

DO LAWYERS REALLY BELIEVE THEIR OWN HYPE AND SHOULD THEY?: A NATURAL EXPERIMENT

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ABSTRACT

Existing research suggests that practicing litigators are too confident in the merits of their clients' cases. But practicing attorneys often self select (1) the area of law in which they practice, (2) the side on which to practice within that area, (3) law firms with whom they practice, and (4) the clients they represent. We explore whether, after stripping away these selection-biases, legal advocates are still overconfident in their clients' claims by exploiting a natural experiment involving participants in moot court competitions at three U.S. law schools. Students are randomly assigned to advocate for either petitioner or respondent, so none of the selection-bias problems above are present. We find that following participation in moot court contests, students overwhelmingly perceive that the legal merits favor the side that they were randomly assigned to represent. We also find that overconfidence is associated with poorer performance in advocacy as measured by legal writing instructors. Theoretical and practical implications are discussed.

I. Introduction

Studies of legal advocacy repeatedly find that lawyers adopt too favorable a view of the merits of the case they are arguing. Lawyers, like individuals in many other contexts, exhibit a tendency known as “overconfidence” or “optimism bias”.¹ For example, a recent study finds lawyers to be more optimistic about their future success with their cases than is warranted (Goodman-Delahunty, Hartwig, Granhag, and Loftus 2010).

While suggestive, the optimism bias for lawyers studies are flawed along a number of dimensions. First, observational studies simply asking lawyers about the merits of their clients' cases are plagued by selection bias. Lawyers who choose to go into civil rights work, for example, may have selected that specialty because they strongly believe in the merits of the cause. If these lawyers prove overoptimistic about their clients' cases, this may be because the process of advocacy has altered their impression of the merits—but over-optimism may also be the result of an underlying presumption in favor of the type of clients the lawyer chooses to represent. Laboratory studies of advocacy reduce the selection bias problem by randomly assigning advocates

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¹ These terms are used interchangeably to mean the same thing.

to one side of a case or another—but the degree to which laboratory games reflect the realities of legal advocacy is suspect at best.

Previous research also fails to provide evidence about whether optimism bias is helpful or harmful for legal advocacy. Optimism bias may be a necessary ingredient for successful advocacy or a recipe for overlooking flaws in arguments that undermine the quality of legal representation. Existing studies provide no indication for how optimism bias affects the quality of legal representation because they have no measure of quality of representation. These flaws stymie scholars' ability to understand the role of optimism bias in the legal profession.

This paper adds to the existing literature by examining optimism bias in the context of moot court cases at three ABA accredited law schools in the United States. Moot court cases are a widely used form of legal training in which law students are assigned to argue one side of an appellate legal issue. Students write briefs on behalf of their side and then argue for their side in mock oral arguments. The goal of moot court is to closely approximate bona fide appellate advocacy, making it an ideal setting in which to examine the existence of optimism bias in legal advocacy and the effects of such bias on the quality of advocacy.

More specifically, moot court cases offer many advantages for studying optimism bias in the context of legal advocacy. In two of the three moot court programs under study, law students are randomly assigned to argue one side of the case or the other. As a result, there is no selection bias problem. At the same time, moot court cases are considerably more realistic than laboratory studies of optimism bias in legal advocacy. Moot court problems are carefully designed to replicate authentic legal experiences (e.g., moot court oral arguments often take place before state and federal judges) and students commonly devote long hours to honing their briefs and oral arguments. In addition, moot court problems are intended to be "close calls" from a legal perspective, offering plausible arguments for each side of a case. As a result, moot courts offer higher quality evidence regarding optimism bias in legal advocacy than existing observational or laboratory studies. Finally, moot court briefs and arguments are graded by legal writing instructors and professional attorneys. One of the law schools under study enabled us to match survey responses with grades. This enables us to compare optimism bias with "success" in an uncommonly direct context.

