

I OBJECT YOUR HONOUR! THE MOOT COURT PARADIGM IS MOOTABLE

*Shreya Atrey**

This paper critically examines moot court as a pedagogic tool to introduce law students to judicial processes. The purpose is to evaluate whether mooting, as a non-mandatory part of legal education in India, is successful in creating a cadre of competent and creative lawyers in the Bar. There are two inquiries which inform this endeavour—first, the normative structure of moot courts and the inherent limitations of it; second, the experiential flaws of mooting in the Indian context. Since mooting reinforces the rigours of adversarialism in the Indian legal education and subsequently in the judicial working, this aspect is queried to demonstrate the difficulties in embracing the moot court paradigm uncritically. Whilst a lot of Western literature has been helpful in theorising on the structure and purposes of moot courts, there are suitable connections and comparisons made with the pan-Asian approach and the Indian counterpart. Though the theoretical and functional limitations of mooting are explored particularly in the Indian perspective, the lessons can be instructive in other contexts as well—especially those jurisdictions which battle to create a system of practical legal education through mooting which is both enriching for law students and at the same time, worthwhile by itself.

I. INTRODUCTION

Mooting is traditionally used in law schools to familiarise students with real world lawyering in terms of court procedure, drafting submissions and delivering oral arguments. The impact of mooting is then directly reflected in the judicial system as law students choose to practice law at the Bar. Whilst the stated aim of moot courts is in raising standards of the Bar, it becomes crucial to examine the ways in which mooting actually contributes in equipping law students with knowledge of the judicial processes. I argue that contrary to its pedagogical purposes, mooting in fact reinforces the rigours of adversarialism to reproduce the hierarchical and patriarchal aspects of the legal system. There is a need to reinvestigate the content and tools of legal pedagogy in relation to mooting, so as to enable students to critique legal knowledge from a standpoint of legitimisation of ideas about *law*, including *institutions* of law.

* DPhil Candidate in Law (University of Oxford), B.C.L. (University of Oxford), B.A. LL.B. (Hons.) NALSAR University of Law, Hyderabad.

This paper concerns the pedagogic theory of mootng and is thus concerned mainly about its normative aspects. The practice of mootng is referred to demonstrate how the norms operate in reality and such perspectives are examined in the Indian context where mootng in the premier law schools is considered the optimal student experience. In as much as the mootng trends in Asia are converging, such practices are analysed to better nuance the Indian position. However, since the theoretical underpinnings of moot court activities are mostly explored in Western academic literature¹ rather than in pan-Asian perspective, the paper draws from the vast research pool developed in the first world context but applies it with caution to reflect upon the Indian context.²

It is important to emphasize here that the lessons from the Indian perspective may be instructive for other jurisdictions which battle to create a system of practical legal education through mootng which is both enriching for law students and worthwhile by itself. On the one hand, the inherently adversarial outlook of mootng mirrors current court procedure and highlights the need for institutional reform and on the other hand, the flaws in implementation signify the crisis of utilising mootng as a commendable pedagogic tool. Together, both these analyses alert us to the normative and functional limitations of mootng, an insight which is useful for every legal education system.

Part II of the paper briefly describes the goals of establishing mootng as a part of legal education in India. Part III argues that within the normative structure of moot courts, its singularly problematic facet lies in maintaining a hierarchical and adversarial outlook. It hypothesises that, if students learn as a norm something which requires reconstruction, upon becoming a part of the system, they *will* reinforce the same system thereby stifling the possibility of reform. Part IV analyses the central features of mootng and offers ways of reconceptualising and strengthening the core practices. Part V concludes by highlighting the need to query the pedagogical contours of mootng in India—both, normatively and functionally.

II. MOOTING—THE INDIAN ENTERPRISE

At the outset, it is essential to briefly explore the moot court enterprise in terms of its stated goals, mechanisms and results. Historically, troubled

¹ See Archana Parashar, *Feminism in Indian Legal Education* in *ENGENDERING LAW: ESSAYS IN HONOUR OF LOTIKA SARKAR* 91 (Amita Dhanda & Archana Parashar ed., 1999) (“...it is undeniable that what happens in the Indian universities is inextricably linked to theoretical trends in the first world universities. You can call it anything—continuing imperialism of thought, post-colonial condition or globalization—but the fact remains that the so-called third world thought is influenced and shaped in relation to European and North American theoretical developments”).

² *Id.*, 91 (“Whether the theoretical claims (developed in first world) are universalistic, or more recently Post Modernist efforts at non-universalism, they are *not simply* extendable to third world societies.”) (emphasis supplied).

by the solely academic focus of legal education divorced from the practice of the profession, mootings were introduced in law schools as a part of practical legal education to break away from the monotony of lecture method.³ The purpose of practical legal education, that is to teach law students about what lawyers do and to understand lawyers' professional role in the legal system⁴ reflects in the goal of establishing moot courts as a means of "integration of student learning of theoretical and practical legal knowledge".⁵

At its core, mootings are structured as mock court exercises to familiarise students with the professional side of law—in the form of court procedures and legal advocacy. Axiomatically, it is aimed at professionalising the Bar.⁶

In the Indian context, after the abandonment of the training requirement for law students, the Ahmadi Committee played a major role in theorising upon the need for and purposes of mootings.⁷ The Report of Ahmadi Committee referred to Rule 21 of the Bar Council of India Rules of Legal Education (as amended upto November 30, 1998) and Schedule I dealing with the 5-year law course which contains the following directive: "Every university shall endeavour to supplement the lecture method with the case method, tutorials and other modern techniques of imparting legal education." The Report recommended that: "This Rule must be amended in a mandatory form and we should include problem method, moot courts, mock trials and other aspects in this Rule and make them compulsory." This laid down the foundation for the Law Commission to recommend legal education reforms including the introduction of mandatory moot courts as a part of legal curriculum through its 184th Law Commission Report in 2002.⁸ It was also actively recommended in the Bar Council of India initiative of formulating Four Papers (as suggestive of model

³ See Jerome Frank, *Why Not a Clinical-Lawyer School?*, 81 U. PA. L. REV. 907 (1933); Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE LJ 1303 (1947).

⁴ Frank S. Bloch & M. R. K. Prasad, *Institutionalizing a Social Justice Mission for Clinical Legal Education: Cross-National Currents from India and the United States*, 13 CLINICAL L. REV. 165, 166 (2006).

⁵ WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 13 (2007).

⁶ WILLIAM R. JOHNSON, SCHOoled LAWYERS: A STUDY IN THE CLASH OF PROFESSIONAL CULTURES xiii-xiv (1978).

⁷ Ahmadi Committee was formed in 1994 at a Conference of the Chief Justices of the High Courts of India to suggest appropriate steps to be taken so that the law graduates acquire sufficient experience before they become entitled to practice in the courts.

