"MOOT COURT"

(*The Winona Herald*, March 7, 1873)

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FOREWORD

BY

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In early March 1873, lawyers and law students in the town of Winona revived a method of legal instruction that was in use at least three centuries earlier: they held a moot court.

The use of moots as a pedagogic tool began in the sixteenth century, waned during later periods, the eighteenth century for instance, and flourishes today.[1] Moots were a part of the educations of many of the great figures of Anglo-American law.

They were used to teach law students in the Inns of Court in the sixteenth century. Presiding over moots was one of the duties of

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[1] Alfred Zantzinger Reed, *Training for the Public Profession of the Law* 19 (New York: Charles Scribner's Sons, 1921)(reprint William S. Hein & Co., 1986) (By the eighteenth century, "The Inns of Court had long ceased to hold their famous 'moots.'").

Today, a website, "Mootness: The Moot Court Blog," maintained by Professor Kent Streseman of the Chicago-Kent College of Law, keeps track of the results of national moot competitions. The American Collegiate Moot Court Association encourages its use for undergraduates.

the "Lector" or "Reader" in the Inner and Middle Temple in the mid-sixteenth century:

> His duties were onerous. He was required to give a specified number of readings or lectures to the students both of the Inn and the Inns of Chancery affiliated to the society, and to act as president of the moots, as the debates were and still are called, at which fictitious cases were put and argued by the students. [2]

Holdsworth admired the results of the rigorous educational regimen in the Inns, which included almost daily moots:

> It is not surprising that law schools conducted after this fashion made 'tough law.' The training which they gave was intensely practical, and no doubt it kept the practical, the argumentative, the procedural side of the law prominently to the front—perhaps sometimes to the exclusion of legal theory. It produced the men who wrote the Year Books —the men who made the common law a system of case law. At the same time we cannot say that it gave no

[2] Hugh H. L. Bellot, *The Inner and Middle Temple: Legal, Litemary, and Historical Associations* 37 (London: Methuen & Co., 1902).

> opportunities for instruction in legal theory. It also produced Littleton and Fortescue. [3]

Moots, like other facets of English law, were transported to the colonies. The nation's first law school, Litchfield Law School, in existence from 1784 to 1833, offered optional moot court participation.[4]
In 1822, Chancellor Creed Taylor opened a law school in his home in Needham, Virginia. His students were given a heavy dose of moots in which they learned the importance of drafting, pleading and procedure.[5]

When John Marshall attended law-preparation classes at the College of William and Mary for several months in 1780, moots were a required part of the curriculum devised by George Wythe. According to a recent Marshall biographer:

> In addition to traditional lectures and reading courses, Wythe originated holding moot courts and mock legislatures to give students practical experience. The new laws drafted by Wythe, Jefferson and Pendelton provided the subjects for the mock

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[3] William S. Holdsworth, II *A History of English Law* 507-508 (London: Methuen & Co., Ltd., 1923).

[4] Albert J. Harno, *Legal Education in the United States* 30 (San Francisco: Bancroft-Whitney Co., 1953)(Citing sources)("Moot courts, optional for the students, were also conducted."); Reed, *supra* note 1, at 131 ("Doubtless from the beginning, and certainly during the later years of the school, optional moot courts and debating societies were in operation.").

[5] William P. LaPilana, *Logic & Experience: The Origin of Modern American Legal Education* 42 (New York: Oxford University Press, 1994).

> legislative sessions. These were held weekly in Williamsburg's old capitol building, the state government having recently moved to Richmond. Wythe presided over the assembly and chaired the debate among the students. The moot courts, also held in the abandoned building, were similar. John Brown, a classmate of Marshall's, later represented Kentucky in the United States Senate, wrote to his parents that "Mr. Wythe and the other professors sit as Judges. Our Audience consists of the most respectable of the Citizens, before whom we plead Causes given out by Mr. Wythe. Lawyerlike, I assure you." [6]

In the mid-1830s, moot courts were held once a week at Harvard Law School; they resembled exercises in appellate advocacy rather than trial practice.[7] Within several decades, they were

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[6] Jean Edward Smith, *John Marshall: Defender of a Nation* 79 (New York: Henry Holt and Co., 1996) (citing sources).