Several conclusions emerge from the data. Optimism bias among lawyers exists even when lawyers are randomly assigned to sides of a case. In other words, optimism bias is not merely a selection effect associated with advocates choosing sides in which they *a priori* believe. We are also able to relate the size of optimism bias to engagement in a case, finding that spending more time on a case is *not* associated with greater optimism bias. The framing of the advocate's legal role impacts the degree of optimism bias. Moot court participants assigned to the role of respondent (defending the decision of the court below) expressed stronger confidence in the legal merits of their case than participants assigned to the role of petitioner—in spite of the fact that moot court problems are chosen to be closely balanced for each side. However, we found no relationship between levels of expressed confidence in the merits of the case for students who *chose* their appellate roles and those whose roles were assigned to them. We also found no gender effect, as one might expect based on other research (Barber and Odean 2001; Niederle and Vesterlund 2007)—across all three schools in our study, men

expressed no more confidence than women in their side's arguments. In addition, we find that stronger optimism bias is associated with weaker performance as an advocate. Those with the highest opinion of their cases' legal merits did significantly *worse* in moot court competitions than those who viewed the substantive merits of their cases as more debatable. This effect persists even after controlling for covariates such as the number of hours advocates spend on their moot court cases and pre-existing subject-specific knowledge and expertise.

The paper proceeds as follows. Part II reviews the existing literature on optimism bias generally and within the legal profession more specifically. Part III describes the moot court programs under study and derives predictions for the effects of moot court participation on attitudes regarding legal merits from the optimism bias literature. Part IV explains our survey methodology, empirical techniques for evaluating survey responses, and reports the survey results in light of the predictions discussed in Part III. Part V concludes.

II. Review of Literature

A. Evidence of Overconfidence

Studies have repeatedly shown that individuals tend to be overconfident in assessing their own relative abilities, skills and knowledge, and unrealistically optimistic in assessing their likelihood of successfully accomplishing future tasks (Camerer and Lovallo 1999; Kahneman and Tversky 1995; Weinstein 1980). Research has documented this across diverse occupations, contexts and cultures (see, e.g.: Allen and Lueck 1995 (share croppers); Koellinger, Minniti, and Schade 2007 (entrepreneurs); Malmendier and Tate 2005 (CEOs); Massey and Thaler 2010 (NFL draft predictions); Oskamp 1982 (psychologists)). As Moore and Healy (2008) observe, research on overconfidence has been used to explain “wars, strikes, litigation, entrepreneurial failures and stock market bubbles,” among other things.

Different mechanisms contribute to explaining the circumstances under which individuals are likely to be over confident. For instance, consistent adherence to a course of action, or “escalation of commitment” theory, originally conceived by Staw (1976; 1981), predicts that individuals are more likely to gain an inflated sense of the rightness of a decision or conclusion reached the more they articulate the reason publically, and the more they reinforce their original choice or conclusion. Non-rational escalation of commitment is theorized to happen for five reasons: (1) individuals are more likely to notice information that supports their initial course of action, ignoring disconfirming evidence. (2) An individual's judgment of new information tends to be systematically biased in a way that justifies the existing position taken. (3) Individuals tend to justify their actions privately and publicly. (4) Individuals tend to seek cognitive balance—which requires that an individual cannot maintain two opposing beliefs simultaneously. (5) Lastly, changing a course of action may signal defeat or weakness, and individuals generally wish to avoid lending such perceptions, particularly when they tend to view their counterparts as adversaries in an exchange like civil litigation (Neale and Bazerman 1991).

Related to escalation of commitment is Self-Perception Theory (Bem 1967; Tetlock 1985), which explains actors' motivations in terms of concerns for self-presentation. As this relates to optimism bias, actors tend to present themselves in an overconfident light, and begin believing their self-presentations as true.²

Dissonance theory also accounts for overconfident estimations of likelihood of success on an upcoming task. Dissonance theory asserts that individuals try to reduce cognitive dissonance, which is a state of psychological uneasiness brought on when actors freely choose to perform a behavior that does not conform with their preexisting attitudes, and which could induce an aversive event or block one's self-interests (Festinger 1957). Festinger and Carlsmith's (1959) classic demonstration of cognitive dissonance involved students who had to tell fellow students that they perceived a boring peg-turning task to be exciting. Following this, the students significantly revised their attitudes towards the task, especially when they were given a small external monetary inducement to make the counter-attitudinal assertion in the first place.