⁸ Law Commission of India, *184th Law Commission of India Report on 'The Legal Education and Professional Training and Proposals for Amendments to the Advocates Act, 1961 and the University Grants Commission Act, 1956'*, December 20, 2002, available at <http://lawcommissionofindia.nic.in/reports/184threport-PartI.pdf> (Last visited on March 31, 2013).

reforms)⁹ and by the National Knowledge Commission.¹⁰ Even the Supreme Court of India has been aware of the need to acclimatise students to court procedure through mooting. In *V. Sudheer v. Bar Council of India*, a case which challenged the Bar Council of India Training Rules, 1995 amending the training requirements for lawyers entering legal profession under the Advocates Act 1961, the Supreme Court noted with affirmation the developments of new techniques in preparing young lawyers.¹¹ It reiterated the report of Ahmadi Committee in relation to the need to “provide for compulsory training to young advocates entering the portals of the courtrooms” through improvements in legal education including introduction of moot courts and mock trials.¹² These developments indicate a clear and growing consensus for mooting to be a part of legal education in India.¹³

However, even after the proposed reforms and the assumed importance of mooting in India, it is still not a mandatory part of the legal curriculum, and it primarily exists in the form of ‘extra-curricular’ external competitions. Law schools have devised internal mechanisms for selecting students for these external competitions – through a yearly competition, *ad hoc* selections for particular moots or even selections based on Grade Point Average (‘GPAs’). In the absence of a substantive course on mooting, these *ad hoc* competitions sometimes remain the law students’ only rendezvous with the judicial procedure (other than internships) during their law school lives.

III. MUCH OBLIGED, YOUR LORDSHIPS— THE ADVERSARIAL ROOTS OF THE INDIAN JUDICIAL SYSTEM AND MOOTING

This part undertakes the normative inquiry into how mooting reinforces contested stereotypes in litigation. It is argued that by failing to challenge those stereotypes, legal pedagogy colludes with the present system in sustaining its worst practices in the judicial arena.

⁹ See Bar Council of India, *Bar Council of India Rules of Legal Education, Part IV, Sch. II, Compulsory Clinical Courses: 24. Moot Court Exercise and Internship*, available at <http://www.barcouncilofindia.org/wp-content/uploads/2010/05/BCIRulesPartIV.pdf> (Last visited on September 25, 2009).

¹⁰ National Knowledge Commission (NKC), Report of the Working Group on Legal Education, ¶ 2.7, available at http://www.knowledgecommission.gov.in/downloads/documents/wg_legal.pdf (Last visited on March 31, 2013). The NKC was set up on June 13, 2005 as a high-level advisory body to the Prime Minister of India, with the objective of transforming India into a knowledge society.

¹¹ (1999) 3 SCC 176, 210-211 (“Participation in moot courts, mock trials, and debates must be made compulsory”).

¹² *Id.*

¹³ Bloch & Prasad, *supra* note 4.

A. ADVERSARIAL BAIT IN THE JUDICIAL CONTEXT

One of the most pressing issues lurking in the Indian judicial system is of delay in justice delivery mainly due to backlog of cases or the so-called ‘docket explosion’.¹⁴ This has often been directly linked to the inefficiency and failures of the adversarial system, which has failed in meeting the demands of a modern and progressive judicial system. V.S. Elizabeth specifically compares delay and arrears to the adversarial method which was supplemented and supplanted in the older days with more reconciliatory methods.¹⁵ A need to revert to some of these older and now innovative methods has its basis in realising the downfalls of the adversarial method specifically because of its lengthy and convoluted procedure mechanism. Even the Indian justices have articulated its grave concerns with the adversarial system. Former Chief Justice Y.K. Sabharwal has specifically linked what he calls as the phenomena of ‘delayed justice’ to the adversarial system which he describes as follows:

“The Courts and Tribunals adjudicate and resolve the dispute through adversarial mode of dispute resolution. Litigation as a method of dispute resolution leads to a win-lose situation. Associated with this win-lose situation is the growth of animosity between the parties, which is not congenial to a peaceful society.”¹⁶

Former Chief Justice K.G. Balakrishnan enlists the characteristics of the adversarial method which he believes are in need for reform in order to strengthen our judicial system. He states that:

¹⁴ Dr. Manmohan Singh described the arrears and backlogs of cases as the ‘scourge’ of the Indian legal system at The Conference of Chief Ministers and Chief Justices (August 16, 2009). See Press Information Bureau, *Prime Minister’s Speech at the Joint Conference of Chief Ministers and Chief Justices*, August 16, 2009, available at <http://pib.nic.in/newsite/erelease.aspx?relid=51878> (Last visited on November 10, 2013).

¹⁵ V.S. Elizabeth, *The Indian Legal System, IALS Conference: Learning from Each Other: Enriching the Law School Curriculum in an Interrelated World*, available at <http://www.ials-net.org/meetings/enriching/elizabeth.pdf> (Last visited on March 31, 2013) (“[I]n the context of India today some of the most critical issues before the Government and thus, the judiciary, are the questions of delay in justice because of the backlog of cases...[i]n the pre-colonial days the administration of justice was not based on adversarial system, but on an adjudicatory process that sought through arbitration and negotiation to bring about a compromise. This was available at the local level and did not involve distance or financial expenses as the present system involves”). See also V. R. Krishna Iyer, *The Syndrome of Judicial Arrears*, THE HINDU December 2, 2009 (“More than all else, delay of dockets and Himalayan arrears frustrate the hope of justice...[t]he Bar, an indispensable factor in the adversarial system, is too expensive for the lowly and the forlorn”).

¹⁶ Y. K. Sabharwal, *Delayed Justice- Justice Sobhag Mal Memorial Jain Lecture*, July 25, 2006, available at http://supremecourtfindia.nic.in/speeches/speeches_2006/delayed%20justice.pdf (Last visited on March 31, 2013).

“Civil litigation has an inherently adversarial character and is widely perceived in society as a tool of confrontation and unnecessary harassment. Especially in instances where parties are otherwise well-known to each other, their involvement in lengthy and acrimonious civil suits can do irreparable damage to their mutual relationships.”¹⁷

As Justice S.B. Sinha points out, “The world has experienced that adversarial litigation is not the only means of resolving disputes. Congestion in court rooms, lack of manpower and resources in addition with delay, cost, and procedure speak out the need of better options, approaches and avenues.”¹⁸ Most High Courts in India have also identified the inadequacies of the adversarial techniques. The High Courts of Jharkhand and Uttaranchal have opined that the adversarial system has simply failed in delivering justice whilst the High Courts of Bombay, Chhattisgarh, Delhi, Himachal Pradesh, Kolkata, Madras, Madhya Pradesh and Orissa have expressed that the present system is not satisfactory.¹⁹ Similarly, the apex court in the case of *Ram Chander v. State of Haryana*²⁰ described the state of Indian litigation as:

“[T]here is an unfortunate tendency for a Judge presiding over a trial to assume the role of referee or umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortion flowing from combative and competitive elements entering the trial procedure.”

To address this problem of mounting arrears and to improve judicial efficiency, the larger agenda of judicial reforms includes addressing judges’ competency, judicial appointments, physical infrastructure as well as use of advanced technology and judicial accountability.²¹ Whilst each of these has

¹⁷ K.G. Balakrishnan, Former Chief Justice of India, Judicial Reforms in India, Keynote Address Delivered at the Indo-EU Business Forum, London (October 31, 2008), available at [http://supremecourtindia.nic.in/speeches/speeches_2008/31\[1\].10.08_judicial_reforms_-london.pdf](http://supremecourtindia.nic.in/speeches/speeches_2008/31[1].10.08_judicial_reforms_-london.pdf) (Last visited on March 31, 2013).