[7] Harvard's course catalogue for 1834 provided:

> In addition to the course of reading, the students occasionally write dissertations upon subjects of law. Once in every week a *moot court* is held before one of the Professors, at which in rotation four of the students argue some law case, which is previously given out, so that they may make suitable preparation; and at the close of the arguments the Professor delivers his own opinion,

increased to twice a week—still less frequent than those held in the Inns of Court in the sixteenth century. According to an internal report on the mission of the law school published in 1850:

> These same purposes are promoted by the favorite exercise of moot courts, held twice a week by the different professors in succession. A case involving some unsettled question of law is presented by four students, designated so long in advance as to allow time for careful preparation; and at the close of the arguments an opinion is pronounced by the presiding professor, commenting upon the arguments on each side, and deciding between them. These occasions are found to enlist the best attention, not only of those immediately engaged, but of the whole School,—while some of the efforts they call forth show distinguished research and ability. On this mimic field are trained forensic powers destined to be the pride an ornament of the bar.[8]

> commenting upon the doctrines maintained on each side.

"Catalogue of Harvard Law School (1834)," in Charles M. Haar, ed., *The Golden Age of American Law* 68 (New York: George Braziller, 1965) (emphasis in original).

[8] Report of the Committee of Overseers, *Character and History of the Law School of Harvard University* (1850), in Haar, *supra* note 7, at 66.

Holmes participated in moot courts while attending Harvard Law School from 1864 to 1866,[9] and from these experiences, he professed a preference for a legal education that included moots. In a review of a lecture delivered in 1871 by James Bryce on "The Academical Study of the Civil Law," Holmes argued:

> The common law begins and ends with the solution of a particular case. To effect that result we believe the best training is found in our moot courts and the offices of older lawyers.[10]

In early March 1873, apprentices and practitioners in Winona staged a moot. It caught the attention of a newspaper reporter whose story in *The Winona Herald* follows.

At that time, Winona had less than 10,000 inhabitants.[11] Its bar was small— probably fifteen or so lawyers. Only eleven lawyers posted their business cards in the *Herald*. [12] Few of the men who

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[9] Mark DeWolfe Howe, *Justice Holmes: The Shaping Years, 1841-1870* 189-190 (Cambridge: Harvard University Press, 1957)(Describing Holmes's experience in a moot court before the formidable Joel Parker, Royall Professor of Law, in November 1865, and suggesting that he may have preferred moots held in the "more informal atmosphere of a [student] Law Club.").

[10] Oliver Wendell Holmes, "A Book Notice," 5 Am. Law Rev. 715 (1871), reprinted in Harry S. Shriver, ed., *Justice Oliver Wendell Holmes: His Book Notices and Uncollected Letters and Papers* 18, 19 (New York: Central Book Co., 1936).

[11] According to the 1880 census, Winona had a population of only 10,208. *Legislative Manual of the State of Minnesota* 581 (St. Paul: 1891).

[12] *The Winona Herald* published the business cards of local lawyers in a vertical column on the second page of its issue on March 7, 1873. There were seven listings, four of which were advertisements of two-man firms: 1) G &

participated in the moot would qualify as one of Holmes's "older lawyers." James Dyckson had been admitted to the bar on September 13, 1870, and Arthur H. Snow on March 28, 1871. C. F. Rowell appears to have been one of the few apprentices in the moot, being admitted to the bar almost two years later, on December 12, 1874. [13]

It was a mock criminal trial. The plot was carefully planned, an indictment read, openings and closings delivered, witnesses examined, motions made, and the jury of "twelve good men and boys" charged. Yet during the proceeding, as in most gatherings of lawyers, there was levity. The witnesses were sworn to tell the truth "so help them John Rogers."[14] The jurors "called for beer" but got nothing, "not even a bologna sausage." It is doubtful that these jurors were aware of the history of moots, but their call for this refreshment maintained a centuries-old tradition. A recent history of the Inns in the late sixteenth and early seventeenth centuries, described the conclusion of a "typical moot court case argued in the Middle Temple in Lent vacation in 1612": "Finally

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W. Gale, which consisted of George Gale, Jr., and William Gale; 2) Thomas Wilson; 3) Norman Buck; 4) Keyes & Snow, which consisted of John Keyes and Arthur H. Snow; 5) Simpson & Wilson, which consisted of Thomas Simpson and George P. Wilson; 6) Mitchell & Yale, which consisted of William Mitchell and William H. Yale; and 8) O. B. Gould. *Winona Herald*, March 7, 1873, at 2. The cards of the law firms appeared in the order stated in this paragraph, not alphabetically.