B. Overconfidence in the Legal Profession

The cognitive processes described in the previous section likely apply to lawyers. Legal representation requires ongoing, public argumentation on behalf of one's client. Escalation of commitment theory, self perception theory, and dissonance theory all predict that such engagement should induce advocates to become overconfident regarding the merits of the arguments they are making.

A relatively small body of empirical research supports these predictions. Surveys of lawyers demonstrate that their political and moral viewpoints mimic those of their clients (Heinz, Nelson, Sandefur, and Laumann 2005). Another study using survey methodology shows that lawyers tend to over-estimate the likelihood of achieving a goal on behalf of clients they represent in both the civil and criminal law contexts (Goodman-Delahunty, Hartwig, Granhag, and Loftus 2010). Both of these studies provide evidence that lawyers are prone to overestimate the merits of their cases. Both, however, suffer from the problem of selection bias discussed above. As one of the studies describes the problem, "do lawyers choose to work for clients with whom they already have sympathy or some sense of identity, or do the lawyers take the work they can get ... and then develop affinity with the clients after having advocated their interests" (Heinz, Nelson, Sandefur, and Laumann 2005: 191).

Laboratory studies asking student subjects to assume the role of litigant surmount the selection bias problem. For example, Loewenstein et al (1993) randomly assigned students to the role of plaintiff or defendant in an auto accident. They find that students assigned as plaintiffs thought a larger settlement was "fair" than students assigned to

² This is closely tied to Lee Ross's famous "fundamental attribution error," in which actors over-attribute causes of success to their behavior, but their failures to situational constraints beyond their control (Ross, Lee. 1977. "The Intuitive Psychologist and his Shortcomings." Pp. 174-220 in *Advances in Experimental Social Psychology*, vol. 10, edited by L. Berkowitz. New York: Academic Press.). As Goodman-Delahunty, Hartwig, et al. (2010) suggest, lawyers' may over-attribute their success on behalf of past clients to their own lawyering abilities, and under-attribute their success to situational constraints that do not bear on current clients. In so doing, they may form overly optimistic assessments of future claims.

defendants. The authors attribute these biased perceptions of fairness to “self serving bias”, a concept closely related to overconfidence.

Overcoming the selection bias problem comes with a significant cost in terms of validation and generalizability. Experiments do not resemble actual legal advocacy. They often involve running subjects through games played on a computer, or simulated exchanges involving hypothetical scenarios. Additionally, laboratory subjects frequently simulate representing themselves rather than other parties. They are both client and counsel, rather than just counsel. The psychological processes that take place in the self-representation in a lab context may be very different from those relevant to lawyers representing clients in cases with higher stakes.

If legal advocacy leads to overconfidence, then this will have several important implications. Settlement, for example, may become more difficult if counsel for both sides overrate the strength of their cases (Babcock and Loewenstein 1997; Loewenstein, Issacharoff, Camerer, and Babcock 1993). More generally, the quality of legal advocacy will be altered by overconfidence. Overconfident lawyers may not just reduce the probability of settlement, but also write weaker (or stronger) briefs and present poorer (or better) oral arguments. Moreover, the tendency to associate with the viewpoint of one’s clients is an important factor for lawyers to consider when making career choices.

Moot court competitions offer a novel means of evaluating the possibility of overconfidence in legal judgments, as well as the implications of overconfidence. As in lab experiments, students are randomly assigned to sides in moot court contests. Unlike lab studies, students participating in moot court explicitly assume the role of lawyer and devote a considerable amount of time to formulating legal arguments on behalf of their clients. Furthermore, the availability of moot court grades enable us to examine how overconfidence affects legal performance in a uniquely straightforward manner.