¹⁸ S.B. Sinha, *ADR and Access to Justice: Issues and Perspectives*, available at <http://www.hcmadras.tn.nic.in/jacademy/articles/ADR-%20Justice%20SB%20Sinha.pdf> (Last visited on October 19, 2013). See also Pratiksha Baxi, *Access to Justice and Rule-of-[Good] Law: The Cunning of Judicial Reform in India* (2007 Working Paper Commissioned by the Institute of Human Development, New Delhi, On behalf of the UN Commission on the Legal Empowerment of the Poor), available at http://www.undp.org/legalempowerment/reports/National%20Consultation%20Reports/Country%20Files/12_India/12_4_Access_to_Justice.pdf (Last visited on March 31, 2013).

¹⁹ Ministry of Home Affairs, Government of India, Report of Committee on Reforms of Criminal Justice System: Chairman Dr. Justice V. S. Malimath, Volume I, 27 (2003).

²⁰ (1981) 3 SCC 191; AIR 1981 SC 1036.

²¹ See generally Robert Moog, *Indian Litigiousness and the Litigation Explosion: Challenging the Legend*, 33 ASIAN SURVEY 1136 (1993).

been rigorously debated, the urgent need for case management²² through an improved adversarial system is particularly significant, as it relates to the very *performance* of law at courts.²³ Interestingly, since pure forms of adversarial or inquisitorial systems have been out of vogue, judicial reform may be driven towards *revamping* the adversarial model, as opposed to rejecting it *in toto*, mainly by reducing the confrontational element within it.²⁴ The tone for reforms is thus set by critically examining the adversarial system for its qualitative benefits and downfalls and introducing suitable modifications and supplications where necessary. For example, learnings from other areas like mediation view adversarial technique as:

“Effective reform lies in measures which promote both efficiency and ethics. The adversarial system is the appropriate method in a number of situations especially those needing authoritative interpretation or establishment of rights or which manifest severe negotiating imbalance. It is also required as a last resort of resolution. However, its indiscriminate and unvarying application across a broad band of conflict is a major cause of the several ills plaguing the legal system. The indiscriminate use of the adversarial method also raises fundamental ethical problems for members of the legal profession, characterized as a learned and a noble one. The system places a premium on winning, not on establishing the truth or finding the best solution. This leads to repeated use of the legal process, aggravation of conflict, and worsening of relationships. Hidden under generalizations and defenses are fundamental ethical issues relating to our conduct, the behaviour we promote and the dichotomy between theory and practice of law.”²⁵

²² Hiram E. Chodosh et al, *Reform of the Indian Civil Justice System: Limitation and Preservation of the Adversarial Process*, 30 J. INT'L L. & POL. 1, 62 (1998) (“The objectives of cases management are to establish judicial responsibility for the otherwise substantially party-controlled, adversarial preparations of civil cases for trial. Specifically, case management is designed to reduce dilatory, frivolous, inefficient, and protracted litigation practices and to replace party controlled litigation processes with judge-controlled, sequential steps in the life of a civil proceeding”).

²³ See for reforms in criminal litigation, Malimath Committee Report, *supra* note 19, 24 (“As the adversarial system does not impose a positive duty on the judge to discover truth he plays a passive role. The system is heavily loaded in favour of the accused and is insensitive to the victims’ plight and rights...Over the years taking advantage of several lacunae in the adversarial system large number of criminals are escaping convictions. This has seriously eroded the confidence of the people in the efficacy of the system”).

²⁴ Sriram Panchu, *On the Mediation Process*, available at http://lawcommissionofindia.nic.in/adr_conf/sriram17.pdf (Last visited on March 13, 2013).

²⁵ *Id.*

Thus, adversarial systems like Australia have demonstrated signs of imbibing inquisitorial features whilst Italy and France—traditionally known to be purely inquisitorial—are adopting adversarial techniques and as Justice Kirby explains:

“In reality, pure adversarial and inquisitorial systems are now hard to find. Most jurisdictions have a mixture of the two techniques. Some features of the inquisitorial system have become grafted onto court systems in Australia, such that pro-active judges are much more vigorously controlling, and directing, the efficient resolution of cases. In Italy, which is predominantly an inquisitorial system, aspects of the adversarial system have been introduced into the procedures of criminal trials. One study discovered that passive defence lawyers and bureaucratic prosecutors of the civil law tradition were culturally ill-suited to the new adversarial contest. They were not disposed to fight cases nor motivated to seek their efficient resolution. I suspect that this is not a problem for Indian or Australian advocates. Nonetheless, in Federal and State jurisdictions, and in a myriad of tribunals in Australia, new procedures have been introduced, in the nature of ‘case management’ to enhance court control over litigation.”²⁶

In the light of these developments, the decadal Indian policy has shown signs of graduating from a cut-throat adversarial legal system to a more collaborative and conducive one.²⁷ In this sense, as these reforms finally come to be realised, the legal education should be complementarily progressing and advancing the cause. Since moot and judicial procedure are inextricably linked, it is important that moot as a pedagogic tool is examined and corrected for its inherent and functional flaws arising from imitating the real system itself. This paper seeks to demystify the adversarialism surrounding the judicial system by reverse engineering the process and spearheading this

²⁶ Justice Michael Kirby, *India & Australia: A Neglected Legal Relationship and a Plan of Action*, Indo-Australian Public Policy Conference, New Delhi, India (October 23-24, 1996), available at http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_india.htm (Last visited on March 31, 2013).

²⁷ National Mission for Delivery of Justice and Legal Reform, *Towards Timely Delivery of Justice to All A Blueprint for Judicial Reforms 2009 – 2012*, 18, available at http://lawmin.nic.in/doj/justice/National_Legal_Mission-7NOV2009.pdf (Last visited on November 20, 2013) (“The need of the hour is to depart from the traditional adversarial case management practices which had left the pace of litigation primarily in the hands of legal practitioners. This can be achieved by adopting modern and efficient case management practices”); B. Lokur Madan, *Case Management and Court Management*, available at http://lawcommissionofindia.nic.in/adr_conf/Justice_Lokur.pdf (Last visited on March 31, 2013) (“For the last decade or so, the effort seems to have shifted from tribunalising justice to reducing the adversarial role that litigants play”).

reform at the legal education site. The next section explains how adversarialism has embodied itself in mooting.

B. ADVERSARIAL BAIT IN INDIAN MOOTING

The adversarial framework, which dominates the judicial side of the law, has permeated through other institutions²⁸ and dominates the way in which students understand law and legal systems.²⁹ Described as “getting on your feet and getting grilled over hot coals while speaking”,³⁰ moot court reinforces the rigours of the imperial heritage of adversarialism within the judicial system and in methods of teaching legal education.³¹ The resulting causality of this ‘culture of adversarialism’³² is counterproductive to seeking reforms in the institutions of law, making litigation more suited to our times and promoting an overall culture of equality and integrity in the judicial process. However, in as much as the moot court perpetuates this culture as *ought*, we operate cyclically, progressing nowhere.³³ Therefore, the concern with mooting is its overemphasised and unchallenged faith in adversarialism.³⁴ Lord Brougham strikes the core:

“An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.”³⁵

The modern day version of this dated notion, called ‘zealous advocacy’ has become a powerful prototype for a lawyer.³⁶ That has become the end in itself, not just sidelining other duties³⁷ of a lawyer but observing legal

²⁸ See DEBORAH TANNEN, *THE ARGUMENT CULTURE: MOVING FROM DEBATE TO DIALOGUE* (1998).

