

The Politics of the Moot Court

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Mark Thomas and Lucy Craddock. **The Art of Mooting: Theories, Principles and Practice**. Cheltenham: Edward Elgar, 2019. Pp. 224. £75. ISBN: 9781788970389. © The Author(s) 2021. Published by Oxford University Press.

Abstract

Scholarship has generally represented moot court competitions in one of two ways: either as a beneficial way for students to develop practical skills prior to the Bar, or as a reproducer of hierarchy and exclusion. This review essay attempts to plot a third way of thinking about moots, one that finds critical potential in the exercise of mooting while remaining attentive to its conservative biases. Building out from a critique of the common law focus of Thomas and Craddock's *The Art of Mooting*, the essay reflects on how critical approaches to international law can be used to teach moot skills more effectively. The essay then turns to the limitations such a critical pedagogy must be aware of within the actual practice of the competition, considering how these limits can be navigated and even flipped into teachable moments for critically inclined students. The essay closes with a call for a more nuanced discussion about the use of experiential learning, of which moots are only one example, for fostering critical engagement with international law.

1 Introduction

Moot competitions are a significant component of the modern university curriculum. The two largest international moots, the Philip C. Jessup International Law Moot Court Competition and the Willem C. Vis International Commercial Arbitration Moot, boast the participation of thousands of students each year from law schools all over the world, and one need only list the many, many others around the world – the

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** Postdoctoral researcher, PRIVIGO, University of Helsinki, Helsinki, Finland. Email: ukri.soirila@helsinki.fi. The authors are indebted to Eve-Anne Travers and G.C. McBain for their comments on an earlier draft of this article, as well as to the generations of moot participants we have coached, taught and judged who were subjected to these theories in practice. Any errors remain wholly our own.

Telders International Law Moot Court Competition, the International Criminal Court Moot Court Competition, European Law Students Association's European Human Rights Moot Court Competition and John H Jackson Moot Court Competition on World Trade Organization (WTO) law, the Jean-Pictet Competition on international humanitarian law, the European Law Moot Court Competition, the Manfred Lachs Space Law Moot Court Competition, the International Law of the Sea Moot Court Competition, the Oxford International Intellectual Property Moot, the Foreign Direct Investment International Arbitration Moot, to name just a few – to understand the breadth of regimes now covered in mootings.

The pedagogical benefit of participation is well-known.¹ Students gain skills in complex case analysis, legal writing, oral advocacy and teamwork. Universities, too, use mootings as an advertisement for their academic programmes, often including accredited mootings modules in their LL.Ms. Employers widely recognize their value and it is common to find that senior colleagues will themselves have gone through formative mootings experiences. Whether one is working in a law firm, a non-governmental organization (NGO) or the Registry of the European Court of Human Rights, it is likely that someone on your corridor can still describe in great detail the facts of 'their' Jessup case.²

Yet, while competitions often provide guides covering the basics of participation for students,³ the notion of what marks a truly great moot performance remains elusive. Take the Jessup Oral Pleadings guide. Despite beginning with the statement that 'in the oral advocacy stage you are seeking to persuade the judges as to the strength of your client's position', the main focus is on the logistics of a round – where pleaders will sit, how judges should be addressed – and on the basics of public speaking – back

¹ As confirmed by interview-based research conducted by one of the authors during his pedagogical studies, moot court competitions guide students into adopting deep learning approaches, the benefits of which are well-recognized in pedagogical research. See Biggs, 'Enhancing Learning: A Matter of Style or Approach?', in R.J. Sternberg and L. Zhang (eds), *Perspectives on Thinking, Learning and Cognitive Styles* (2001) 73; Postareff, Parpala and Lindblom-Ylänne, 'Factors Contributing to Changes in a Deep Approach to Learning in Different Learning Environments', 18 *Learning Environments Research* (2015) 315; Barrows, 'Problem-Based Learning in Medicine and Beyond: A Brief Overview', 68 *New Directions for Teaching and Learning* (1996) 3; Watters and Watters, 'Approaches to Learning by Students in the Biological Sciences: Implications for Teaching' 29 *International Journal of Science Education* (2007) 19; Heikkilä and Lonka, 'Studying in Higher Education: Students' Approaches to Learning, Self-Regulation, and Cognitive Strategies', 31 *Studies in Higher Education* (2006) 99.

² This is true for academia, too. For example, Michael Byers credits participation in the Jessup as the spark for his interest in customary international law: see M. Byers, *Custom, Power and the Power of Rules* (1999), at xi.

³ See, e.g., Friends of the Jessup, *Tips for Writing Memorials for the 2015 Competition* (21 September 2014), available at www.ilsa.org/Jessup/Jessup%20Competitor%20Resources/Tips%20for%20Writing%20Memorials%20for%202015.pdf; Liu et al., *A Guide to the Philip C. Jessup International Law Moot Court Competition*, Chinese Initiative on International Criminal Justice (2014), available at [www.ilsa.org/Jessup/Jessup%20Competitor%20Resources/Jessup%20Guide%20\(International\)%20.pdf](http://www.ilsa.org/Jessup/Jessup%20Competitor%20Resources/Jessup%20Guide%20(International)%20.pdf), both hosted on the website of the organizer of the Jessup, the International Law Students Association (ILSA). See also White & Case, *Jessup Competitors Guide*, available at www.whitecase.com/publications/video/jessup-competitors-guide (last visited 2 August 2021).

⁴ White and Case, *Jessup Oral Pleadings*, at 1, available at https://events.whitecase.com/jessup/pdfs/Section4_JessupGuide_Oral.pdf (last visited 2 August 2021).

straight, voice clear, with a consistent structure to the presentation of arguments.⁴ The nitty gritty of what constitutes good, forensic international legal argument, as a specific kind of rhetoric, is left unexplored. Taken at face value, the Guide does little to dispel Dan Joyner's criticism that the 'Jessup is just another law student moot court competition in which style trumps substance, and where good used car salesmen typically come out on top'.⁵

In this light, Mark Thomas and Lucy Craddock's *The Art of Mooting: Theories, Principles and Practice* marks a welcome intervention into the field. Acknowledging that 'mooting is a unique form of public speaking', one 'to which most law students and lawyers have had limited structured exposure and in which many moot coaches have had limited formal training' (at 178), Thomas and Craddock set out to explain, within a framework of educational psychology, how mooting can best be approached to ensure the effective development of students both during and after the competition. Crucially, their approach takes mooting seriously as a distinct form of argument, one that requires competence in *legal* communication as opposed to other forms of public speaking. Accordingly, it tailors its advice to measuring student's development in moot-specific skills such as the synthesis of legal sources, correct application of legal and policy principles to the facts of the case and correct comprehension of the legal context in which the argument is made.

The book is a very useful guide for both new and experienced coaches, as we explore below. In the competitive, practice-oriented way in which it frames mooting, however, it also represents some tensions we have found latent in the structure of moot court competitions – tensions we think it is high time for international law scholarship to take seriously. In this review, we explore the strengths and weaknesses of mooting from a distinctly critical perspective. We begin the review with an overview of Thomas and Craddock's book, outlining the useful contribution it makes to mooting pedagogy while also drawing attention to its limitations for understanding international law moots specifically (Section 2). In Section 3, we take forward our consideration of the distinct aspects of international law mooting by exploring the contribution critical approaches to international law can make to moot preparation. More specifically, we rely on the analysis of the structure of international legal argument as set out in Martti Koskenniemi's *From Apology to Utopia* to show how students can fruitfully approach mooting through a critical lens, different from the one outlined in *The Art of Mooting* and other moot guides.⁶ Section 4 then explores the contradictions that a critical international lawyer will face in promoting such an approach within the actual moot competition. Using the Philip C. Jessup International Law Moot Court Competition as

⁵ D. Joyner, 'Why I Won't Attend the Jessup Competition Again', *Opinio Juris* (13 February 2012), available at <https://opiniojuris.org/2012/02/13/dan-joyner-why-i-wont-attend-the-jessup-competition-again/>. For another brief criticism of the Jessup as 'a rather artificial exercise and one which rewards a sort of indulgent competitiveness as much as beneficial collaboration', see Simpson, 'On the Magic Mountain: Teaching Public International Law', 10 *European Journal of International Law (EJIL)* (1999) 70, at 90.

⁶ M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2006).

our example, we try to reflect on how the experience of mooting as a global competition variously coheres with and jars against the kind of critical pedagogy we outline in Section 3, and suggest some strategies for leveraging critical lessons for students in the wholly non-critical environment of the moot competition. In the closing section, we think through these productive and frustrating aspects of mooting, in order to situate mooting's critical potential within the broader context of legal education today.

We write this review from two perspectives. In pedagogical terms, we have a deep investment in mooting. We have between us over 15 years of mooting experience, predominantly with the Jessup, participating first as competitors and then going on to serve as coaches, judges and teachers of moot skills courses. In terms of our research, however, we approach international law from a decidedly critical perspective, one that would be uneasy with, even hostile towards, the kind of doctrinal view espoused by moot court practices. In our own experience, we have found mooting to both support and trouble our critical approach to international law, and we want to explore that tension here, in contrast with the way in which mooting is presented by Thomas and Craddock.