III. Moot Court Programs and Predictions for the Effects of Program Participation

A. Moot Court Competitions

The law school students surveyed in this study competed in intra-law school moot court competitions in the spring semester of 2010. These competitions award student credits and are offered at nearly all American law schools. As described in more detail below, the students participating in the survey included first year, second year, and third year law students. Moot court competitions are designed to “encourage the development of skills in brief writing and oral advocacy.”³ One representative course description for moot court runs as follows:

“Students brief a pending United States Supreme Court case and argue the case before a panel of faculty members and local practitioners. Twenty-two semifinalists are chosen after the first round of argument. Competitors receive one academic credit for their work.”⁴

³ See <http://indylaw.indiana.edu/mootcourt/>

⁴ See <https://goat.law.upenn.edu/cf/courses/coursesByCategory.cfm?term=2010A>

In the moot court competitions under study, students sign up for the moot court course. The moot court question, generally chosen to be a close issue with compelling arguments on both sides, is then distributed. Students are then randomly assigned to argue the case for petitioners or appellants (the side challenging the lower court's ruling) or respondents or appellees (the side favoring the lower court's ruling). The students have a period of time (e.g., three weeks) to write briefs on behalf of their side. After turning in their briefs, students participate in oral argument against a moot court participant representing the other side. Moot courts are designed to prepare law students for future litigation as professional lawyers and therefore attempt to replicate professional litigation as closely as possible.

Evaluation of moot court performance consists of evaluations of the briefs, which are typically graded by legal writing instructors, and oral arguments, which are evaluated by the faculty members and legal practitioners acting as judges during the oral argument. Successful students advance to later rounds of the competition. Winning a moot court competition, with the final round generally evaluated by distinguished state and federal court judges and watched by many students from the law school, is considered a significant accomplishment.

B. Predictions for the Impact of Participation in Moot Court Competition on Participants' Perceptions of the Merits

Participation in a moot court competition is a significant undertaking. The median student who participated in our surveys spent 26 to 30 hours working on their moot court briefs.⁵ Figure 1 shows the distribution of time spent writing the brief. As a result, the cognitive processes that influence lawyers representing clients are likely to be at work for students participating in moot court. Because students are randomly assigned to cases, however, the selection effects that plague empirical studies of the impacts of legal advocacy, such as the likelihood that lawyers choose clients whose views they share, are not present at moot court. This combination makes moot court competitions an ideal setting to measure the impacts of legal advocacy.

FIGURE 1 ABOUT HERE

Dissonance theory predicts that moot court participants should have an enhanced (overconfident) sense of their side's legal merits. Moot court participants are devoting considerable amounts of time to writing briefs advancing a particular legal argument. Not believing in the arguments they are making subjects participants to considerable

⁵ This is likely an underestimate of the total time students devoted to the competition because the surveys were taken before the students participated in oral arguments, which generally require additional preparation.

cognitive dissonance. To reduce dissonance, the participants may consciously and unconsciously raise their opinion of the arguments they are making.

Escalation of commitment theory also predicts that moot court participants should adopt an inflated view of the legal merits of the side they are arguing. Moot court participants are taking a very public stance in favor of legal arguments supporting their side. Under escalation of commitment theory, this public adherence to one view should strengthen moot court participant's intellectual commitment to their side.

Escalation of commitment theory also suggests that the more time a student spends on moot court, the stronger their view of the merits of their side should be. Time spent on an argument is a proxy for commitment, and therefore should be correlated with the strength of one's views. A similar prediction may be made for dissonance theory. The longer one spends on a case, the more dissonance that occurs if one does not believe in the merits of one's arguments. As a result, the need to reduce dissonance may be greater when lawyers spend more time on cases.⁶ Dissonance theory also predict that students who select their roles (petitioner or respondent) would express greater confidence in the merits of those roles than students whose roles were assigned to them (Bendersky and Curhan (Under Review)).

Because there is no possibility of settlement, moot court is (in some respects) even more adversarial than ordinary litigation. The impossibility of settlement may cause the aforementioned cognitive processes to have even greater impact on overconfidence than true litigation. On the other hand, students may presume that moot court legal questions are chosen because they offer both sides legitimate arguments, thus reducing the tendency towards overconfidence. These considerations reflect the general point that moot court mimics but does not perfectly replicate litigation.

While reduction in cognitive dissonance and association with a cause to which one is committed may be good for the well being of lawyer, it is not clear that such a reduction improves lawyer's ability to make legal arguments. Overconfidence may blind advocates to the weaknesses in their cases, reducing the effectiveness of their legal arguments. Alternatively, it may be necessary to truly believe in an argument in order to convince others of its correctness.