[13] This data is taken from Arthur H. Snow, "Bench and Bar of Winona County," in Franklyn Curtiss-Wedge & William Jay Whipple, I *History of Winona County, Minnesota* (Chicago: H. C. Cooper Jr., & Co., 1913), which will be posted separately on the MLHP at a future date.

[14] We can only guess at this reference; it may be to John Rogers (1505-1555), a minister, Bible translator, and first English Protestant martyr, who was charged with heresy and burned at the stake on February 4, 1555.

the mooters presented the judges with a slice of bread and a mug of beer and the exercise was over."[15]

The following article, headlined "Moot Court," appeared first on page 3 of *The Winona Herald* on Friday, March 7, 1873. Though reformatted it is complete. Punctuation and spelling have not been changed. It concludes with the announcement that a second moot court would be held that evening, March 7th; but neither the *Herald* nor its rival, *The Winona Daily Republican*, carried an article on that one.

A chapter on moots from *Gray's Inn: Its History & Associations*, by William Ralph Douthwaite, published in 1886, is reproduced in the Appendix.

THE WINONA HERALD

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MOOT COURT

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[15] Wilfred R. Prest, *The Inns of Court under Elizabeth I and the Early Stuarts, 1590-1640* 118 (Totowa, N. J.: Rowman and Littlefield, 1972) (citing sources).

The law students who daily and nightly (?) pore over the pages of Blackstone, Kent, &c., in this city, took it into their heads, last week, to introduce a little variety into the dull routine of their studies. They organized a moot court. They threw the judicial ermine around A. H. Snow, invested J. W. Dyckson with the Court seal and clerical functions, drew up an indictment against Charlie Rowell for assault, being armed with a dangerous weapon, to wit: a hatchet, L. C. Burr being the reputed sufferer of said assault. A jury, composed of twelve good men and boys, having been empanelled, the counsel opened their batteries and stormed at the court, jury, and each other in gallant style—R. R. Biggs appearing for the people, and C. F. Dikeman for the prisoner. Of course the indictment was demurred to; but after grave consideration the judge overruled the demurrer and ordered the trial to proceed. The witnesses were sworn to tell the truth "so help them John Rogers," which formidable oath seemed to stimulate their natural truthfulness to the point of perfect accuracy. At any rate, judging from the manner and matter of their statements, they told pretty straight stories. After due argument by counsel and a charge by the Court, the jury retired for deliberation in charge of officer Lamberton, who assisted them in their labors, somewhat irregularly, it must be confessed, by entering their room and exhorting them, in rather emphatic terms, to agree instanter.

Jury called for beer, but it happening that the Judge and Clerk were not dry, the request was virtuously denied. Jury got nothing to eat either—not even a bologna sausage. After a time, the twelve good and true men and boys not being able to agree, though conscientiously striving so to do, they were discharged, and the prisoner breathed freely once more. We are not informed whether it is the intention of this Prosecuting Attorney to try him again.

We learn that the Court will sit this evening for the trial of a case of forgery. ■

APPENDIX

"Moots," a chapter on the history of moot courts, which appeared first on pages 80-87 of *Gray's Inn: Its History & Associations*, by William Ralph Douthwaite, follows. It is complete though re-formatted. Spelling, grammar, and punctuation have not been changed. Page breaks have been added.

Gray's Inn

ITS

HISTORY & ASSOCIATIONS

COMPILED FROM ORIGINAL AND

UNPUBLISHED DOCUMENTS

BY

WILLIAM RALPH DOUTHWAITE

LIBRARIAN.

LONDON:

REEVES AND TURNER, 100, CHANCERY LANE,

Law Booksellers and Publishers.

1886

MOOTS

Something more should be said as to the institution of "Moots," which formerly used to bear a considerable part in the mechanism of legal education at the Inns of Court.* In connection with Gray's Inn, the subject possesses especial interest. In the Tudor and Stuart periods the exercises of the law were here conducted with the greatest vigour, under the fostering care of Bacon; and in our own time, the institution of the Moot has been again revived in Gray's Inn, with immediate success and abundant promise of duration.

The return made to Henry VIII., mentioned on p. 30, thus describes, "The ordering and fashion of Motying":—"The Reader, with two Benchers, or one at the least, cometh into the Hall to the Cuboard, and there most commonly one of the Utter-Barresters propoundeth unto them some doubtful Case, the which every of the Benchers in their ancienties argue, and last of all he that moved; this done, the Readers and Benchers sit down on the bench in the end of the Hall, whereof they take their name, and on a forme toward the midst of the Hall sitteth down two Inner-Barresters, and of the other side of them on the same forme, two Utter Barresters, and the Inner-Barresters doe in French openly declare unto the Benchers (even as the Serjeants [81] doe at the barr in the King's Courts, to the Judges) some kinde of Action, the one being as it were retained with the Plaintiff in the Action, and the other with the Defendant, after which things done, the Utter-

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* An interesting account "of the Studies of the foure Innes of Court" is given by Stowe (Annals, p. 1073).