2 The Art of Mooting

The Art of Mooting is distinct from the standard competitor guides provided by moot court competitions. It is not a guide on how to research legal issues, nor does it offer templates for structuring written and oral submissions. Instead, Thomas and Craddock seek to engage with mooting as a learning exercise, one that engages 'all of the domains of human mental activity' (at 1), in order to draw out the unique pedagogical experience of mooting for students and coaches.

The book is divided into three sections: 'Theories', 'Principles' and 'Practice'. Together, these sections outline 'a mooting-specific theoretical framework' (at 7) to help moot coaches develop their teams' skills across the competition. Mooting, Thomas and Craddock argue, is different from any other experience at law school. Competitors (and coaches) cannot approach it as a simple intellectual exercise, but must grapple with how mooting develops a set of additional skills – what Thomas and Craddock group together as the *cognitive*, *psychomotor* and *affective* domains of human mental activity – that require distinct pedagogical attention. Breaking mooting down in this way allows the authors to focus on the different skills that are required and refined at each step of the competition, from the first stages of research to the final oral pleadings.

Part I focuses on these different domains of mental activity and the ways in which the pedagogical theories regarding them can be adjusted to the context of mooting. When it comes to the cognitive domain, Thomas and Craddock draw from the educational psychologist Benjamin Bloom's *Taxonomy of Educational Objectives*⁷ to provide a framework for understanding how students not only learn the surface-level facts about

⁷ B. S. Bloom (ed.), *Taxonomy of Educational Objectives: The Classification of Educational Goals. Handbook I: Cognitive Domain* (1956).

the moot court case and the law surrounding it but also gain a deeper understanding of the case's context. In particular, this adapted version of Bloom's *Taxonomy* helps to situate the case within a more general framework of law and navigate between several alternative arguments and counterarguments, as well as helping to isolate and analyse elements that require further attention in the team's learning process.

Yet as Thomas and Craddock explain, mooting is not only a cognitive process. How to stand, how to use facial expressions and hand gestures and how to project your voice are all important aspects of mooting, as is dealing with anxiety and stage fright. Although there are previous studies on these aspects in the performing arts, for example, they are not wholly satisfactory in the context of mooting. Mooting differs from, say, ballet in that the latter is dominated almost entirely by the psychomotor skills and aesthetics, whereas in mooting the psychomotor skills are needed only to help convey the verbal message of the mooter to the judges and to control any gestures that might prove distracting. For these reasons, the authors develop their own taxonomy of mooting psychomotor skills, one that emphasizes the dynamic relation between these skills and the cognitive domain of mooting to focus on convincing judges most efficiently.

Applying this in practice, the authors argue that moot court training in the psychomotor domain should focus on removing undesirable, usually subconscious, psychomotor activity through staged exercises and practices under the supervision of a coach aware of the relevant theories of psychomotor behaviour. The affective domain, on the other hand, is best developed by training under circumstances as similar as possible to the competition, but with practice benches that are more hostile than the competition ones, in order to train students to deal with the worst-case scenario in a non-competitive environment.

Part II analyses the impact of these educational theories on different aspects and stages of the moot court experience. According to Thomas and Craddock, coaches should be able to combine sufficient knowledge of these theories with some practical skills in litigation to guide students in their process and help them weigh the value of different arguments, as well as how those arguments should be presented. Furthermore, the authors discuss team dynamics and the division of labour within the team (including the all-important selection of oralists⁸), as well as strategies for minimizing possible friction between team members. Helpfully, this section provides useful tips on building trust and communication both within the team and between the team and their coach, understanding that nurturing both dynamics is vital for successful participation.

⁸ Some of the advice in this chapter may be alien to coaches – ourselves included – as it presumes coaches have a reasonably large pool of applicants to choose from, as well as presuming that coaches are prioritizing competitive performance in their selection. In our own experience, we have often been confronted with a limited pool of moot applicants, essentially making the team from whoever applied and is willing to do the work. On that ground, our presumption is that all students will be given the opportunity to plead, unless they do not wish to or show insufficient dedication. This gives all participants the full experience of mooting, but perhaps at the cost of a stronger performance at the competition.

Part III, titled ‘Practice’, is closest to a typical moot guide, but is significantly more informed by theory than a normal guide would be. Within the scope of this part, the authors provide useful tips on how to craft written arguments, what kind of language to use and so on, but also develop an assessment methodology for moot courts, both for the informal assessment of the team’s progress during the competition and for grading the students at the end, if this is required by the university.⁹

Interestingly, part III also includes a section on the use of legal theories in moot argumentation – a discussion that reveals one of the few weak points of the book, at least for international law moots.¹⁰ Thomas and Craddock’s theoretical-methodological discussion appears in chapter 7 of the book, where they provide the following guidance on how to approach written submissions:

[W]hile legal theory has its place in moot competitions (as it does in forensic advocacy), it is not the purpose of the written submissions to engage in a sterile theoretical discussion without precise engagement with the legal and factual matrix of the problem. *What is more directly relevant is how courts ordinarily engage with and apply those laws, how they perceive their role in the process, and the theories of adjudication which guide judicial decision making.* Engaging with judicial reasoning therefore (and not merely transposing the decision from another case onto the facts of the moot problem) will be a vital part of the process of developing written submissions. (at 120, emphasis added)

Thomas and Craddock ground this turn to theory as a way to resolve cases in which ‘there is no reason intrinsic to the legal system which commands a particular choice’ (at 120). By design, this would encompass almost every moot submission, written as they are to provide arguable submissions for both sides. But then there is an odd slip-page. ‘In order to resolve such problems’, they write, ‘*common law courts* [emphasis

⁹ While not the focus of our review essay, it is worth noting the book’s top-down approach to moot and the coach–student relationship. Thomas and Craddock reinforce a hierarchical relationship between the coach and the team, where the team carry out the work and then have it judged externally. As we explore below, much of the benefit we find in moot is in the critical exploration of tensions between the ideal and practice of international law, and here we find that the role of the coach is more facilitative and non-hierarchical, with the coach going through much the same tensions and frustrations as the team (this also underpins our dislike of the competitive selection of oralists). For further reflection on non-hierarchical grading in a moot context, where students decide their own grade internally as a marker of the individual’s contribution to the group’s success, see Murdoch, ‘Using Group Skills in Honours Teaching: The European Human Rights Project’, 28 *Law Teacher* (1994) 258; Murdoch, ‘Using Self- and Peer Assessment at Honours Level: Bridging the Gap between Law School and the Workplace’, 49 *Law Teacher* (2015) 73.

¹⁰ Although it should be noted that *The Art of Mooting* is not a book specifically about international law moots, the case study Thomas and Craddock provide is, with chapter 8 of the book focused on the experience of the Queensland University of Technology team at the International Criminal Court Moot Competition 2017. In fact, although our discussion here largely concerns public international law, the ICC poses even more problems for Thomas and Craddock’s common law framework, having not only its own logic of criminal justice distinct from the kind of adjudication envisaged by Thomas and Craddock but also a distinctly international form of criminal justice. For reflections on this latter point, on the commensurability of domestic criminal law theory to international criminal law, see Nouwen, ‘International Criminal Law: Theory All Over the Place’, in A. Orford and F. Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (2016) 738.

added] have to step outside the narrow limits of legal precedent and bring to bear some other form of reasoning or introduce some underlying assumptions which are not intrinsically *legal*' (at 120). They go on to cite the introduction of the neighbourhood principle in *Donoghue v. Stevenson* as their case in point.¹¹ This domestic common law framing continues throughout the rest of the chapter, with Thomas and Craddock surveying the practice of the Australian High Court to discuss the concept of judicial activism (at 121–122) and approaching statutory interpretation through the lens of Australian legislation and Parliamentary intention (at 123–124). The specificities of common law reasoning, as opposed to other legal systems, are left unexplored.

The problem is not that these ideas are alien to international law moots. Analogies can certainly be drawn between the process of statutory interpretation as a resolution of textual ambiguity and the interpretation of treaties, just as international law mooters will need to close read cases to understand which aspects of the court's approach have been relied on in subsequent cases. Indeed, particularly in a United States-oriented competition such as the Jessup, it can be helpful to remind students from civil law systems that judges can and will expect discussions of precedent, interpretation and limits on the judicial function that would be alien to their own domestic advocacy. But Thomas and Craddock's suggestion that judges locate their power within 'the "local" constitution and/or other legislative documents of the particular country' (at 121), for example, is hard to map onto the practice of international courts. While international courts and tribunals will certainly have founding documents that explain their jurisdictional limits, the social construction of those limits – and the authority an international court may feel able to wield in a particular circumstance – is one wholly distinct from the constitutional settlement of a domestic legal order. We return to these points in greater detail below.

The book concludes by discussing some future challenges for mooting, including the challenges of remote mooting – an issue which has become more topical than the authors could have known due to the COVID-19 outbreak, which led most competitions, including the Jessup, Telders and Vis moots, to 'go virtual'. They also note a need for continued institutional support for mooting, including the allocation of sufficient teaching time for coaches. But the book ends on an optimistic note. Mooting is spreading, evidenced by 'its role within Bar courses; the engagement by student associations in training sessions and internal competitions . . . and its increasing role for assessment purposes within law schools' (at 183). Teachers of international law would do well to acquaint themselves with these skills as soon as possible.