As a result, dissonance and escalation of commitment theories makes no strong predictions for how changes in impressions of the merits of a case should translate into performance in moot court competitions. The next sections seek to determine if these predictions prove true through analysis of survey results from a group of students participating in moot court competitions.

IV. Research Methods

A. Survey Design

121 law students from three schools participated in a short voluntary survey about their beliefs in the merits and moral value of their and their counterparts' assigned

⁶ An alternative means of making a similar prediction is that individuals who disagree with the side they are arguing will spend less time making their arguments in order to avoid the psychological discomfort caused by dissonance.

arguments. The schools, for ease of reference, referred to herein as Schools “A”, “B”, and “C”, are respectively ranked within the top ten, twenty-five, and seventy-five U.S. law schools according to the U.S. News and World Report 2009 rankings. In all instances, students participating in moot court were given the opportunity to respond to this survey online before they received any grade or score for their performance. In only School “C”, (n = 23), eighteen students self-selected their appellate roles—respondents or petitioners. The remaining five students at this school were assigned their roles. In the other two schools (n = 90), all students were assigned their appellate roles. All together, fifty-six percent of participants were assigned the role of “petitioner/appellant” and the remaining forty-four percent were assigned the role of “respondent/appellee.” Forty-nine percent of the participants were male, and fifty-one percent were female. The mean participant age was 24.97 years. Respondents were also asked to identify their future employment plans. Fifty-seven students (47.11%) said that they planned on pursuing litigation employment; the remaining Sixty-four (52.89%) said that they planned to work in regulatory practice, non-profit, transactional work or that they did not plan to practice law at all after graduating.

Subjects answered several Likert-style questions aimed at gauging (1) how much time they spent preparing for their moot court arguments, (2) their knowledge and experience with the issue before starting moot court, and (3) how easy or difficult it was for them to argue the assigned issues. These are critical components for assessing the relative perceived confidence in the merits and moral value of their assigned arguments.

Here are the two questions used to assess subjects’ perceived confidence in the legal merits of the positions they were assigned to advocate:

1. “How much do you agree or disagree with this statement: The substantive legal merits favor the position I argued.”
2. “If you were the judge, how likely would you be to rule in favor of the issue YOUR OPPONENT argued?”

Both questions are based on a 7-point Likert-style scale. The first one ranged from “strongly disagree” to “strongly agree”, and the second ranged from “very unlikely” to “very likely”. Both factor analysis and principal component analysis confirm that subjects’ responses to these questions load onto a single factor or component.⁷ As both questions use 7-point scale responses, we created a “merits confidence index” using an equally weighted average of the responses for these two questions as a measure of subjects’ confidence in the legal merits of their assigned roles.⁸

⁷ Using factor analysis, the first factor’s eigenvalue is .832, and the second is -.25. Using PCA, the 1st component’s eigenvalue is 1.54, and the second is .46.

⁸ Subjects were also asked to rate the likelihood that a “real appellate court” would rule in their favor on the issue they argued. However, it appears that this question prompted respondents to consider elements other than the legal merits of their assigned roles, which is why we excluded it from the merits index. For instance, subjects may have expressed confidence in their assigned positions’ legal merits, but thought that because of a heightened standard of review on appeal, that their fictional clients would lose before a real appeals court. Such considerations surely factor into lawyers’ assessment of their clients’ likelihood of success, however, our survey was designed to focus only on perceived legal merits, exclusive of other things like economic

Participants were also asked two Likert-style questions aimed at eliciting their confidence in the moral value of their assigned roles. Subjects were asked to rate how much they agreed or disagreed with these statements:

1. “The position I argued was morally or ethically justifiable.”
2. “The position I argued was MORE morally or ethically justifiable than my opponent’s position.”

Both factor analysis and PCA confirm that responses for these questions load onto a single factor or component.⁹ Both of these questions were scaled on a 7-point Likert scale from “strongly disagree” to “strongly agree”. We generated a “moral confidence index” using an equally weighted average of the responses for these two questions as a measure of subjects’ confidence in the moral value of their assigned roles.