²⁹ Susan Sturm & Laní Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 526 (2007).

³⁰ Peter F. Lake, *Insights on Legal Education: When Fear Knocks: The Myths and Realities of Law School*, 29 STETSON L. REV. 1015, 1032 (2000).

³¹ It is important to note that the since our legal system is a British legacy, it does not come to an end with the formal end of colonial rule. See DANIEL LERNER, *THE TRANSFER OF INSTITUTIONS* (William B. Hamilton ed., 1964).

³² Carrie J. Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM & MARY L. REV. 5, 11 (1996).

³³ Gerald Korngold, *Legal Education for Non-Litigators: The Role of the Law Schools and the Practicing Bar*, 30 NYL SCH. L. REV. 621-623 (1985).

³⁴ *Id.*, 622.

³⁵ CAROLINE, *TRIAL OF QUEEN CAROLINE* Vol. 3 (1874).

³⁶ Monroe H. Freedman & Abbe Smith, *Zealous Representation: The Pervasive Ethic in UNDERSTANDING LAWYERS’ ETHICS* 71 (2004).

³⁷ The Bar Council of India under the Advocates Act outlines duties toward clients, opponents, colleagues, and the courts. See Advocates Act, 1961, § 49 (1)(C).

representation of client to win the case as the paramount duty.³⁸ Detachment from any other moral or ethical consideration assumes that the *only* ethics involved in lawyering is in defending the client. Detachment is further encouraged in moot court competitions where victorious teams are those best able to argue both sides of the case.³⁹ The greatness of argumentation is assessed from the ability to champion a cause detached from personal beliefs. This denies real and practical opportunity of making qualitative judgments about different sides and advocacy choices which lie therein. Further, it makes different sides appear as rivals rather than as *parties* to a claim which needs to be clarified, negotiated and resolved. It almost forces the students to “argue in oppositional modes, to see black or white, to resist nuance and complexity, and at worst, to be uncivil to each other”.⁴⁰

What is problematic is the associated assumption that “all disputes are best resolved by objective advocacy in a hierarchical, competitive, win/lose approach”.⁴¹ However, most often, client satisfaction and overall success of a court decision is not captured in the win/loss statistic. In fact, a win has often been described as imprecise justice.⁴² In evaluating the overall ‘justice’ component of a case, factors unrelated to the outcome have assumed greater importance, such as, having a chance to state one’s case and to be treated with dignity and respect, or the overall fairness of the process.⁴³ None of these are adequately captured or learnt during moots due to its adversarial alliance.

³⁸ C.f. Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 603 (1985) (“There is no professional duty... which compels an advocate... to secure success in any cause, just or unjust; and when so instructed, if he believes it to be intended to gain an unrighteous object, he ought to throw up the cause, and retire from all connection with it, rather than thus be a participator in other men’s sins”) (citing G. SHARSWOOD, PROFESSIONAL ETHICS 100-101 (1860)).

³⁹ The sentiments of the British Barrister Cross are similar: “Certainly I have seldom felt better pleased than when I persuaded three out of five law Lords [i.e., the court] to come to a decision which I was convinced was wrong...”. See Warren Lehman, *The Pursuit of a Client’s Interest*, 77 MICH. L. REV. 1078 (1979) (quoting Rt. Hon. Lord Cross of Chelsea). This *detachment* should be considered differently from the value in being aware of both sides of the case to respond to counter-arguments.

⁴⁰ Carrie J. Menkel-Meadow, *When Winning Isn’t Everything: The Lawyer as Problem Solver*, 28 HOFSTRA L. REV. 905, 909 (2000).

⁴¹ Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman’s Lawyering Process*, 1 BERKELEY WOMEN’S LJ 39, 52-53 (1985); Polly Beth Proctor, *Toward Myths and Mythology: Applying a Feminist Critique to Legal Education to Effectuate a Socialization of Both Sexes in Law School Classrooms*, 10 CARDOZO WOMEN’S LJ 577, 596 (2004) (“...emphasis on argument, debate, threats, hidden information, deception, lies, persuasion, declarations, and toughness”).

⁴² John E. Coons, *Approaches to Court Imposed Compromise—The Uses of Doubt and Reason*, 58 NW. UL REV. 750 (1964) (unravelling the parameters of imprecise justice).

⁴³ TOM R. TYLER, WHY PEOPLE OBEY THE LAW 178 (1990).

One of the most notable manifestations of adversarialism is the preparation of moot court competitions like ‘championship fights’.⁴⁴ There is clamoured emphasis on absolute recalcitrance because retreat is impossible.⁴⁵ For example, a mooter might concede to have wrongly answered a question and then goes ahead to give the correct answer but may well be penalised for ‘not sticking to his ground’.⁴⁶

While the adversarial archetype continues to remain lawyers’ ‘standard philosophical map’,⁴⁷ it is timely to realise the need of a paradigm shift in judicial procedure. To this end, moot courts can play a significant role in spearheading the reform. Even as one may not completely abandon the adversarialism in courts as it sharpens analytical skills and helps reach justice by analysing opposite arguments of adversaries,⁴⁸ it remains problematic in as much as it reinforces the sense of ritualised combat.⁴⁹

C. THE BOILERPLATE EFFECT

As articulated by Worden: “moot court reifies a particular vision of the real world and prepares us to act within that reification”.⁵⁰ It is then worthwhile to query the normative structure of mooting to construct a vision which is worth being reified. Consider two examples in this regard. In the Iraqi law school moot court curriculum, the final session of a moot court exercise is conducted as a demonstration, committed to make clinical pedagogy less hostile.⁵¹ Mindful that students can mistake the demo as the ‘correct method’, it is only suggestive in nature, leaving the students to choose from different styles,

⁴⁴ Peter T. King, *Legal Education at Notre Dame Law School: The Lasting Significance of its Catholic Dimension*, 69 NOTRE DAME L. REV. 995, 997 (1994). Although this term was spoken of in a different context, it aptly applies in the context of moot court competitions.

⁴⁵ Paul M. Pruitt, *The Life and Times of Legal Education in Alabama, 1819-1897: Bar Admissions, Law Schools, and the Profession*, 49 ALA. L. REV. 281, 301 (1997).

⁴⁶ King, *supra* note 44, 997-98 (King has a very interesting example from his own adversarial mooting experiences where he described the overbearing assertiveness in formulating arguments, “I was interning in a New York law firm and was assigned to work with a law student from New York University named Rudy Guiliani... One job we were given was to write a memorandum establishing that issuing municipal bonds in Mississippi was not violative of that state’s constitution. When Rudy read my sections of the memorandum, he told me how surprised he was by the certitude and forcefulness of my arguments”).