3 A Critical Approach to International Law Moots

If a new or experienced coach wants to get to grips with the various cognitive, psychomotor and affective skills necessary for a successful moot performance, *The Art of Mooting* is an invaluable guide. It provides useful insights as well as filling a clear gap in the existing pedagogical literature on mooting as an educational practice, and is a

¹¹ [1932] UKHL 100.

trailblazer for more theoretical discussion on moot court participation and the skills these competitions help students develop.

We seek now to contribute to this discussion by reflecting on our own approach to mootings, as competitors and as coaches. We do so by taking up a topic that is briefly touched upon but otherwise noticeably absent from the book, namely the relation between moot court competitions and critical approaches to law and legal theory. While *The Art of Mooting* – and moot guides in general – pay little attention to this field of research, our own experiences as mooters have been firmly informed by critical approaches to international law. In particular, we take up the work of Martti Koskenniemi, focused as it is on the practice and ‘feel’ of international legal argument,¹² in order to correct the common law bias of Thomas and Craddock’s approach and ask what kind of contribution Koskenniemi’s work can make to a moot team’s performance.

Our argument is not that Koskenniemi is the *only* critical scholar who can be read by mooters¹³ (and he is assuredly not the ‘most’ critical).¹⁴ But these insights *are* decidedly critical in the context of the conservative space of moot court competitions. As we explore further in Section 4, Koskenniemi’s work helps turn the competitive practice of mootings into a lesson about the ultimate indeterminacy of international law in the real world, as well as the institutional biases that structure and constrain what is eventually found to be the ‘right’ answer. Exploring these links thus helps expose a very different pedagogical approach to mootings than the one found in *The Art of Mooting*, one that foregrounds its non-competitive, intellectual dimensions. This, we feel, should also help open a conversation amongst critical scholars about the pedagogical value of mootings, an aspect of the modern university experience that has received little critique so far.

A *The Indeterminacy of International Law*

In *From Apology to Utopia*, Koskenniemi famously argued that international law is indeterminate due to fundamental contradictions at the heart of its liberal foundations. Rejecting both the power of the strongest and natural law, liberal international law is built around the notions of autonomy and sovereign equality. This duality, argues

¹² See, e.g., Koskenniemi, ‘Epilogue’, in Koskenniemi, *supra* note 6, 562, at 564, where the book is described as an attempt ‘to describe international law in a way that would resonate with practitioner experience’.

¹³ Notably, Duncan Kennedy’s work on the phenomenology of adjudication and argument patterns remains instructive, although losing the international law focus that we emphasize here in Koskenniemi’s work. For particularly helpful pieces for mooters, see Kennedy, ‘Freedom and Constraint in Adjudication: A Critical Phenomenology’, 4 *Journal of Legal Education* (1986) 518; Kennedy, ‘A Semiotics of Legal Argument’, in Academy of European Law (ed.), *Collected Courses of the Academy of European Law*, vol. 3, bk. 2 (1994) 309.

¹⁴ For criticisms of Koskenniemi’s work from a Marxist perspective, see C. Miéville, *Between Equal Rights: A Marxist Theory of International Law* (2006), ch. 2; B. S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (2017), ch. 5. For criticism of this dismissal from within the Marxist tradition (in this case, engaging with Chimni’s *International Law and World Order*), see Rasulov, ‘A Marxism for International Law: A New Agenda’, 29 *EJIL* (2018) 631, at 649–650.

Koskenniemi, creates the dynamics of international legal argument which allow any case to be argued from both the perspective of state sovereignty, emphasizing the fact that international legal rules derive from the will of states – what Koskenniemi calls ‘ascending’ arguments – and from the perspective of the international community, emphasizing the fact that rules must bind each state equally – what Koskenniemi calls ‘descending’ arguments. Because liberal international law is based on both autonomy and equality, both ascending and descending arguments are equally valid and also equally vulnerable to critique. Arguments arising from state sovereignty are all too easy to be made to look like the power of the strongest – and hence ‘apologist’ – whereas arguments based on shared community values and fictional equality are easy to cast as little else than natural law – and hence ‘utopian’. When one pushes harder, in fact, autonomy comes to appear utopian, just as shared values reflect and apologize for the power of the strongest. For these reasons, liberal international law is fundamentally indeterminate, caught in an endless loop between ascending and descending arguments, none of which can hold critical scrutiny.

In our view, familiarity with the indeterminacy thesis and the structure of the international legal argument is essential for moot court competitors in preparing for and reflecting on their moot court experience. Our starting point for this comes not from theory but from the Jessup itself. In the organizer’s introductory guide, the competition is described as follows:

A moot court competition is intended to be a relatively fair match between the two arguing sides. Moot court judges want to focus on your team’s ability to prepare and present good legal arguments, rather than decide which team has the ‘winning’ legal argument. Therefore, most moot court problems are written with the goal of balance. In order to maintain that balance, certain facts are included, or omitted, so that the issues do not overwhelmingly favor one side. Often, the facts are drafted so that there is a degree of ambiguity: the goal of the authors is to avoid clear answers as to which side is right, thus allowing both parties to use particular facts in their favor to argue their case.¹⁵

Building from this quote, we can reflect on how the indeterminacy thesis and its repercussions provide a pedagogically fruitful way of approaching the moot court competition. Accepting indeterminacy allows students to overcome the common problem (especially among civil law students) of continuously searching for the ‘right answer’, and moves them more quickly into working with the inherent openness of the facts and legal problems of the case.

In our experience, one of the most frequent obstacles students face in early (and sometimes later) stages of the competition is getting frustrated and sometimes even paralysed due to their inability to find the ‘perfect’ argument – the (imaginary) argument with an iron-clad plethora of legal authority behind it – or becoming discouraged by a case or other source that initially seems to be in the opposing side’s favour. Knowledge of the indeterminacy thesis helps in relieving these frustrations and increasing students’ confidence in their argumentation, turning their early

¹⁵ White & Case, *Working with the Jessup Compromis*, at 2, available at https://events.whitecase.com/jessup/pdfs/Section1_JessupGuide_Compromis.pdf (last visited 2 August 2021).

frustration into a tool for deconstructing the opposing side's arguments. Indeed, in our experience, understanding and accepting the indeterminacy thesis may be a truly relieving moment that also significantly increases the students' comprehension and enjoyment of international law and legal argument – even if they must pass through anxiety and nihilistic disbelief along the way.

In a similar vein, understanding the ways in which international legal arguments are coded as ascending and descending – and the critiques each can be exposed to – helps not only in the construction of new arguments but also the sophistication and 'balance' of those that seem clear-cut at first glance. Indeed, while some students get fixated on finding the 'perfect' rule, as discussed above, it is also not uncommon that others take such strong positions on behalf of the government they are representing that they assume extreme apologist or utopian positions, replacing the finer details of legal arguments with simplified notions of 'sovereignty' or all-trumping, extremely expansive readings of human rights and global justice. When they become more familiar with the structure of international legal argument and the weaknesses of each ascending and descending position, they can learn to 'hide' the starting premise of their argument and propose more detailed legal solutions that at least appear to balance pragmatically between apology and utopia.

Think, for example, of a case dealing with a transboundary aquifer which is of essential importance to the economy of a state struggling with poverty and drought, but the drilling and extraction of water of which causes harm to the neighbouring states and potentially to the entire ecosystem.¹⁶ A state justifying the extraction of water solely on the basis of its sovereignty over natural resources may seem far too apologist of its own interests, just as the neighbouring state's focus on conservation of the environment may seem too utopian. Teams that can only put these arguments forward remain vulnerable to an opposing team (or judge) who reject the fundamental premises of these arguments. Yet anyone familiar with the indeterminacy thesis knows also how to flip both sides of the argument, so that the sovereignty argument becomes utopian (perhaps by framing the argument as a protection of the fundamental rights of peoples everywhere) and the environment argument apologist (foregrounding, say, the neighbouring state's sovereign right to protect itself from transboundary harm). Getting to grips with the indeterminacy thesis in this situation may help the students not only to move past the impasse caused by the rules seeming to favour one side of the dispute at first, but also to be able to find a more nuanced argument which seeks to shield itself from the most obvious critique of apology or utopia (even if no argument can do so perfectly). Indeed, the best arguments – in moots and real life – are usually those that appear to take into account the interests of both parties while finding that the details and facts tilt the scale in the favour of their client in that particular case.

¹⁶ Former Jessupers might recognize this fictional example as the 2017 Jessup case, the Case Concerning the Sisters of the Sun.

B Structural Bias

But how *does* one ‘tilt the scale’? The structuralist approach of *From Apology to Utopia* opens up the fundamental indeterminacy of legal argument. But on its own it cannot account for the general consistency of decisions by international courts – the general predictability of how a case will be plead and a court will rule, even in the face of a seemingly endless series of possible arguments. As Akbar Rasulov has memorably put the problem:

[*From Apology to Utopia*]’s implicit metaphor that the international legal argument was essentially like a coin (there is always another side to a coin and neither side is any more ‘privileged’ than the other) was certainly immensely progressive. . . . But every metaphor has a limited service area. Perhaps, it is time now to begin acknowledging – in order to sponsor even more critical legal inquiries – that the international legal argument almost never works like a coin; that it acts more like a buttered toast: released in a free fall, it may flip over several times, but it will almost always land the same side down. (And the question must then become: why?) Any suggestion that ‘that is just what toasts do’ would give toasts ‘way too much credit’.¹⁷

To put this in mooted terms: any argument may well be makeable before the bench, but it is a certain style of argument that will be generally recognized as the ‘right’ one to make, and it is that team that will receive the higher score.