B. Response Bias

As with any survey based research design, there is a concern about response bias—are the moot court participants who answer our survey representative of the general population of moot court participants? If not, then the survey results may not be informative regarding the effects of advocacy on the typical law student or lawyer.

Unusually for a survey, we have some information regarding the population of non-respondents. One of the law school moot court competitions graded each participant’s moot court performance and shared the distribution of scores with us. Each score was associated with a unique id number that enabled us to match scores with responses for those who responded to the survey. As a result, we are able to compare moot court scores (at one school) for survey respondents vs. non-respondents. If the distribution of scores for the two groups is different, then this presents evidence that respondents constitute a non-representative sample of moot court participants.

For this school, we received a total of 98 moot cup performance scores. Of these, we were able to link 35 with survey responses, for a response rate of approximately 36% for those who completed the moot court course. The mean moot court score for the respondents was 31.24; the mean score for the non-respondents was 32.55. This difference is not statistically significant at ten percent level. Table 1 provides a more fine-grained view of the two distributions, listing score percentiles for survey respondents and non-respondents. Aside from the 10th percentile of the distributions, where the respondent score is much lower than the non-respondent score, the two distributions have quite similar scores at each part of the distributions.

leverage, civil procedural concerns or other Legal Realist notions of how judges might render opinions. Such clearly relevant components of attorney overconfidence are important, and merit careful evaluation in future research. However, our participant pool consisted only of law students with minimal, if any, real courtroom experience. We therefore thought that their views on practical considerations of how the legal system “really” works either needs to be more carefully and separately measured, or should be left to subject pools consisting of attorneys and not law students.

⁹ Using factor analysis, the first factor’s eigenvalue is 1.21, and the second is -.21. Using PCA, the 1st component’s eigenvalue is 1.71, and the second is .29.

The similarity between the distribution of moot court scores for respondents and non respondents suggests (though it cannot prove)¹⁰ that non-response bias may not be a significant concern for this study. Along one observable dimension, there appears to be essentially no bias in the population of survey respondents relative to non-respondents.

TABLE 1 ABOUT HERE

C. Empirical Methodology

We report our analyses and results in two parts. First, we examine the survey responses of the entire population of surveyed students across all three schools to evaluate the extent of merits-based and morals-based optimism (if any). In this first part, we investigate six possible predictors of overconfidence: (1) gender, (2) role assignment (respondent or petitioner), (3) selection of appellate role (4) time spent preparing for oral argument and writing the brief, (5) how difficult or easy respondents thought it was to argue their cases, and (6) participants' plans to work in litigation following graduation.

Second, relying on the survey responses and moot court performance scores from one of the three schools surveyed, we explore the relationship between over-confidence and litigator performance, and, which kind of optimism, merits-based or morals-based better correlates with high or low legal advocacy performance.

V. Results

A. Predictors of Overconfidence

How confident in terms of substantive legal merits and moral value are the subjects in their "clients'" arguments? Both the merits index and the morals index range from zero to six, where zero represents the lowest possible confidence and six represents the highest possible confidence. A moot court participant who thinks the merits are in equipoise would have a merits index of 3. The mean merits confidence index for the all students for whom data are available ($n = 105$) is 3.87, ($SD = 1.3$). The median merits index value is 4, considerably higher than the "merits in equipoise" value of 3. There is no difference across the three schools surveyed in terms of the confidence students expressed in the merits of their roles.¹¹

¹⁰ Of course, it remains possible that respondents may be biased along other dimensions that are related to the answers of interest. The fact that along one important dimension (performance in moot court) the distributions are so similar reduces but cannot eliminate non response bias concerns.

¹¹ The means and standard deviations of the merits confidence index for the three schools are as follows: School "A": $N = 45$; $M = 3.84$; $SD = 1.33$, School "B": $N = 38$; $M = 3.89$; $SD = 1.34$; School "C": $N = 22$; $M = 3.89$; $SD = 1.26$.