⁴⁷ Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. LJ 29, 43-48 (1982).

⁴⁸ Sturm & Guinier, *supra* note 29, 529 (“Adversarialism is valuable for “sharpening the mind in order to narrow it” but it pushes aside other potentially important legal approaches including efforts to problem solving in light of the relevant social, political or economic context. It also discourages students from grappling with the moral values implicated by a problem”).

⁴⁹ Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STANFORD L. REV. 1299, 1339 (1998).

⁵⁰ K.C. Worden, *Overshooting the Target: A Feminist Deconstruction of Legal Education*, 34 AM. UL REV. 1141, 1149 (1985).

⁵¹ Haider Ala Hamoudi, *Toward a Rule of Law Society In Iraq: Introducing Clinical Legal Education into Iraqi Law Schools*, 23 BERKELEY J. INT’L L. 112, 125 (2005).

including their own.⁵² Importantly, the emphasis is maintained on breaking through the passivity of learning the law and to create a cadre of lawyers who could challenge preconceived notions associated with the judicial arena.⁵³ Also consider the Chinese model, wherein moot courts are made far less adverse by organising them around large groups (as in-course exercises) to collaboratively spot issues, analyse facts, draft documents, construct legal arguments and elect their representatives to present their arguments, under the supervision of the professors.⁵⁴ Although moots are barely a decade old in China, yet their approach appears far more conducive to student learning than its counterparts.⁵⁵ Both the Iraqi and Chinese models represent a version of mooting pedagogy which is worth being reified in other jurisdictions.

Mooting in India reflects competitive, individualistic and adversarial perspectives of the judicial side of law. Within the formative structure of moot court, the most problematic aspect lies in perpetuating as a norm the prototypical characteristics of lawyering traditionally associated with maleness.⁵⁶ After a discerning analysis of cases, preparing articulate briefs and withstanding a fierce moot court round, mooters remain within the paradigm of being judged for their ‘male voice’.⁵⁷ More often than not, a young mooter astonishingly learns judge’s discontentment over her courtroom attire being too western or too traditional.⁵⁸ The criticism over appropriate attire, a throaty voice or a visible personality in a courtroom reinforce both patriarchal and classist

⁵² *Id.*, 126.

⁵³ *Id.*

⁵⁴ Mao Ling, *Clinical Legal Education and the Reform of the Higher Legal Education System in China*, 30 FORDHAM INT’L LJ 421, 427 (2007). See Lingyun Gao, *What Makes a Lawyer in China? The Chinese Legal Education System after China’s Entry into the WTO*, 10 WILLIAMETTE J. INT’L L. & DIS. RES. 197 (2002).

⁵⁵ Zou Keyuan, *Professionalising Legal Education in the People’s Republic of China*, 7 SING. J. INT’L & COMP. L. 159, 161-163 (2003).

⁵⁶ S.P. Sathe, *Gender, Constitution and the Courts* in ENGENDERING LAW: ESSAYS IN HONOUR OF LOTIKA SARKAR 117 (Amita Dhanda & Archana Parashar ed., 1999) (“The legal profession has always been a bastion of male dominance”).

⁵⁷ “Male voice” rationality is the traditional notion of thought process associated with logic, objectivity, dissociation, detachment, all of which are valued above passion, interconnected and subjective thinking, morality, building relationships and associations. See C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT 24-35 (1982).

⁵⁸ Worden, *supra* note 50, 1149 (Worden reflects the harsh reality by a narrative of her own experience:

“I could not believe that success in moot court depended on total conformance to a fossilized standard of appearance and conduct. Somehow, within that standard, one’s neckline is a crucial feature of legitimacy! Scoop neck, v-neck, ruffles and clinging sweaters, are all unacceptable: they are too feminine, and hence, ‘unprofessional’. On the other hand, men’s neckties are too masculine, too severe, and, therefore, equally taboo. The best bet seems to be a large (but not too large) soft bow (feminine) tied at the neck (masculine) which calls as little attention as possible to the chest beneath it. The implicit patriarchal message is that prospective female attorneys must silence their ‘female voice’, but should not try or expect to be like men either. The message is a variation of the self/other conflict: “Be like us, but not totally; join our game, play by our rules. . . but not on our team, and not on their team. It is a catch-22”).

tendencies in litigation.⁵⁹ It is as if we seek to impose the persona of a barrister as traditionally associated with upper class Englishmen.

Aggression, willingness to fight, emotional detachment, and exaggerated bravado are not universal traits.⁶⁰ While those traits may not always and necessarily be male, we must envision the judicial process to be more inclusive and embracing of other kinds of styles and qualities.⁶¹ Although individuals can develop themselves in a manner so as to assume the attitude of social groups,⁶² for example students can mimic maleness if they aspire to be successful litigators; this trade-off in identity can be crippling.⁶³ Those who do not identify with the adversarial nature of proceedings in terms of its abstract as opposed to contextual reasoning may experience dissonance and disengagement.⁶⁴ Indeed, if survival by disenchanted groups of aspiring judicial persons⁶⁵ is only about ‘playing the game’,⁶⁶ we must rethink the judicial system we try to impersonate in mooting.⁶⁷

Designed to distil everything into black-white or wrong-right, by the very nature of it, winners emerge raving about the moot court exercise. Indeed “many students are excited to have the opportunity to argue like lawyers ... almost all students come away feeling that it was a high point of their first year”.⁶⁸ But success may come at the cost of reproducing the culture of competition and conformity.⁶⁹ It may also come at the altar of hiding the proclivity towards speaking and furthering uncertain ideas and giving up the

⁵⁹ Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFFALO L. REV. 1155, 1156 (2008).

⁶⁰ See CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT 31-38 (1982).

⁶¹ S.P. Sathe, *Legal Profession—Its Contribution to Social Change: A Survey of the Pune City Bar*, 13 INDIAN COUNCIL OF SOCIAL SCIENCE RESEARCH-RESEARCH ABSTRACTS 117 (1992).

⁶² See PETER WOODS, SOCIOLOGY AND THE SCHOOL: AN INTERACTIONIST VIEWPOINT 2 (1983).

⁶³ Lani Guinier, *Of Gentlemen and Role Models*, 6 BERKELEY WOMEN’S LJ 93, 94 (1990-91).

⁶⁴ Roberta M. Hall & Bernice R. Sandler, *A Chilly Climate in the Classroom* in BEYOND SEX ROLES 503 (2008); Lani Guinier, *Becoming Gentlemen: Women’s Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 65 (1994).

⁶⁵ There may be a broad array of persons besides litigators who wish to be a part of the judicial system not just as an adversary. Judicial clerks, researchers, in fact judges themselves will embody this group.

⁶⁶ Guinier, *supra* note 63, 82.

⁶⁷ Parashar, *supra* note 1, 101 (“But if law is to be something more than a legitimator of status quo it must be important for the members of the profession as well as academicians at least to inculcate habits of self-reflectivity in the construction of legal knowledge”).

⁶⁸ LOUIS J. SIRICO, TEACHING ORAL ARGUMENT, PERSPECTIVES: TEACHING LEGAL RESEARCH AND WRITING 17 (1998).