Koskenniemi’s own work on this problem is instructive. *From Apology to Utopia* had focused on a kind of generic public international law that no longer seemed recognizable by the turn of the century, where the proliferation of particular regimes (trade, human rights, environmental law and so on) had ‘fragmented’ international law across different institutions. Having acknowledged this critique of *From Apology to Utopia* by the mid- to late 2000s, Koskenniemi’s work began to focus on *structural bias*, ‘the way in which patterns of fixed preference are formed and operate inside international institutions’.¹⁸ Although international law might remain indeterminate on an analytical level, the decisions of different courts and tribunals are far from random in practice. A human rights court will decide a dispute in a very different way from a trade panel deliberating on the same subject matter, for the former has learned to *de facto* prefer different ‘outcomes or distributive choices’ from the latter – it has, in other words, a different structural bias, one with its own logic that puts human rights values over and above trade and economics.¹⁹ Indeed, this is the reason why political conflicts today so often take the form of struggles over jurisdiction and the definition and re-definition of legal problems.²⁰

¹⁷ Rasulov, ‘Review of Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument (Reissue with New Epilogue)*’, 16 *Law and Politics Book Review* (2006) 583, at 589, citing Kennedy, ‘A Semiotics of Critique’, 22 *Cardozo Law Review* (2001) 1147, at 1185.

¹⁸ Koskenniemi, ‘The Politics of International Law – 20 Years Later’, 20 *EJIL* (2009) 7, at 9. See also Marks, ‘False Contingency’, 62 *Current Legal Problems* (2009) 1.

¹⁹ Koskenniemi, *supra* note 6, at 606–607.

²⁰ Koskenniemi, *supra* note 18, at 9, 11; Koskenniemi, ‘Hegemonic Regimes’, in M. A. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (2011) 317.

Structural bias, we suggest, is a much more useful way of approaching the contextual aspects of international law mooting than the common law focus suggested by Thomas and Craddock, precisely because a domestic court will not need to compete for authority in this way. The International Court of Justice (ICJ) – lacking the compulsory jurisdiction and enforcement mechanisms of a WTO Panel, the Court of Justice of the European Union (CJEU) or the European Court of Human Rights (ECtHR) – will often take a more deferential approach towards sovereignty and the consent of the parties, in order to ensure the participation, compliance and continued ‘buy-in’ of the states before it.²¹ For mooters, these nuances are important to grasp because their argument must be pitched to the correct audience. Understanding structural bias will help students grasp the decentralized structure of international law and international legal adjudication, attenuating their arguments to the bias of the court they are pleading before.

Allow us to illustrate this point with a couple of examples drawn from the Jessup. First, let’s take one of international law mooting’s favourite problems: the question of attribution and the effective/overall control test. One state will be required to allege a violation that fails to fit the effective control test laid out in *Nicaragua*,²² but would fit the overall control test applied by the ICTY in *Tadić*.²³ Many teams will attempt to plead *Tadić* directly, overlooking the ICJ’s explicit rejection of the standard in the *Bosnian Genocide* case, and will face strong questioning from the judges.²⁴ More strategic teams will attempt to massage the facts of the moot case to fit the effective control test, or otherwise try and demonstrate some form of *lex specialis* that requires the Court to depart from the specificities of the test as set out in *Nicaragua*.

²¹ For discussion of the ICJ’s function and its relationship with states, see variously Posner, ‘The Decline of the International Court of Justice’, John M. Olin Program in Law and Economics Working Paper No. 233 (2004), available at https://chicagounbound.uchicago.edu/law_and_economics/500/; Cassese, ‘The International Court of Justice: It Is High Time to Restyle the Respected Old Lady’, in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (2012) 239; and Scobbie, ‘“All Right, Mr. Demille, I’m Ready for My Close-up”: Some Critical Reflections on Professor Cassese’s “The International Court of Justice: It Is High Time to Restyle the Respected Old Lady”’, 23 *EJIL* (2012) 1071. Within the context of the recent proliferation of international tribunals and the risks of forum shopping, it should be noted that the initial fear over fragmentation was sparked by statements by two ICJ Presidents, Judges Stephen M. Schwebel and Gilbert Guillaume. For discussion, see Koskeniemi and Leino, ‘Fragmentation of International Law? Postmodern Anxieties’, 15 *Leiden Journal of International Law (LJIL)* (2002) 553; M. Prost, *The Concept of Unity in Public International Law* (2012).

²² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits Judgment, 27 June 1986, ICJ Reports (1986) 14, para. 115.

²³ Judgment, *Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999, paras 120–121.

²⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports (2007) 24, at 43, 209–211, paras 402–407, esp. para. 403, where the ICJ explicitly draws a distinction between state responsibility (the type of general international law the ICJ is concerned with) and individual criminal responsibility (which the ICTY governs).

²⁵ See, e.g., *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, 30 November 2010, ICJ Reports (2010) 639, at 664, para. 66:

Second, teams are often tasked with interpreting treaties that have their own special interpretative bodies, such as international human rights law or questions of international arbitration and the WTO system. Here, again, we find a division between competitors, with many teams citing cases from other tribunals without grounding why the Court should find them persuasive (at best maybe throwing in a reference to Article 38(1)(d) of the ICJ Statute), but higher scoring teams not only leaning on the ICJ's own statements on other tribunals,²⁵ but also relying on the broader context of international law to think about, for example, how subsequent agreements influence the interpretation of prior treaties,²⁶ as well as the structural differences between tribunals that must be taken into account.²⁷

The two examples above might seem obvious to readers. But the point is that *neither of these problems can be solved within the common law framework relied on by Thomas and Craddock*. While analogies can certainly be drawn between common law and international adjudication – both examples rely on ICJ precedent in grounding the approach the court should take, for example, just as Thomas and Craddock's common law framework would suggest – the way an international law mooter must articulate their argument is very different, bearing in mind that even the mention

Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the [International Covenant on Civil and Political Rights] on that of the [Human Rights Committee], it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.

²⁶ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS, Art. 31(3). See also Report on Subsequent Agreements and Subsequent Practice in Relation to Interpretation of Treaties, adopted by the International Law Commission at its seventieth Session in 2018 and Submitted to the General Assembly as a Part of the Commission's Report Covering the Work of that Session, A/73/10, 18 May 2018, para. 51.

²⁷ Think, for example, of the selective leeway given to individuals appearing before the European Court of Human Rights in light of their procedurally weaker position: Ambrus, 'The European Court of Human Rights and Standards of Proof: An Evidentiary Approach towards the Margin of Appreciation', in L. Gruszczynski and W. Werner (eds), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (2014) 235. Compare this to the strategies of judicial reasoning employed by the ICJ to signal its impartiality: see Petersen, 'The International Court of Justice and the Judicial Politics of Identifying Customary International Law', 28 *EJIL* (2017) 357, esp. at 364–366. For wider discussion of these tensions, see Gruszczynski and Werner (eds), *supra*; and on the ICJ specifically, see also J. G. Devaney, *Fact-Finding before the International Court of Justice* (2016), esp. ch. 3, which contrasts the ICJ's evidentiary standards to those of other tribunals.

²⁸ Statute of the International Court of Justice, Article 59: 'The decision of the Court has no binding force except between the parties and in respect of that particular case.' This can normally be overcome by citation to one of the many statements the Court has made on keeping its case law consistent. See, e.g., *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, 11 June 1998, ICJ Reports (1998) 275, 292, para. 28:

It is true that, in accordance with Article 59, the Court's judgments bind only the parties to and in respect of a particular case. There can be no question of holding Nigeria to decisions reached by the Court in previous cases. The real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases.

of ‘precedent’ as a concept in international law is dicey (moot court judges will almost immediately point out the limited bindingness of the Court’s judgments, as set out in the ICJ Statute).²⁸ All this indicates a need for a distinctly international legal approach to the persuasion of courts, one that takes seriously the structural specificity of international law and the limits state sovereignty places on judicial bodies like the ICJ.

4 The Critical Limits of Mooting

Above, we have tried to show how critical approaches can inform moot court participation, moving us away from the common law approach pursued in *The Art of Mooting*. But our agenda goes further than this. As critical scholars, we also believe that mooting as an intellectual exercise can actively *engage* students with critical approaches to international law. Our sense is that for most moot participants Koskenniemi’s approach will be immediately intelligible. They will intuitively understand from their experiences in the competition the malleability of legal argument, the multiple ways in which the same legal argument can be reached by different methods and the ultimate conclusion that international law is ‘singularly useless as a means for justifying or criticizing international behaviour’.²⁹ This means ex-mooters can take forward a more ambivalent approach to international law’s claims to progressive teleology and peacefulness, something that can inform their studies in other university courses. Moreover, and contrary to how Thomas and Craddock largely approach the exercise, not everyone who moots will end up at the Bar.³⁰ From our own experience we can name a number of former students who have used mooting not as a springboard to practice but to postgraduate studies, PhD theses and other research positions (one of our own doctoral theses even began life as a Jessup problem). Thus, just as critical approaches can inform mooting, moots can help inform the critical skills of mooters.