Barresters argue such questions as be disputable within the Case (as there must be always one at the least) and this ended, the Benchers doe likewise declare their opinions how they think the Law to be in the same questions, and this manner of exercise of Moting, is daily used, during the said Vacations. This is always observed amongst them, that in their open disputations, the youngest of continuance argueth first; whether he be Inner-Barrester, or Utter-Barrester, or Bencher, according to the forme used amongst the Judges and Serjeants."

"The subject of the Mootings," says Mr. Macqueen, "were feigned cases thrown into the form of pleadings, which were generally opened by a student, and followed up by an utter barrister. The debate was then taken in hand by the cupboard-men,** with whom, likewise the Benchers contested. And finally the Reader himself, high over all, closed the discussion by delivering his opinion. The avowed object of these exercitations was, to promote the faculty of ready speaking. To secure this end, the disputants were kept in ignorance of the topic until called upon to discuss it. The case drawn [82] up by the Reader was laid under the salt-cellar before meals; and none were to look into it upon pain of expulsion from the Society."

Fulbecke, in his *Preparative to the Study of the Law* (p. 41, ed. 1620), says, "Gentlemen students of the Law ought by domesticall Moots to exercise and conforme themselves to greater and waighter attempts, for it is a point of warlike policie, as appeareth by *Vegetius*, to traine younge souldiours by sleight and small

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** A superior order of disputants, so called from the *cupboard*, which, during exercises in the Hall, was used as a Tribune for the convenience of speakers.

skirmishes for more valorous and haughty proceedings, for such a shadowed kind of contention doth open the way and give courage unto them to argue matters in publicke place and Courts of Recorde."

Unfortunately for the continuance of this means of education, the Moot was bound up with a semi-conventual mode of life, which fell into disfavour. The desire, attributed to Lord Clarendon and Sir Matthew Hale, to revive the old discipline after the shock it had received during the troublous times of the seventeenth century, if it existed, was ineffectual to the attainment of that object. At Gray's Inn, as we shall more particularly show in a later page, Mootings were eventually restored to a place of usefulness, and for these exercises, which Stow calls "boltas," "mootes," and "putting 'of cases," Gray's Inn was particularly conspicuous of old. In 12 Elizabeth it was ordered, "that from henceforth in Hilary term and Midsummer Term, the Mootes should be kept three dayes in every week, *viz*., Monday, Tuesday and Thursday, if none of those days were Holy-day, and if so, then the next following, and that [83] the case be always assigned upon Sunday after supper. As also that upon the other days not appointed for the Mooting, it should be lawful for the Utter-Barristers to keep Bolts; and when they shall sit, other Students to be bound to put cases according as had been accustomed in Michaelmas Term." "Grand Mootes" were kept on Tuesdays and Thursdays: "Petit Mootes" on Wednesdays and Fridays.

In 16 Elizabeth, "Bolts" were enjoined to be held in every Term on non-moot days; "other than on Holy-days and half Holy-days; upon penalty that every Utter-Barrister then in Commons should forfeit for the not keeping of every Bolt *3s. 5d*." And also "that

every Utter-Barrister assigned in the Moot, who should not moot in proper person that week, to forfeit ten shillings."

In 21 Elizabeth, there was an order made, that the Readers of Chancery should as well keep their Readings as their Mootes according to the Ancient Orders therein used.

In 36 Elizabeth, "None shall be called to the barr but such as be of convenient continuance, and have performed exercises for three years before they be called, that is to say, Have gone abroad to Grand Mootes six times. Have mooted at the Utter-Barr in the Library six times, and have put Cases at Bolts in Term six times, and thereof bring due certificates; of the first from the Reader, the ancient that goeth with him, and the Principall in the Inns of Chancery; of the second, from [84] those two that sit at the Bench; and of the third, from those three that sit at the Bolt."

In 1631 it was ordered, "that the fourth Butler shall always hereafter keep a Book wherein the exercises of the Gentlemen under the Bar shall be set down and recorded in manner following, viz., for the exercises abroad at the Inns of Chancery, the surveyor of the Moots shall certify every several Exercise performed. And for the Moots performed in the Library, the ancients and Barristers that shall sit at the Case, shall subscribe to the names of those that mooted before them in the aforesaid book; to the which end the Butler is to attend the Barrister with the book upon every such occasion."