The mean moral confidence index is 3.88 ($n = 105$; $SD = 1.4$) and the median moral index value is also 4. However, unlike the merits index, participants' moral confidence scores significantly varied by school.¹² Students from School "A" expressed significantly less moral confidence in their moot court arguments than subjects from Schools "B" and "C". Similarly, subjects from School "B" expressed significantly greater moral confidence in their arguments than subjects from Schools "A" and "C". Students from School "B" have the highest mean moral confidence at 4.24, followed by School "C" at 3.95, with School "A" as the lowest of the three at 3.54. Table 2 shows the mean comparisons for the moral confidence scores across schools. Table 3 shows all of the comparative means and standard deviations for merits-based confidence and morals-based confidence across the three schools by moot court role (respondent or petitioner).¹³

TABLES 2 & 3 ABOUT HERE

Figures 2 and 3 depict the population distributions of merits- and morals confidence indices histographically. Both distributions appear top-heavy evidencing what could be construed as *over*-confidence in both the substantive legal merits *and* the moral value of the arguments students were assigned to make. The median moot court participant "somewhat agreed" with the statement that the legal and moral merits of the cases favored the side that they were randomly assigned to argue for or disfavored the side that they were against.

¹² The moot court problems were different across schools, so this may account for the difference in confidence in the morals of the case.

¹³ An interesting observation (perhaps worthy of future exploration) about the comparisons in Table 3 has to do with the relationship between appellate role (i.e.: respondent or petitioner) on the one hand, and the possible trade-off between confidence in substantive merits versus confidence in the moral value of arguments on the other. It is important to note that the three schools used different issues in their respective moot court competitions. One would expect that the issues would play an important role in determining the relative moral confidences but less of a role in the confidence in the merits. For instance, if students argued an abortion case, the law would be too close to call, but each side might be more likely to think that morality were more salient than if the issue were a civil procedural technicality. So, one would expect variation in moral confidence to be different across schools, (which it is), but random within schools across role assignment (which it isn't). As it turns out, in all three schools, respondents expressed significantly *lower* moral confidence. In schools "A" and "C" the merits-confidence and moral-confidence scores flip: respondents are more morally confident but less confident in the morals of their arguments, implying the possibility of a trade-off in how attorneys conceive of the moral value of claims that they think might have less substantive merit and vice-versa.

FIGURES 2 & 3 ABOUT HERE

Perhaps unsurprisingly, the merits and moral indicies are significantly and positively correlated ($r = .32$; $p < .001$). Figure 4 is a scatter-plot of the two indicies with a prediction line showing the correlation.

FIGURE 4 ABOUT HERE

Next, we evaluate six possible predictors of merits-based and moral-based confidence: (1) gender, (2) role assignment (respondent or petitioner), (3) role selection (whether roles were assigned or chosen), (4) time spent preparing, (5) difficulty arguing the case, and, (6) plans to work as litigators following graduation from law school. Table 4 shows the t-test comparisons of the mean legal-confidence and morals-confidence indicies for these six variables.

Not surprisingly, those who reported that it was either “somewhat difficult,” “difficult,” or “very difficult” to argue their role ($n = 51$) were significantly less confident in both the substantive legal merits ($p < .05$) and the moral value of their arguments ($p < .05$), as compared to those who reported that it was either “very easy,” “easy,” or “somewhat easy” ($n = 37$).¹⁴ Also unsurprisingly, subjects arguing in the respondent role were significantly more confident in the legal merits of their arguments than those arguing the petitioner role. As noted above, the respondent/petitioner effect may be caused by the context of appellate argument. The respondent is defending the decision of the court below, while the petitioner is asking the appellate court to overrule the lower court’s decision. As a result, the respondent, with the lower court’s ruling in support, may have more confidence in her argument. Interestingly, this difference does not carry over to moral confidence. There is no difference between petitioners and respondents in terms of their moral confidence in their assigned arguments.

There are several surprising results here, calling into question some of mechanisms suspected to explain overconfidence. First, there is no difference in merit-based or moral based confidence by gender, which is contra other research suggesting that men would express more overconfidence than women (Barber and Odean 2001; Niederle and Vesterlund 2007). In fact, even though the difference is not statistically significant, across all three schools, men ($n = 49$) expressed *less* confidence in both the merits and morals of their arguments than women ($n = 51$).

¹⁴ The question asked, “how difficult or easy was it for you to argue this issue,” and used a 7-point Likert scale. The 19 respondents who selected the “neutral” option were dropped from the difficult/easy dichotomization in the reported comparison.