But the critical picture is, of course, also more complicated than we make out. Recently, a body of scholarship has appeared that openly criticizes moots and attempts to open the space for alternative moot court practices. Christine Schwöbel-Patel, for example, has argued that mooting constitutes a kind of ‘play-acting of integration into the institutionalised inequalities of the law’, reproduced not only through the ‘constitutive features of the moot’ (such as their competitive nature, the dual role of

²⁹ Koskenniemi, *supra* note 6, at 67.

³⁰ While noting that not all students plan a career at the Bar, Thomas and Craddock’s discussion of the skills mooting develops are largely focused on litigation. See, for example, the distinction they draw between the ‘Benthamite dream-world of a positive law wholly defined by prescriptive codification’ and ‘the real world’ where ‘scope remains for recourse to the strategic deployment of persuasive language (and performance)’ – a distinction they identify as ‘an assumption which underpins the very existence of mooting competitions’ (at 173). The idea that law and legal knowledge might be used in some other way, outside of the courtroom and the need to persuade a bench of judges, is left unanalysed.

³¹ Schwöbel-Patel, ‘Mooting: A Critical View and a Radical Proposal’, in F. Middleton and I. R. Wall (eds), *The Critical Legal Pocketbook* (forthcoming).

the judges as participants and scorers of the teams and the nature of acceptable legal argument) but also through ‘softer tones’ such as requirements of ‘posture, smart dress and solemnity’ that reproduce privilege.³¹ In an attempt to challenge the depoliticization and normalization of power imbalances between states that she perceives to be at the heart of moot court competitions, Schwöbel-Patel takes influence from the practice of the radical French lawyer Jacques Vergès, and suggests ‘a trial of rupture moot’ that would foreground the ‘ways in which legal tools can be used to highlight structural inequalities’:

[A] strategy of rupture in a moot would seek to forcefully bring the political nature of positivist laws to the fore. As to decorum: Non-conformist, revolutionary, or indigenous dress, a range of emotions, and a diversity of linguistic inflections would no doubt disrupt the solemnity of the moot. These possibilities of rupture allow a broader profile of law students into the often exclusive sphere of mooting – notably those students who have no desire to imitate the ideal-type advocate of the elite, but instead wish to establish more radical trajectories for mooting, and ultimately for anti-imperial law in practice.³²

A second (and more ambivalent) critique of mooting comes from Wouter Werner. At the heart of Werner’s critique is the observation that moot court performances do not actually re-enact legal practice but mimic a pre-given ideal, one that closes down options for more radical legal strategies and requiring students (and coaches) to leave ‘behind many of the critical skills that should make up academia’.³³ Werner approaches moot courts as a theatrical exercise – ‘a staged environment, filled with theatrical elements such as roles, scripts, audience, dress codes and stage properties’ – and persuasively questions the rehearsals’ emphasis on the team’s performance in the final competition, structured and determined by the moot court scoring sheet.³⁴ In asking why moot preparation and practice must be disciplined by the final state of the competition, as opposed to allowing for experimentation and critical reflection on how moots and legal argument more generally are traditionally and can be differently structured, Werner brings into question the narrow ways in which moots are engaged with at present.

These criticisms have much merit, and indeed help illuminate additional biases in Thomas and Craddock’s presentation of the ‘reality’ of mooting and legal performance to the ones we discussed above.³⁵ But their critiques also pose a challenge to our

³² *Ibid.*

³³ Werner, ‘Moot Courts, Theatre and Rehearsal Practices’, in L. Boer and S. Stolk (eds), *Backstage Practices of Transnational Law* (2019) 157, at 157.

³⁴ *Ibid.*, at 158.

³⁵ See, e.g., *The Art of Mooting*, at 42:

Court attire as a reality of legal practice (and competition formality) is often forgotten in preparation and yet an advocate’s physical discomfort or awkwardness can significantly distract and thus detract from their overall performance. As soon as possible therefore moot practices should involve mooters wearing as close to proposed competition attire as possible, and should have regard to factors such as comfort of dress, tie (properly tied for males), and appropriate shoes (heel height for females) and suits (for all).

The gender assumptions inherent here, as well as the location of ‘comfort’ as a physical attribute rather than one tied to, say, gender, sexuality, culture, or class is precisely the type of blind spot Schwöbel-Patel in particular critiques.

position. How can we assure that a critical approach to the intellectual aspects of mooting will not be smothered by the conservative reality of the competition?

Having made the critical case for mooting, we now turn to these limits, in an effort to engage with the criticisms of Schwöbel-Patel and Werner. We identify four limits that any critical engagement with mooting must reflect on: the self-disciplinary aspects of mooting (Section 4.A); the ‘brand’ of international law that moots transmit (Section 4.B); the limited world of the moot court case (Section 4.C); and the competition’s requirement that competitors ‘win’ each submission outright, as opposed to the more creative ways international courts are leveraged in reality (Section 4.D). However, we raise these issues as *limitations* of moots rather than straight criticisms or failures. Contrary to Schwöbel-Patel and Werner, we believe that awareness of these limits can be used as a pedagogical exercise, to allow students to productively identify and learn from the contradictions between mooting and a critical approach to international law. As such, we explore these tensions in order to bring out the critical potential of mooting, as opposed to its failures.

A *The (Self-)Disciplining of the Mooter*

The first criticism is of the disciplining function of moots and their ‘rules of decorum’. Passed from one mooting generation to another and even mentioned in mooting guidelines, these rules have to do with addressing the bench, dress code and other details which do not deal with legal arguments but can nevertheless impact scoring. In particular, Schwöbel-Patel emphasizes the detailed guidelines addressed to female participants, dealing with the length of skirts and heels, appropriate jewellery and other accessories and so on (men are expected to wear dark suits). As Schwöbel-Patel makes clear, these guidelines serve to represent an ideal-type advocate, one who is male, white and possesses sufficient education and manners to grant him an air of authority and solemnity necessary to succeed in a moot. In this way, mooting maintains and reproduces class, gender and racial biases and encourages and rewards respect for the established order.

It is true that moot court competitions mandate this kind of dress, and for certain students – particularly gender non-confirming students – participation may be difficult.³⁶ Coaches owe a duty of care to their students and should reflect on how they can support and facilitate their comfort throughout the competition, including defending deviations from the normal dress code to ensure accessibility. But we also think there is value in understanding the performance of decorum *as a performance*, one which can be learned, mastered and turned on and off at will.

³⁶ While our focus here is on students, it should be noted that similar dress codes are imposed on coaches and judges. We speak from experience that even mild deviations from sartorial norms can lead competitors and fellow judges to interact with you differently, often seeing your input – correctly or otherwise – as more ‘radical’, critical or theoretical, and less grounded in the ‘proper’ law that the Jessup ‘should’ be focused on.

³⁷ Schwöbel-Patel, *supra* note 31.

Schwöbel-Patel slightly overstates her case when she writes that mooting ‘works forwards in terms of conditioning a young generation of lawyers in how to approach the law’.³⁷ While this can indeed be true, it is also possible to maintain a critical distance from mooting, to root around in the uncanniness of its performance in order to de-reify received ways of understanding authority. Once you yourself have stood there in your suit, projecting the mixture of confidence and deference necessary to fit the mould expected by the bench, you realize how little substance there actually is to this authority. Armed with knowledge of that performance, students can maintain a critical distance to received wisdom while also able to play that role later in their careers, should the context require it.

Wouter Werner’s theatrical approach to mooting comes closer to this position, but his emphasis remains on the disciplinary aspects of moot performance. Werner argues that mooting develops a certain kind of ‘capacity’ in students – ‘the ability to master body and mind in the correct way’. Yet this capacity comes with discipline. To acquire the skills needed to moot effectively, students must shape themselves into a pre-fit mould of the ideal international lawyer, a form of subjectivity that is difficult to trouble once the student has submitted to it. ‘Practicing in a moot court’, Werner writes, ‘means that students not only acquire important skills, but also that they undergo a specific experience that makes them feel like “real lawyers”’. What it is to be a real lawyer, in turn, is structured and constructed in the set-up of the competition, including the message that students should try to be better than their fellow teams. Werner therefore suggests that moot teaching should incorporate ‘elements of disruption, reflection, and critique’, making students aware of the fallacies of the exercise in an effort to create ‘room for critical reflection on the role of law and litigation in international society’.³⁸

We agree with Werner that mooting can be used as a platform for critiquing the limited framing of the field. But here again we wish to push back against the notion that the successful performance of legality must be *disrupted* to be critical. As Werner concludes his piece:

The combination of experience and distance opens up room for critical reflection on the role of law and litigation in international society. *The latter may not necessarily help a law school to win the competition*; but it does help to develop the critical potential of practical exercises such as moot courts.³⁹

We disagree with this assessment. Speaking from our own experience, we maintain that there remains value in successfully understanding and performing the traditional image of the international lawyer as a skill of its own. If a student approaches mooting from a critical perspective, open to its inherent indeterminacy and structural indeterminacy, and is *successful* in their performance, the power and truth of that critical insight is reinforced. Put otherwise, we believe that a critical sensibility should

³⁸ Werner, *supra* note 33, at 170–171.