As a curious relic of the times, it may be mentioned, that in the same year, in connexion with these disputations, the Butler was ordered "to be set in ye stocks about noon, for putting Mr. Frowle up to Moot in his wrong."

"About the end of the seventeenth century," says Lord Campbell in his evidence before the Select Committee on Legal Education, 1846, "the Mootings and the Exercises fell gradually into disuse, or were continued merely as matters of form, but long before them the system had been declining, and Lord Bacon had lamented that there was not a better system of education in the Inns of Court, and had contemplated the foundation of a University in London, which was to be chiefly devoted to the acquisition of juridical knowledge, and fitting men for public life." [85]

The revival of Moots as a means of tuition within the Inns of Court, appears to have been discussed from time to time in the earlier part of the present century, at which time, forensic practice for students, was afforded only by societies composed of students of the Four Inns, which met periodically in Lyons Inn Hall.

Lord Sherbrooke (then Mr. Robert Lowe) expressed before the Commission on the Inns of Court, in 1855, an opinion that "the old system of putting cases might be revived with great benefit." But at that time, Readings had been re-established in the Inns; at Gray's Inn, Mr. Lewis, the Society's Reader on Conveyancing, had lectured and conducted mootings for several years with great success.

In an article on Legal Education, in the *Law Magazine and Review* (vi. 5) it is said the holding of moots is "calculated to work much good amongst the students. A habit of discussing legal questions, of citing and tersely dealing with decided cases, must be got sooner or later by every proficient at the bar. Why, then, should not facilities for acquiring this habit be afforded by the Inns of Court for their alumni? Why should intelligent and willing

students be remitted to debating societies, there to acquire a habit which may more properly and more methodically be fostered in legal colleges ?"

In the year 1875, a voluntary movement took place among the members of Gray's Inn for the resucitation of these ancient and useful exercises. The proposal was enthusiastically received by the Students and Bar-[86]-risters, and it was as warmly embraced and aided by the Masters of the Bench.

Since this time, the Moot Society of Gray's Inn has been conducted with a perfect measure of success which demonstrates the high utility of the experimental practice it affords. It has not been confined in its scope to members of the Inn, although the necessary expenses of its maintenance have been defrayed by the Society. All members of the Inns of Court are invited to be present at, and to take part in, the arguments. To the students of Gray's Inn, it is a point of honour to provide for the due discussion of every Case presented for argument before this tribunal; but barristers as well as students of the other Inns, usually take part on one side or the other. Argument, and not debate, is the function of the Society. The discussions are strictly legal, and by way of still further familiarizing the student with the practice of his profession, the proceedings are conducted as nearly as possible like those of the Supreme Court of Judicature.

Virtually, as we have said, the practice is the same as that of a Court of Appeal. At each sitting, a new case is argued, the case being stated for argument by the President of the Sitting—some eminent lawyer who has accepted the invitation of the Society, through the Benchers, to accept the office of presiding judge for the occasion. Two Moots take place in each Term. Commonly the

case which has been propounded, is printed a week or more before the sitting at which the argument takes place, and very frequently, the point [87] involved, is one which has arisen and upon which final judgment is pending in the Supreme Court; and copies of the printed case are screened for some days in the libraries and Halls of the four Inns. As in old times, the Moot is held in the Hall, an hour after dinner. The Court is constituted of, besides the President, the Masters of the Bench. All taking part in the proceedings are attired in their gowns. The case, having been duly read, is argued by two as counsel on each side, with the same strictness as in the Supreme Court, and subject to the same judicial authority, the President and Masters applying by their questions a crucial test of the thoroughness with which the moot case has been considered and prepared. The judgment of the Court is delivered by the president, and duly recorded in the Moot-Book of the Society. During the last few years increasing interest has been taken in the Moots, and the lists of Presidents contain the names of some of the most distinguished Queen's Counsel now practising at the Bar, who have unanimously testified to the great importance of dis-cussions of this character in the training of students.

Every year a meeting of the Moot Society is held, at which officers are elected by the votes of the barristers and students being members of the Society. From the commencement of the Society, his Honour Judge Russell, the Master of the Library, has been its honorary president, and as such is official president of these annual meetings, at which others of the Masters of the Bench are also generally present. ■

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