⁶⁹ Sturm & Guinier, *supra* note 29, 519 (“By culture we mean the incentive structures and peer pressure, dominant rituals and unspoken habits of thought that construct and then define the interpersonal, institutional and cognitive behaviours and beliefs of members of the educational community”).

enthusiasm in experimenting and exploring.⁷⁰ It might engender loss of good litigating skills helpful in the future since good litigators require creative thinking and capacity to challenge the *status quo*.

As Bourdieu saw it, educational pedagogy works to create a collective attitude that causes individuals to docilely accept their place within the greater social structure, without question.⁷¹ Described as ‘exposition in the grand manner’,⁷² the moot court imbues us with a sense of unquestioningly embracing the law’s aristocratic ideals with ‘structural subordination’⁷³ manifested in the judicial process. Bourdieu has argued that academics have a moral obligation to study how educational institutions replicate this structural subordination.⁷⁴ In this regard, moots should play a significant role in judicial reforms by way of reverse engineering, i.e. introducing reform through legal education aspiring to change how the judicial process *ought* to be.⁷⁵ The next part investigates what needs to be re-examined and what can be recommended as the *ought* in moot pedagogy.

IV. COUNSEL PLEADS IGNORANCE?— RESPONDING TO EXPERIENTIAL LIMITATIONS OF MOOTING

As Younger observes, clinics like moot courts can work as “incentive to master the law library, [but] at worst...seedbeds from which sloppy or incorrect work habits grow”.⁷⁶ If either is possible, it is worthwhile to scrutinise the experiential flaws of mooting which may instil incorrect working habits in future litigators. This Part seeks to reconstruct some of the central features of mooting for serving its stated aim of adequately equipping law students with practical training for real courtroom experience.

Firstly, there must be a renewed focus on presenting creative and coherent legal arguments comprehensively. This includes capacities for

⁷⁰ *Id.*, 530 (“Many students feel constrained from initiating difficult yet important discussions that will not advance the discrete goals of conveying verbal mastery to win the argument”).

⁷¹ PIERRE BOURDIEU & JEAN-CLAUDE PASSERON, REPRODUCTION IN EDUCATION, SOCIETY AND CULTURE 31-35 (1990). Although Bourdieu wrote in the context of French legal education, his critique is useful from the standpoint of advocacy against the implicit ways in which the legal education permeates inequality within legal institutions.

⁷² See ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 24 (1983).

⁷³ ELLIOT B. WEININGER, FOUNDATIONS OF PIERRE BOURDIEU’S CLASS ANALYSIS 118 (Erik Olin Wright ed., 2005).

⁷⁴ J.D. Wacquant, *Toward a Social Praxeology: The Structure and Logic of Bourdieu’s Sociology* in AN INVITATION TO REFLEXIVE SOCIOLOGY 14 (2008).

⁷⁵ PARASHAR, *supra* note 1, 103 (“A radically restructured legal education is the *only* way of realistically achieving such a transformation (in legal system)”) (emphasis supplied).

⁷⁶ Judith T. Younger, *Legal Education: An Illusion*, 75 MINN. L. REV. 1037, 1038 (1991).

developing cogency in speech, articulacy in answering, a composed demeanour, comprehensibility in navigating through contentions and above all, the content.⁷⁷ At the same time, there cannot be excessive weight given to stylistic concerns,⁷⁸ where argumentation in a hurried and complicated prose is equated to fluency, and a deep and heavy (male) voice is all that constitutes persuasiveness. Legal analysis must be declared pivotal, not just in moot theory but also in practice.

Secondly, the use of precedents and authorities need to be critically examined. With judges asking at each point ‘what’s your authority’,⁷⁹ there is a need to both undercut the inclination to look only for cases greatly similar to moot problems or to avoid any adverse precedent. Whilst moot problems are framed around unsettled questions of law or fact, the reason for re-mooting these controversial legal and factual contexts is to cultivate the proper *use* of precedents. This exercise lies at the core of judicial process wherein litigators and judges use or negate the impact of precedents, doing so only after engaging *with* precedents.⁸⁰ Evidently, if the only judicial choice lies in the decided case law, there is little a lawyer can contribute to in the judicial decision-making. In this sense, moot courts cannot just alert students to the existence of precedents (just as the lecture or case method does) but develop skills in *utilising* them.⁸¹ Without a carefully considered pedagogic theory of the use of precedents in moot, this crucial element in legal training will remain tentative.

Thirdly, we need to address Dauphinais’ concern that bodily-kinesthetic intelligence⁸² involving acting skills including facial expressions, posture, gestures, eye contact, and voices are disproportionately relevant in moot.⁸³ This is coupled with the fact that most of the argumentation is reduced to rhetorical harangue.⁸⁴ Divergence from the adversarial, gladiator style moot such as more deferent and supplicatory methods, need to be

⁷⁷ Alex Kozinski, *In Praise of Moot Court - Not!*, 97 COLUM. L. REV. 178, 183 (1997).

⁷⁸ Kimberlee K. Kovach, *The Lawyer as Teacher: the Role of Education*, 4 CLINICAL L. REV. 359, 388 (1998).

⁷⁹ Eleanor Wong, *Designing a Legal Skills Curriculum for an Asian Law School: Lessons in Adaptation*, 1 ASIAN J. COMP. L. 1, 15 (2005) (emphasising the culture of ‘legal proof’).

⁸⁰ Alex Kozinski, *The Wrong Stuff: How You Too Can...Lose Your Appeal*, BYU L. REV. 325 (1992) (“Each case is different insofar as the facts are concerned. Where the lawyer can really help the judges--and his client—is by knowing the record and explaining how it dovetails with the various precedents”); Ronald Dworkin, *Integrity in Law* in LAW’S EMPIRE 24-29, 225-75 (1986).

⁸¹ See RICHARD K. NEUMANN, *LEGAL REASONING AND LEGAL WRITING* (2005) (explaining how to juggle between different levels of proof).

⁸² See HOWARD GARDNER, *FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES* 226-230 (1983).

⁸³ Kirsten A. Dauphinais, *Valuing and Nurturing Multiple Intelligences in Legal Education: A Paradigm Shift*, 11 WASH. & LEE RACE AND ETHNIC ANC. LJ 1, 11 (2005).

⁸⁴ Willem J. Witteveen, *Reading Vico for the School of Law*, 83 CHI.-KENT L. REV. 1197, 1213 (2008).

considered.⁸⁵ Although the image of the gladiator style lawyer is not altogether false, yet, the actual courtroom is far more detached than the debate-style hangover witnessed during moots. For instance, in real courtrooms, legal briefs assume greater significance than the very impressive repartee of advocates during oral submissions.⁸⁶ Prizing bodily-kinesthetic intelligence may lead to undervaluing of logical, linguistic, or interpersonal intelligences which are also useful in lawyering.

Fourthly, moot problems must rekindle the interest in mastering the facts. Currently, problems are largely set around pre-packaged set of facts from which the law students must deduce a legal principle and debate on policy arguments and merits. The emphasis on facts is minimal, focus being on legal arguments.⁸⁷ Students often begin by asking if the Court is ‘well versed with the facts of the case’ so that they may argue on law.⁸⁸ Axiomatically, moot courts are obsessively structured around policy arguments presented before the highest courts.⁸⁹ As the highest court which largely functions as an appellate body, facts are not supposed to be in dispute.⁹⁰ As Kozinski observes:

“There is a quaint notion out there that facts don’t matter on appeal – that’s where you argue about the law; facts are for sissies and trial courts. The truth is much different. The law doesn’t matter a bit, except as it applies to a particular set of facts.”