³⁹ *Ibid.*, at 171 (emphasis added).

⁴⁰ We are careful here not to say ‘dressed as men’. As Preciado makes clear,

ultimately strengthen rather than disrupt the team's performance, and in turn that recognition of success will help foster critical awareness.

Allow us to draw here on a field of subjectivity and performance much more powerful than that of mooting – namely writing on the deconstruction of gender – to consider how the performative dimensions of mooting can themselves hold radical promise *as a performance*. In Paul B. Preciado's reflections on drag king workshops, where cis-females work collectively with an instructor to deconstruct and play with notions of gender presentation, eventually venturing out into the world while dressed in ways that would be culturally understood as masculine in order to experience society in the way someone who presents as male would,⁴⁰ Preciado writes of how such deconstructions of gender radically re-oriented interactions with others:

Once the drag king virus has been triggered in each participant, the hermeneutics of gender suspicion extend beyond the workshop and spread to the rest of daily life, causing modifications within social interactions. *Drag king knowledge isn't the awareness of being an imitator of masculinity surrounded by anonymous male and female bodies . . .* rather, it resides in the fact of perceiving others – all others, including oneself – for the first time, as more or less realistic biofictions of performative gender and sexual norms that are decodable as male or female. In strolling around among these anonymous bodies, all these masculinities and femininities (including one's own) appear like caricatures that, thanks to a tacit convention, are seemingly unconscious of being so. *There is no ontological difference between these embodiments of gender and mine.*⁴¹

What Preciado brings out is the way in which superfluous performances of gender work to destabilize the social construction of those genders by the outside world at large. It is not only that the individual realizes their own gender performance can change, but also that *everyone's* gender is performed in the first place. In a similar (although much, much more modest) way, learning to embody and perform the role of the Platonic ideal of an international lawyer – and performing it successfully *while maintaining a critical mindset* – can help students disenchant the received narratives of

The important thing [about drag king workshops] is not to be dressed as a man – anyone at all can do that in his or her private space – but to have had the *collective experience* of the arbitrary and constructed dimensions of our gender. During the first drag king workshop, we're not trying to produce a theatrical effect or a caricatured stereotype of gender, but to construct a commonplace, all-purpose form of masculinity.

P. B. Preciado, *Testo Junkie: Sex, Drugs, and Biopolitics in the Pharmacopornographic Era* (2013) at 368 (emphasis in the original).

⁴¹ *Ibid.*, at 373–374 (emphases added).

⁴² Here we are thinking along the same lines as Christine Schwöbel-Patel's work on the branding of the ICC. See, e.g., Schwöbel, 'The Market and Marketing Culture of International Criminal Law', in C. Schwöbel (ed.), *Critical Approaches to International Criminal Law – An Introduction* (2014) 264.

⁴³ While it is outside the scope of this article, we find it interesting that moot competitions as spaces of disciplinary reproduction have previously received little attention from international lawyers, critical or otherwise. Strong arguments for the Jessup are found in Brown, 'The Jessup Mooting Competition as a Vehicle for Teaching Public International Law', 16 *Canadian Yearbook of International Law* (1978) 332; Almond, Jr, 'Strengthening the Philip C. Jessup International Law Moot Court Competition', 4 *ILSA Journal of International and Comparative Law* (1998) 635. A. Roberts, *Is International Law International?* (2017), at 272–276, discusses the Jessup as a vehicle for the global spread of international law as an

how international law should be done and who it should be done by. It can give competitors the confidence to challenge other international lawyers (be they practitioners or academics) who more readily fit the image of the international lawyer, unmasking the ease with which arguments are made from a doctrinal perspective. And it can give competitors the skills to thrive in international legal practice, ultimately helping foster critical perspectives within the practice of international law in the real world.

B *The Moot 'Brand' of International Law*⁴²

It is not only in self-discipline that mooting puts forward a particular idea of how international law should be conducted. Institutionally, competitions transmit a particular branding of international law, one that many critical scholars would find troubling.⁴³ We can explore this tension through a description of how international law is talked about within the Philip C. Jessup International Law Moot Court Competition. We take the Jessup as our example not only because it is the competition we have most experience with, but also because of its unmatched influence on generations of international law students. Each year, around 700 teams take part in their national Jessup rounds, each with two to five students taking part. That's as many as 3,500 students

English-language field, noting how it both denationalizes (in the sense that students learn a 'common language' of international legal argument) and renationalizes (in that students will discover the distinct approaches of different countries to the field, for example US teams' reliance on domestic case law) international law. Rasulov, 'Central Asia and the Globalisation of the Contemporary Legal Consciousness', 25 *Law and Critique* (2014) 163, at 178, also notes the role mooting has played in 'the promotion and popularisation of Western-style legal education' in Central Asia. Most critically, d'Argent, 'Teachers of International Law', in J. d'Aspremont *et al.* (eds), *International Law as a Profession* (2017), 412, at 419 writes that '[t]he multiplication of moot courts – all bearing the names of famous teachers of international law: Jessup, Rousseau, Telders, Pictet, Lachs' has helped foster 'the acquisition of the indispensable esprit international that comes with meeting fellow students of international law from abroad'. Similar to Wouter, d'Argent questions the disciplinary aspects of the moot:

[D]espite students having been taught in treatises or cases and materials, the anthropological and cultural shock resulting from those gentle encounters is never great nor painful: it probably must be that international law either has the incredible capacity of attracting very similar breeds of young men and women all over the planet, or it has the formidable power of transforming and moulding similarly those who take pain in its study, quite irrespectively of the method used to that end. For the 'style [to] survive', it must first be learnt. Moot courts seem to be a very powerful agent for that purpose. (*Id.* at 419)

⁴⁴ White & Case, *The Jessup Competition*, available at www.whitecase.com/global-citizenship/jessup-competition (last visited 2 August 2021).

⁴⁵ See, for example, the webpage for the official Jessup documentary, *All Rise: Journeys to a Just World*, available at <http://allrisemovie.com/home/> (last visited 2 August 2021), describing the film as following 'the journeys of seven passionate students of law . . . [laying] bare the struggles, triumphs and transformations they experience alone and together'.

⁴⁶ See the Chinese Initiative on International Criminal Justice, *supra* note 3, at 5:

It is said that the Jessup Moot is addictive, we cannot help but concur! Yet, in all seriousness, the benefits do outweigh the detriments. A love for international law, you would develop. Lifelong friendships, you would forge. Sharper legal instincts, you would hone. At the end of the day, mooting is meant to be a fun and intriguing learning experience.

⁴⁷ Bonfire, *Support the Jessup Competition*, available at www.bonfire.com/store/the-jessup/ (last visited 2 August 2021).

from over 100 countries each year being given the Jessup ‘brand’ of international law.⁴⁴ Critical reflection on its specificities is therefore warranted.

Two narratives pervade the Jessup. The first is its incredible difficulty for students. The language that surrounds it is always one of ‘struggle’, ‘survival’ and ‘passion’,⁴⁵ with the expectation that Jessup ‘addiction’ will take over your life during the competition.⁴⁶ You can even buy Jessup merch.⁴⁷ To be sure, the commitment students make to the Jessup is substantial: they work with the same case for six to eight months, carrying out legal research and argumentation far beyond what is expected of a traditional undergraduate or even Master’s course. The level of expertise students will gain in complex areas of international law are far more specialized than other areas of their legal education, too, and it is not uncommon for students to use their submissions as the basis for undergraduate and Master’s theses.

But where this narrative becomes more troubling is in its interaction with the second Jessup narrative: that of the transformative potential of international law generally, and the Jessup ‘brand’ of international law in particular. On Facebook, there is a group – one of many – of around 3,000 ex-Jessup competitors called ‘I did the Jessup International Law Moot Court Competition’. The group description reads: ‘We participated in the largest and toughest moot court competition in the world, and survived. And we will forever believe in international law.’⁴⁸ This ‘belief’ is a common refrain at all stages of the competition. Students are told again and again what a great opportunity participation is, how they should seize the opportunity to make friends with competitors across the globe. All of this helps reinforce the Jessup’s unofficial motto, a mantra repeated in speeches throughout the competition: ‘In the future, world leaders will look upon each other differently, because they met here first, as friends.’⁴⁹

Critical alarm bells should already be ringing. As Schwöbel-Patel raises in her article, moots often reinforce the ‘fictitious neutrality’ of law and its separation from politics,⁵⁰ and, indeed, the presumption of international law’s inherent peaceful rationality has been one of the primary targets of critical approaches to the field.⁵¹ This Jessup mantra fails to even fit with the experience of the competition. Mooting is entirely predicated on the idea that the case is arguable from both sides. Inside the moot court human rights abuses, uses of force and annexations are all justified in the language of international law, yet outside it, in the grand ballroom of the Hilton hotel in the heart of Washington, DC, we are told the spread of international law will lead to a peaceful world. Never mind, too, that for some participating countries the world seems to have gotten a lot less peaceful since the Jessup began.

⁴⁸ Facebook, *I Did the Jessup International Law Moot Court Competition*, available at www.facebook.com/groups/2225551430/ (last visited 2 August 2021).

