment (Sommerlad, 2016). 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 are "institutions of patriarchy constructed to perpetuate male power" (Auchmuty, 2015, p. 5), points that they have informed consideration of moot court practice in American universities (Morrison, 1995) in particular. However, while the two female student participants' individual perceptions of their mooting experience differed 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 on gender alone.

Nationality

The extent to which the experience of mooting can differ for students based upon their ethnic or national origin has been noted (Watson & Klaaren (2002); Sands, (2013)). The participants in this study were not asked to identify themselves based upon such criteria, but I4 voluntarily stated that she was 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 will be explained when considering the next phase of this study in the context of I6 (another international student), the presence 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.

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 on this basis. This factor alone cannot serve to discount 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 took part in the moot).

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, 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 learning (Kolb, 2015, pp. 118-119). 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 environment (Hull, 1930, p. 512). As will become apparent, the learning styles demonstrated by the participants in this phase of the study did not remain static throughout the other phases.

As none of these obvious reasons serve to discount 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, so as to attempt to identify a way in which the hypothesis can be modified to account for these deviant cases, or to discount them.

Phase 2 of the study involved a moot problem on the law of theft. This phase consisted of one moot between I4 and I6, acting for the appellant and I1 and I2 for the respondent (I3 and I5 withdrew from the study, permanently in I3's case). I1 and I2 had initially prepared to represent the party in the moot case that they were not instructed to represent and were required to alter these preparations at short notice. Mooting "off-brief" in this way is not common practice in English university moot competitions, although it is in the United States. The practice has been criticised on the basis that it leaves students with a distorted impression of real courtroom practice (Kozinski, 1997, p. 185). Such criticism has been rebutted on the basis that the practice "will help students develop the useful habit of carefully analysing all sides of an issue before developing a final argument" (Hernandez, 1998, p. 74).

The significance of Phase 2 lies in the evidence of the experiential learning process in operation to exemplify the hypothesis in the case of some, but not all, of the student participants. While the analysis of the findings from this phase shows 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" (Watson & Klaaren, 2002, p. 556) from that which they had experienced elsewhere in their studies.

The unifying theme that appeared to suffice to explain the deviant cases involved in this study thus far was the presence of *cognitive or affective barriers to learning*. The presence of affective barriers in the case of I3 was evident in respect of her reaction to her personal circumstances, as well as her explaining in her interview interpersonal difficulties in working with her partner. This latter factor is also apparent in the cases of I4 (based upon comments made by I4 and in her decision to withdraw from the study following Phase 2) and 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 due to the moot experience. These barriers may be due to a lack of "cognitive-academic language proficiency" ("CALP"), in respect of which students speaking English as a second language may be slower to develop than native English-speaking students (Watson & Klaaren, 2002, p. 554), or it may be a consequence of 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 was 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 (Kolb, 2015, pp. 69-77) 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 what has been defined as "intellectual anxiety" whereby a moot participant lacks confidence in "presenting a complex cognitive argument". The impact of this factor, it has been noted, can be reduced by "close analyses of the cognitive content of the mooter's argument" (Thomas & Cradduck, 2018, p. 374). 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 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 with respect to the other deviant cases.

Accordingly, the 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.

I5 was the sole participant in the "moot" that was the subject of Phase 3 of the study and 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 made these submissions unopposed.

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. Considered in the terms used by Kolb, this demonstrates a particular dominance of the "Abstract Conceptualisation" ("thinking about the concepts and ideas involved in order to arrive at a solution") and Active Experimentation ("practical application in order to determine what works as opposed to what is absolute truth" (Kolb, 2015, p. 105)). 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 "Form of Learning" classified by Kolb as "Comprehension transformed by Extension" (or "CΔE" (the mental adaptation of a theoretical solution in order to arrive at a practical outcome" (Kolb, 2015, p. 101). This suggests a further demonstration of the experiential learning cycle ((Kolb, 2015, p. 51), whereby I5 drew 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. Observable also with respect to I5 is his transition from the "Initiating Style" exhibited in his interview following Phase 1 to the "Deciding" style. The "Initiating Style" is described by Kolb as "characterised by the ability to initiate action in order to deal with experiences and situations" (Kolb, 2015, p145). This typifies the perceptions expressed by the participants in Phase 1 in respect of the 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. Conversely, the "Deciding Style" is described by Kolb as "characterised by the ability to use theories and models to decide on problem solutions and courses of action" (Kolb, 2015, p. 145). This can be seen in practice with respect to I5's explicit discussion of his adaptation and application of his moot preparation to ensure a perception of sufficient comprehension in order 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 interview (I5 second interview, 28th May 2019) and as the stated reasons for his non-participation in Phase 2 (Email from I5 to Ross Fletcher, 14th February 2019). Clearly, these circumstances presented what is 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" (Piaget, 1972, p. 91), 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.

Conclusions and recommendations

The above findings suggest that mooting can be beneficial in helping develop a legal understanding (c.f Watson & Klaaren, 2002), 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 enthusiastic (I4). This student's enthusiasm about the moot process was also commented upon by her seminar tutor (T1 Interview (I4) 11th December 2018). This suggests 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 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 exercise (c.f Marsh & Ramsden, 2015) or summative assessment method (c.f Boylan-Kemp, 2013). 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:

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 feedback (q.v Lynch, 1996; Gillespie, 2007) 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. However, the educational and personal benefits to be potentially derived from its adoption are such that any higher education provider, with aspirations towards providing law students with a challenging, engaging, and research-rich learning experience, ought to seriously consider adopting it.

The method, or one of the methods, of teaching or providing formative feedback (q.v Keyes & Whincop, 1997) **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 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 recently implemented recommendations for programmes of legal education (Solicitors' Regulation Authority, 2017), which include the requirement that the first stage of a prospective solicitor's education includes the assessment of "applied knowledge" (Solicitors' Regulation Authority, 2017, p. 5) 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 solicitors (Duncan & Kay, 2010; c.f Guth & Ashford, 2014) 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.

Also, there are findings from this study that should inform the practical elements of any proposed moot-based educational developments. Those findings that are 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-making. This makes the case for the implementation into such a study module the requirement for students to reflect upon this discrete issue as part of a formative assessment.

Mooting "off-brief" – the practice 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 positive (Hernandez, 1998, p. 74) and negative (Kozinski, 1997, p. 185) academic commentary. However, the examples of I1 and I2, who in Phase 2 (albeit due to accidental errors on their part) engaged in this practice, demonstrate perceived benefits. This was evident particularly in respect of I1's account of the mental processing exercise necessary for him to undergo so as to rationalise his own sense of the "right" outcome of the moot, in accordance with his duty to represent his client, and was perceived by him to have been particularly effective in challenging his understanding of the way in which case law is decided. This supports a proposal that some degree of engagement in this practice should form part of a mooting-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 I1, I5, and I6 demonstrate that they attached particular perceived importance to the judge's feedback. This implies that any legal education provider contemplating the development of a mooting-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.

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 was 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 are further enriched by a greater degree of moot participation;

- thorough triangulation with the students' seminar tutors. It was not possible to fully carry this out due to a 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" (Mills, 2017) to new law students (for example, Trusts and Equity) in order to consider whether the student participants perceived their understanding of the relevant subject area 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 would occur in a similarly organised study involving a different experiential learning activity.

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