⁸⁵ See James R. P. Ogloff, *More Than “Learning to Think like a Lawyer:” The Empirical Research on Legal Education*, 34 CREIGHTON L. REV. 73 (2000).

⁸⁶ Kozinski, *supra* note 77, 186 (“By contrast, oral arguments in real cases rely heavily on the briefs”).

⁸⁷ David Simon Sokolow, *From Kurosawa to (Duncan) Kennedy: The Lessons of Rashomon for Current Legal Education*, WIS. L. REV. 969, 974 (1991) (“When we drafted a briefing problem for moot court, we recognized that the students were likely to give short shrift to the statement of facts. How could we impress on the students the crucial role lawyers’ interpretation of facts plays in persuading the court that they should prevail?”); Kozinski, *supra* note 77, 188 (“Moot court competitions perpetuate this misconception by providing little or no training in dealing with what is normally the most important aspect of any case: the record”). Although I refer to Judge Alex Kozinski at various points for his valuable critique of the moot court institution, he only makes his criticism to the extent that moot court does not teach the students about the real courtroom procedure and working. KOZINSKI, *supra* note 77, 197 (“While moot court may be fun now, there ain’t nothing like the real thing”). However, I argue that the real court room itself needs to be revamped to address the crippling downsides of the judicial system, and in as much as moot court tries to replicate and teach such a system, it can neither be educative nor reformative.

⁸⁸ Keith A. Findley, *The Pedagogy of Innocence: Reflections on the Role of Innocence Projects in Clinical Legal Education*, 13 CLINICAL L. REV. 231, 242 (2006); C.f. RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENTS 4 (1996) (“The appellate lawyer deals primarily with law, not facts....”).

⁸⁹ See Duncan Bentley, *Mooting in an Undergraduate Tax Program*, 7 LEGAL EDUCATION REVIEW 98, 113 (1996) (For Australia); JOHN SNAPE & GARY WATT, THE CAVENDISH GUIDE TO MOOTING 20 (2000) (For UK); William H Kenety, *Observations on Teaching Appellate Advocacy*, 45 J. LEG. EDUC. 582, 584 (1995) (For USA).

⁹⁰ Kozinski, *supra* note 80, 330.

This all recreates the same case method of teaching, where most students will remember the international law induction into municipal law pursuant to *Vishaka v. State of Rajasthan*⁹¹ but none might recall Bhanwari Devi.⁹² In which case, moot court becomes yet another instance of presenting briefs on merits (just as scholarly articles) devoid of factual background or socio-economic and political context, different from examinations only to the extent that it is vocal. On the other hand, in the real courtroom, successful lawyers know the value in marshalling the facts since law is nothing *sans* facts.⁹³

Moreover, the issue of sub-standard judging has already been talked of far more emotively in moots than the competition itself. Poor quality of judging can be frustrating, especially when it wrongly rewards an otherwise unappealing team. Detached and under-prepared judges can hamper the moot-ing experience vastly.⁹⁴ All this reinforces the easy conclusion that judges only decide according to their whims and mostly upon their own personal beliefs and biases.⁹⁵ It is significant to realise that not all judges rule according to what they had for breakfast,⁹⁶ and judicial choices, *choices* as they are, are reached by deploying tools of interpretation and canons of construction in augering factual and legal analysis. This lesson is an important one and can be learnt through a positive experience with the judges.

Mooting will also significantly benefit with a structured strategising and mentoring component to help prepare students with the written and oral submissions. The same has to be emphasised for faculty involvement and

⁹¹ (1997) 6 SCC 241; AIR 1997 SC 3011.

⁹² *Vishaka v. State of Rajasthan* is a seminal decision delivered by the Indian Supreme Court significant for explicitly dealing with sexual harassment by drawing from international law incorporated in CEDAW which was not legislatively incorporated in India. The facts leading up to the Supreme Court judgment have been far less emphasised than the sexual harassment guidelines. The immediate cause for filing a petition was the incident of brutal gang rape of a social worker in a village of Rajasthan. However, the Court remarked: "That incident is the subject-matter of a separate criminal action and no further mention of it, by us, is necessary".

⁹³ Findley, *supra* note 88, 242.

⁹⁴ Michael V. Hernandez, *In Defense of Moot Court: A Response to "In Praise of Moot Court - Not!"*, 17 THE REVIEW OF LITIGATION 69, 84, 85 (1998) ("I have witnessed a fair amount of substandard, even atrocious, judging. Some judges are completely unprepared and spend the first several minutes of the argument flipping through the problem and bench brief (usually to the detriment of the first advocate's score)". "Nothing is more frustrating to a competitor than sensing the judges know nothing about, or have a superficial or mistaken understanding of, the relevant cases or statutory provisions").

⁹⁵ Alex Kozinski, *Judging Judges' Ethics*, September 15, 2003, available at <http://notabug.com/kozinski/ethics> (Last visited on April 30, 2013).

⁹⁶ Alex Kozinski, *What I Ate For Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOY. LAL REV. 993, 993 (1993) ("It is popular in some circles to suppose that judicial decision making can be explained largely by frivolous factors, perhaps for example the relationship between what judges eat and what they decide. Answering questions about such relationships is quite simple - it is like being asked to write a scholarly essay on the snakes of Ireland: There are none").

support. Students often make do with unsupervised research and drafting.⁹⁷ A system of formal feedback is often lacking and what the participants get is piecemeal advice from the judges.⁹⁸ Conducting it as a formalised system of assistance and support can fare better in undercutting the competitive adversarialism of mootng than in its present hit-or-miss form.

Further, practical legal education aims at improving lawyer competence (not just technical competence in professionalising the bar); for moot courts to advance this aim, they must be structured as socially and professionally relevant experiences.⁹⁹ Professional legal education (especially in a country like India which is continually striving to grapple with its myriad socio-economic and political issues) must address the public role of law and lawyers in society and must seek to motivate young lawyers to work for the public good.¹⁰⁰ Indeed, mere analytical skills will not create lawyers competent enough to solve broader socio-legal problems. Carrie Menkel-Meadow has observed that the tasks envisaged for 21st century lawyers, would require basic understanding of socio-economic concepts and statistics to analyse the empirical effects of lawmaking and enforcing the law *vis-à-vis* being a ‘means-ends’ lawyer.¹⁰¹ Therefore, a family lawyer must develop counselling skills for working collaboratively with clients amidst divorce process and be able to devise conciliatory and innovative methods for arranging custodial homes, all within the judicial realm. At the same time, a lawyer working with disadvantaged children would have far greater work to do than to know the Constitution remarkably, and also engage with the situation on ground, make a genuine effort in knowing the NGO/group she is supporting and identify herself as a committed participant in the social struggle of disadvantaged groups.