⁴⁹ For confirmation of the unofficial motto, see ILSA, *Cancellation of 2020 International Round* (11 March 2020), available at www.ilsa.org/2020/03/11/cancellation-of-2020-international-rounds/. See also the official Jessup documentary, *All Rise: Journeys to a Just World*, *supra* note 45, a film advertised with the tagline ‘Meet Tomorrow’s World Leaders and Peacemakers’.

⁵⁰ Schwöbel-Patel, *supra* note 31.

⁵¹ See, indicatively, Koskeniemi, ‘The Politics of International Law’, 1 *EJIL* (1990) 4.

To be clear, we agree that students gain significantly from mooting. We are also sensitive to our position as scholars from the Global North, participating with a kind of critical irony while ignoring how life-changing the opportunity to travel may be for participants from other countries. On a personal, intellectual and professional level, participation in the Jessup can be hugely rewarding. These competitions can also be a reminder that international law *is* international. The Jessup is likely one of the few events within the discipline that truly is global in participation – how many international law conferences, for example, can claim to have representation from over 100 countries from every part of the world?

Nevertheless, we can probe how the contradictions between the moot branding and moot practice of international law can still open the space for critical reflection. This can be achieved by refiguring the competition not as an ideological transmitter but as a quasi-ethnographic exercise, where students can see up close how the disciplinary Delief in international law is reproduced. As a teacher, one can press students to reflect on how the language of the moot conflicts with its practice, how belief in its goals operates autonomously from its practice and its reality. Just as preparation of arguments will give students the intuitive ‘feel’ of legal indeterminacy, participation in the culture of mooting can foster the kind of critical suspicion that has been a particular focus of feminist and TWAIL critiques.⁵²

One way to do this is to preface participation in the competition with seminars or a reading group with competing students on critical approaches to international law. When the teams are first selected, coaches can take time – say, one meeting a week – to work through a short reading list of critical texts with the team, using these discussions as a way to frame mooting and international law more generally while also fostering collaboration and discussion within the team in a context separated from the competition itself.⁵³ These sessions can then be phased out as the competition gets underway, but coaches – particularly those running accredited mooting modules – may wish to continue them for longer, in order to reinforce that mooting is not separate from the students’ other studies and remains an intellectual exercise as much as it is a competition.

Two conjoined criticisms are likely to be raised against this suggestion. The first is that reading critical texts does not teach ‘useful’ skills for the moot; the second is that this wastes the already precious time available to a team to prepare for the competition. But as *The Art of Mooting* stresses, mooting is not an intellectual exercise only. Mooting cannot be conquered by memorizing textbooks: it requires creativity, critical thought, independent research and frank and open teamwork. Building in a critical

⁵² See, e.g., Orford, ‘Embodying Internationalism: The Making of International Lawyers’, 19 *Australian Year Book of International Law* (1998) 1.

⁵³ This discussion is based on one of the author’s experiences coordinating a clinical legal research project at the University of Manchester, where students were given a critical introduction to NGOs and human rights in order to ensure that they understood the stakes of the work they were undertaking and approached the project with the correct sensitivity to the ‘saviour narratives’ of much human rights work. For the reading list for these introductory sessions, see Scott and Azarova, ‘GLAN Manchester Reading List [2018–19]’, available at www.academia.edu/37593781/GLAN_Manchester_reading_list_2018_19_ (last visited 2 August 2021).

introduction to international law helps foster these skills at an early stage, which can pay dividends later in the competition.

Running these sessions asks students to critically and creatively engage with the task before them – what international law ‘is’, what its effects are in the real world – and asks them to debate this with one another in a non-competitive environment. This develops their teamworking skills by giving them a space to understand their teammates away from the pressure of the competition and encouraging them to learn to speak openly with one another. It also provides the coach an opportunity to assess the internal team dynamics – who dominates the conversation? who is quieter? who has done the reading? who is an effective leader? – and adjust their coaching methods to avoid tension and conflict further down the line. On this latter point, we speak from experience – a team who cannot communicate with one another will bicker, fall out and ultimately perform far below their abilities.

For that reason, engagement with critical approaches should be seen not as a waste of time but as an exercise for strengthening the various non-knowledge-based skills that mooting requires – precisely the type of targeted pedagogy that Thomas and Craddock advocate for.

C *The World of the Moot Case and Structural (In)equality*

It is remarkable how efficiently the idea of the transformative potential of international law is conveyed to students throughout the Jessup experience and how easily students internalize it. And there is certainly some merit in presenting international law in a positive light in a time when it has been under attack by populist, authoritarian governments and commentators.⁵⁴ But what is missing from the narrative about the transformative potential of international law is the critical point that sometimes injustices are in the structures, that is to say that oftentimes international law, although flawlessly used, has produced and will continue to produce very unjust outcomes.

Other critiques have noticed this. Schwöbel-Patel, for example, writes that the way in which moots are set up as competitions means that ‘[t]he interests of Western powerful states are placed vis-à-vis the interests of Global South states as though these were two equal positions’, with ‘[t]he moot, like the “real thing”, therefore [rendering] the unequal power and negotiating positions of Global South states invisible through the fiction of equal legal opponents’.⁵⁵ But what has gone unnoticed is that such facts – inequality, colonialism and so on – are often present in the moot case. Many moot court cases are built around some sort of economic or political imbalance: one state is developing and the other is developed; one state participates in global trade, while the other does not; and so on. Similarly, several moot court cases during the past few years have at least hinted at colonial relations between the parties to the case, but those relations have been mostly ignored during argumentation. Despite this, arguments focused on political economy are usually shut down by judges during rounds

⁵⁴ See, e.g., Crawford, ‘The Current Political Discourse Concerning International Law’, 81 *Modern Law Review* (2018) 1.

⁵⁵ Schwöbel-Patel, *supra* note 31.

and consequently mostly ignored from the outset by teams with more experienced and goal-oriented coaches. Thinking about international law in colonial or economic terms is thus not excluded from the moot, per se, but it is actively, although subliminally, discouraged through certain micro-practices inherent in the competition.

To give an example, the Jessup 2015 case dealt with a dispute between two de-colonized states, Agnostica and Reverentia, the former of which had been used by a European empire as a source of raw material and had acted as an urban trading centre under the empire. At the heart of the case was also the position of the Agnorevs: ethnic Reverentians who had migrated to Agnostica during the colonial era, in order to gain advantage of lucrative business deals, and had traditionally constituted a particularly wealthy group within the state, but were now seeking to secede as a consequence of Agnostica limiting their access to a mineral salt with particular significance to Reverentian culture, which had recently proved to be able to cure an autoimmune disease in children. The case included other juicy details, including the fact that one of the reasons behind the secession project was Agnorevs' distaste for Agnostica's progressive taxation system, which the Agnorevs felt was designed to deprive them of their well-earned wealth. The legal issues of the case touched on treaty relations between the two states concerning the aforementioned mineral salt, as well as Agnorevs' attempted secession and Reverentia's involvement in it.

Our experience with the 2015 case – as with so many other moot court cases – was that these complex histories and imbalances in economic and political power faded into the background during the competition. Competitors and judges focused only on technical details on treaty law, secession, threat of use of force and countermeasures, with little concern over the larger socio-economic or political context of the case. That the competition still includes this 'flavour' in the case every year reinforces the idea that issues like colonialism and political economy are 'red herrings' to be diligently sorted out and put to one side by high-performing teams. This provides the students with an image of the world where material inequalities exist but where they are legally insignificant and 'natural', and where international lawyers should focus only on the 'correct' – in other words traditional – interpretation of rules. Furthermore, it teaches them to mainly ignore law-making, with questions as to who makes the law, whose voice it amplifies and whose interests it serves left outside the competition.

One need only look at the top-scoring memorials of the competition to see this in action.⁵⁶ While the technical details of whether the Agnorevs count as a 'people' is discussed, the winning memorials do not question where those details come from, and why some groups should qualify as a 'people' while others should not (apart from whether the group meets the criteria of a 'people' at all). The colonial legacy at the heart of the case is also not discussed, except to mention that the Agnorevs have not been colonized by Agnostica. The questions of taxation and economic imbalances are not mentioned at all. And all of this for good reason, from a purely competitive perspective – these are the winning memorials after all. They have managed to fit an

⁵⁶ For top-scoring applicant and respondent memorials, which are awarded the Richard R. Baxter Award each year, see ILSA, *Jessup History*, available at www.ilsa.org/jessup-history/ (last visited 8 August 2021).

astonishing amount of cases and other legal authorities to the 9,500 words allowed by the competition rules and focused solely on what are seen as the most pertinent *legal* issues and corresponding facts in the case. In other words, they exemplify the kind of efficiency and clarity so valued in the competition.

It is not easy to avoid this pitfall while still trying to succeed in the competition. But as a broader academic exercise, one can always encourage students to reflect on these blind spots. Here, again, the role of the coach is particularly important. We do not think that it is necessary to break radically with the ‘rules of the game’. But it is important for the team advisor to discuss unused avenues with the team and help them reflect the consequences of such decisions. Ideally, such an approach allows the students to perceive how certain power relations and mindsets are reinforced from within the international legal practice and how easy it is to unwittingly participate in those practices. This can then be pursued further – perhaps in academic work after the moot, such as a Master’s thesis – to ask how international law could be made otherwise.

Often simple conversations with the students are enough. Students, spending months working on the case, commonly pick up on the details and background stories of the cases, seeking ways to use them as part of their legal arguments and sometimes growing frustrated when they are unable to do so. We remember this being the case for example with the Jessup 2018 case between the developing country Anduchenca and the developed state Rukaruku, which had for centuries been the dominant military, diplomatic and economic power in the region. Whereas the other countries in the region had been left with decimated civil infrastructures and shattered economies during World War II, Rukaruku had survived more or less unscathed, and engaged in aid and stability programmes in the region, until the relations between it and Anduchenca had turned sour after the latter had turned to socialism following an economic depression. This was a rather captivating background story, for which there nevertheless seemed to be little use in the case, from a purely competitive background. In these situations, students are, in our experience, particularly receptive to engaging in critical discussions about international law and its background assumptions, not to mention well equipped to do so after working the case from both sides and multiple angles, and having tried different patterns of argumentation. Indeed, with only a slight push from the coaches, many of our moot court participants have been eager to engage in conversations on questions such as why the typical lines of argumentation ignore the rich background of the case, what are the outcomes of silencing those alternative perspectives in the real world and even what might be the historical reasons for the mainstream arguments having become mainstream. Poring over a moot problem to the level of depth one is unlikely to reach with, say, *Nicaragua* or the *Chagos Islands* cases⁵⁷ also provides students with the time to consider what is left out of these cases and the political import of international law’s structural silences.

⁵⁷ *Nicaragua v. United States of America* supra note 22; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, ICJ Reports (2019) 95.

There is of course always a difficult balance to be found in terms of how much more the students can be expected to read during what is already a very demanding competition, and how much of the competition success one is willing to sacrifice in focusing on issues that do not directly contribute to knowledge of the case. But in our experience, the moot court competition is a very fruitful context for teaching critical thinking about (international) law and structural inequality, and the benefits of developing those skills within the competition, where students have already gained a deep knowledge of the positivist legal doctrine at play, can help uncover the more uncomfortable tensions below the surface all the more powerfully.

D The Need to ‘Win’ Each Submission

Our final limitation comes from the structure of the competition and the expectations of the courtroom. A standard Jessup moot problem will have four main submissions, with each side expected to persuade the Court to find in their favour on all four grounds. Of course, the ease with which each submission is ‘winnable’ for each side is unequal: there will always be one side arguing *lex feranda*, or for the rolling back of a previously clear statement by the Court. Intuitively, coaches and judges will know which arguments are open to debate and which are more performative, and points will be awarded when competitors navigate these submissions in a fluid manner.

Two common criticisms arise against this practice. The first, normally voiced by competitors and (particularly) coaches, is against imbalances in the ‘winnability’ of the case for each side. The criticism here is against the perceived fairness of the competition, that in a given year the case was more favourable for applicant or respondent. The second criticism, voiced in critiques of mootings, questions how the narrow limits of the case obscure the context in which international law operates. Schwöbel-Patel’s critical moot, for example, suggests pursuing Jacques Vergès’s technique of ‘rupture’, a form of advocacy that prioritizes ‘holding a mirror to the powers constituting the court, unsettling impressions of the neutrality of the court, and the bench’.⁵⁸

⁵⁸ Schwöbel-Patel, *supra* note 31.

⁵⁹ For an earlier discussion, see Klabbers, ‘Review of Ronald Smelser (ed.), *Lessons and Legacies vol. V: The Holocaust and Justice*’, 15 *EJIL* (2004) 1055. More recently, see Sander, ‘Unveiling the Historical Function of International Criminal Courts: Between Adjudicative and Sociopolitical Justice’, 12 *International Journal of Transitional Justice* (2018) 334; Sander, ‘History on Trial: Historical Narrative Pluralism within and beyond International Criminal Courts’, 67 *International and Comparative Law Quarterly* (2018) 547. The success of particular tribunals in this function has been subject to critical empirical investigation. See, e.g., Milanović, ‘The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Postmortem’, 110 *American Journal of International Law* (2016) 233; Milanović, ‘Establishing the Facts about Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences’, 47 *Georgetown Journal of International Law* (2016) 1321.

⁶⁰ Sander, ‘The Expressive Turn of International Criminal Justice: A Field in Search of Meaning’, 32 *IJIL* (2019) 851.

Again, we think there is a middle ground to plot between these two approaches. We are not troubled by the idea that a given year's case may be more or less equally weighted for applicant or respondent in terms of the 'difficulty' of arguments. Nor do we think mooting can do away entirely with restrictions on the kinds of submissions that are makeable before the Court: after all, there needs to be some shared framework in which the teams can be judged. Instead, we want to probe whether 'winning' is the only way in which the ICJ is used in reality.

A rich seam of literature has arisen recently detailing the ways in which courts can be used for purposes other than winning the immediate legal dispute. International criminal law has long reflected on its historiographical function, as a method for setting straight the historical facts.⁵⁹ Barrie Sander has written recently of the 'expressivist' function of international criminal tribunals, where cases are pursued not according to their immediate outcome but as a broader symbolic and textual institution, one that can set out the historical record, allow for the airing of victim experiences and grievances or even challenge the institutional and legal limits of how international criminal law is understood and practised.⁶⁰ The ICJ is not immune to this usage either: think of the shapes the Convention for the Elimination of Racial Discrimination is being bent into in *Ukraine v. Russia*⁶¹ – an attempt, in the words of former ICJ Judge Christopher Greenwood, 'to try and squeeze a rather large, perhaps ungainly force [that of Crimea's annexation], into the glass slipper of a jurisdictional clause that really is far too small for the case [it] want[s] to bring'.⁶²

Like Schwöbel-Patel's rupture mooting, we acknowledge that these kinds of arguments would be impossible to make within a moot competition. Indeed, the overall framework of the competition – such as the score sheets, for example – discourages creative, radical or imaginative lines of argumentation to the extent that many traditionally successful universities employ strategies that focus on avoiding any controversial or contestable arguments altogether, with most coaches knowing that they can easily lead to an endless swamp of difficult questions from the bench. Pedagogically, however, we think there remains a benefit in probing students' opinions on these issues outside of the competition: to ask what they think about the cases they are pleading, both real and fictional, and how they might creatively realign the goals of the submissions if asked to plead them in the 'real world'.

The point here goes hand in hand with our discussion in Section 3: critical approaches to international law demonstrate that any argument is makeable in theory, but the structural biases of the court those arguments are made before will structure their plausibility. Raising this flag to students as they grapple with the strength and weakness of their argument will provide them with a nuanced, contextual knowledge of the ICJ (or whichever court the moot is geared towards) and its function and

⁶¹ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Preliminary Objections, Judgment, 8 November 2019, ICJ Reports (2019) 558.

⁶² Quoted in Nuridzhanian, 'Ukraine vs. Russia in International Courts and Tribunals', EJIL Talk! (9 March 2016), available at www.ejiltalk.org/ukraine-versus-russia-in-international-courts-and-tribunals/.

limitations in the production of international law. The experience of playing within these boundaries, and the frustration of being unable to articulate a strong legal argument in support of a noble political goal, will give students an experiential knowledge of international law's biases and limitations: an experiential form of knowledge that a rupture-focused rejection of judicial sensibilities might overlook.

5 Conclusions

This article is intended to open a conversation. As we noted from the outset, moots have commonly been figured in one of two ways. In their mainstream appropriation, as Craddock and Thomas exemplify, they are purely technical exercises, a kind of preparatory school for the Bar. In a more critical light, moots have been torn down as reproducers of inequality and privilege. In this article, we have attempted to carve a third way, one that remains sensitive to the conservative aspects of mooting while arguing for their critical possibilities as pedagogical exercises. This reflects our own conflicted experience with mooting, as well as our ambivalence as to whether moots can or should be radicalized or reformed. It is a conversation we would be keen to see continue, both as educators and as members of the transnational moot 'community'.

In that spirit, let us set up one objection to our argument. In this article we have established the critical benefits of mooting. What we have left open is whether mooting is the best way of imparting this critical knowledge. While Craddock and Thomas give only a cursory discussion of funding, noting that '[t]he authors are happy to report the ongoing support within their Faculty' for mooting (at 179 n.2), we know from experience that such institutional support can be much more precarious than they make out. The question thus becomes whether other projects – small-scale radical moots, as envisaged by Schwöbel-Patel and Werner, or radical law clinics and other research projects – are more effective or efficient methods for grasping the practical aspects of a critical approach to international law, particularly when one thinks of the resource 'buy-in' in terms of entry fees, travel and accommodation for the competition, and allocation of sufficient teaching time.

Such considerations will need to be carried out on an institution-by-institution basis. Your institution may have a strong support structure for mooting already, meaning a critical 'takeover' will require less effort and encounter less institutional inertia. In contrast, a faculty with an existing law clinic may be more amenable to including an international law project within its structures. The academic politics of your institution may also come into play – if other international law teaching is strictly doctrinal, introducing critical aspects singlehandedly within the confines of the competition may be too large an undertaking.

But, as critical scholars, we should not ignore moots. They offer pedagogical benefits and, for better or worse, position students to secure important positions within government departments, law firms, international organizations and NGOs post participation. Moots are a battleground ceded to the mainstream at our peril. But how precisely we should engage with and transform them remains, as yet, an open question.