Lastly, in as much as mootng in India is not made a mandatory part of the curriculum but remains competitive in the sense that only a few are selected to represent universities at national and international moots, it remains an exclusionary, classist enterprise, putting a premium on who can learn the art of courtroom,¹⁰² a practical aspect of a student’s chosen profession.¹⁰³ A formal-

⁹⁷ William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for its Revitalization in Professional Law*, 48 BAYLOR L. REV. 201, 237 (1996).

⁹⁸ Sturm & Guinier, *supra* note 29, 520.

⁹⁹ Bloch & Prasad, *supra* note 4, 171.

¹⁰⁰ See EDUCATING FOR JUSTICE AROUND THE WORLD: LEGAL EDUCATION, LEGAL PRACTICE AND THE COMMUNITY (Louise G. Trubek & Jeremy Cooper ed., 1999); Richard J. Wilson, *Training for Justice: The Global Reach of Clinical Legal Education*, 22 PENN STATE INT’L L. REV. 421 (2004).

¹⁰¹ Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What’s Missing from the MacCrate Report - of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 616 (1994).

¹⁰² WILLIAM R. JOHNSON, *SCHOOLED LAWYERS: A STUDY IN THE CLASH OF PROFESSIONAL CULTURES* 64 (1978).

¹⁰³ Bridget J. Crawford, “Daughter of Liberty Wedded to Law”: Gender and Legal Education at the University of Pennsylvania Department of Law 1870-1900, 6 JOURNAL OF GENDER RACE AND

ised compulsory programme for mootting will make for pedagogic equitability in legal education.

V. CONCLUSION

As an initial matter, it must be stressed that law schools *can* improve their training of lawyers.¹⁰⁴ However, if a system made to familiarise and popularise the judicial process fails to create a pool of dynamic lawyers, it calls for revisiting the pedagogic contours of such a system.¹⁰⁵ At the same time, judicial reforms *can* also be initiated in the institutions which are meant to generate its workforce. There must be a concerted effort at making the practice of law more inclusive and equitable; to this end we must redefine the theorisations around mootting for setting the ground for judicial reform.

One may think of completely doing away with mootting. Simulations are a possible alternative or a useful supplement.¹⁰⁶ Other options include conducting oral exams¹⁰⁷ or substituting moots for interactive law clubs or law societies.¹⁰⁸ At the same time, one must be wary of narrowing the options: we must now, at the crossroads of legal education reform realise the importance of the suite of *options* for developing practical legal skills.¹⁰⁹ Whilst we are aware of the drawbacks of mootting, no one-point solution is adequate or redeeming. We must endeavour to reconceptualise the moot court paradigm

JUSTICE 131, 156 (2002).

¹⁰⁴ Erwin Chemerinsky, *Radical Proposals to Reform Legal Pedagogy: Rethinking Legal Education*, 43 HARV. CIV. RIGHTS-CIV. LIBERTIES L. REV. 595, 595 (2008).

¹⁰⁵ Dr. Manmohan Singh, *PM's Inaugural address at the Conference of National Consultation for Second Generation Reforms in Legal Education*, May 1, 2010, available at <http://pmindia.gov.in/speech-details.php?nodeid=889> (Last visited on April 30, 2013) (Dr. Manmohan Singh recognized this lacuna and thus remarked: "One of the most challenging tasks in legal education in India is to strike a proper balance to ensure that our students are taught a fair mix of courses that give them knowledge and training in Indian law, but at the same time prepare them for facing the challenges...").

¹⁰⁶ While students often fear the mootting process, both because it causes them to commit to their ideas and because they are required to argue on their feet in front of their colleagues, they come to see the value of simulation in that it helps them develop their case more thoroughly. Working on simulations over a long period as in-class mandatory exercises can be more constructive and valuable in learning. Rolando J. Diaz, *Cognition, Anxiety, and Prediction of Performance in 1st-Year Law Students*, 93 J. EDUC. PSYCHOL. 420, 427 (2001).

¹⁰⁷ See e.g., Frances C. Fowler, *Testing, French Style*, 74 CLEARING HOUSE 197, 199 (2001); Barbara M. Kehm, *Oral Examinations at German Universities*, 8 ASSESSMENT EDUCATION 26 (2001). If mootting is barely providing an insight into the real world of legal practice, oral exams can do as much as the moots are doing in providing students a platform to engage with black letter law, build arguments and pitch for their respective positions.

¹⁰⁸ See C. Joseph Nuesse, *History: The Thrust of Legal Education at the Catholic University of America 1895-1954*, 35 CATH. UL REV. 33 (1985). Although law clubs have very broad agendas, it may be worthwhile to explore how the concept can be modelled for building a vital and real link between legal education and practice.

¹⁰⁹ Dhananjay Mahapatra, *Moily, Sibal in Turf War Over Legal Education*, THE TIMES OF INDIA September 20, 2009, available at <http://timesofindia.indiatimes.com/news/india/Moily-Sibal-in-turf-war-over-legal-education/articleshow/5031709.cms> (Last visited on April 30, 2013).

to diminish its adversarialism and redefine the ‘best practices’ it ought to instil in the law students. At the same time, we must identify the virtues of mooting as a pedagogic tool and undertake to realise those while implementing the regime. Furthermore, decentralising mooting from law school life (by making it accessible to all) can be valuable in ensuring that every student has a practical experience through moots to understand the litigious aspect of courtrooms.¹¹⁰ Significantly, we could learn from the West through their first-year legal research and writing courses which contain a mandatory oral advocacy element.¹¹¹ By ensuring access we can provide early exposure to mooting which is helpful for law students to decide if they wish to be litigators at all, rather than embracing or rejecting a choice through an incomplete experience. In Pakistan, law schools which in fact replicated the Indian five year B.A/LL.B. model, now have mandatory courses in mooting.¹¹²

In essence, once we start asking the right questions about the goals of judicial process and their reification in legal pedagogy, we can recreate valuable legal institutions. The popular pedagogic tool of mooting has to be theorised and realised *as* and *in relation* to all these legal institutions. To this end, all legal persons: the bar, academics and professors, and the judiciary ought to share the responsibility for providing both the skills and value-oriented legal education to young lawyers entering the profession.¹¹³

¹¹⁰ The Bar Council initiative of the Four Papers introduced as mandatory since 1998-99 has been a significant step toward introducing clinical legal education formally into the curriculum. The papers focus mainly on practical training wherein Paper I addresses instruction in litigation skills, and Paper II takes up various drafting skills, including pleading and conveyancing. Paper III covers professional matters, such as ethics and bar-bench relations. Paper IV includes legal aid work and other aspects of public interest lawyering. Although seemingly made mandatory, there are no visible signs of its implementation.

¹¹¹ See Assoc. of Legal Writing Directors and Legal Writing Institute, *Survey Results 7* (2007), available at <http://www.alwd.org/wp-content/uploads/2013/02/2007-survey-results.pdf> (Last visited on November 18, 2013).

¹¹² Osama Siddique, *Martial Law and Lawyers: The Crisis of Legal Education in Pakistan and Key Areas of Reform*, 5 REGENT J. INT’L L. 95, 116 (2007).

¹¹³ Parashar, *supra* note 1, 96 (Exploring if professional versus academic aims of legal education are necessarily divergent).