Second, those who selected their appellate roles ($n = 18$) were not statistically significantly more confident in the morals or merits of their arguments than those who were randomly assigned their appellate roles ($n = 87$). This too, is surprising given the expectations set by dissonance reduction and escalation of commitment theories. One would expect that those who self-selected their roles would express greater confidence in them. However, this result could be attributable to an effect of being at school “C”, so more research would need to be conducted to see if this effect generalized across more schools or other contexts. It is also surprising that those who said that they intended to work as litigators following graduation from law school ($n = 57$) expressed no greater confidence in either the merits or moral strength of their arguments than those who said that they planned to pursue non-litigation careers. According to Self-Perception Theory, one would expect that those who choose and declared their careers to consist of advocating for clients before judges, would express significantly more optimism in their arguments than those who did not say they planned to work as litigators.

TABLE 4 ABOUT HERE

Lastly, and perhaps most surprisingly, those who spent more time preparing their arguments were not more likely to express greater confidence in the merits of their arguments. We divided up the reported hours spent preparing by whether students worked more than forty hours (the highest possible option to select) versus those who spent less than or equal to forty hours preparing. Subjects' responses, evidenced by the shape of the distribution depicted in Figure 1 justifies the dichotomization contemplated.¹⁵ Most theories of overconfidence predict that those who worked “the most” in preparing should have been the most over-confident in the merits of their claims. However, the difference in merits-based confidence index scores for those who worked 40 hours or more in preparing ($n = 27$) versus those who reported working less than 40 hours ($n = 78$) is not statistically significant ($p = .49$). Interestingly, however, the less-than-or-equal-to-40 hours of preparation group exhibited statistically significantly *higher* moral confidence than the greater-40 hours of preparation group ($p = .04$). This might suggest that lawyers are able to segregate their moral beliefs from their beliefs about the merits of their clients' cases. Thus, perhaps, for the students who prepared less than their counterparts, they reduce the dissonance they experience from realizing this by rationalizing less of a need to prepare by over-inflating their beliefs in the moral strength of their arguments. In other words, students disappointed by their preparedness might rationalize their failure with augmented reliance on the moral superiority of their roles.

¹⁵ The lack of a significant relationship between expressed confidence in merits and time spent preparing persists regardless of whether one applies this dichotomization.

B. The Relationship Between Overconfidence & Performance

We next explore whether there is a relationship between confidence in the substantive legal or moral merits of subjects' randomly assigned moot court sides and their legal advocacy performance. Before reporting the results of our analyses of these two relationships, we first briefly explain our dependent variable measure of advocacy performance, and then outline the other covariates that serve as controls when explaining the relationships, such as gender, pre-existing expertise in the issues argued, difficulty or ease of making arguments, preparation time, whether participants intend to pursue careers as litigators, and whether subjects were randomly assigned to the role of petitioner or respondent.

1. Measure of Advocacy Performance

As discussed above, for one of the schools, School "A", ($n = 35$), our data include moot court scores. Instructors of legal writing and "judges" in oral argument gave numerical rankings to the combined effectiveness of the written briefs and oral argumentation of each moot court participant. The mean moot court score is 31.24 ($SD = 7.32$). The lowest score was 15.2 and the highest was 42.9. The median score was 30.97. Figure 5 is a histogram of the distribution of moot court scores.

FIGURE 5 ABOUT HERE

2. Covariates

To assess the relationship between confidence in substantive merits and advocacy performance, and the relationship between moral confidence and advocacy performance, we use six other control variables. These are: (1) gender, (2) pre-existing expertise in the subject area, (3) difficulty or ease of presenting the argument, (4) time spent preparing, (5) whether subjects intend to work in litigation following graduation from law school, and (6) whether subjects were assigned to the role of respondent or petitioner. Some of these have already been discussed above. For the purposes of vetting the hypotheses about how lawyers come to over-optimistically assess the likelihood of winning, the two most important control variables are pre-existing expertise and the difficulty or ease of presenting the arguments. To assess the confidence subjects express in their arguments, both in terms of their merits and morals, we need to hold constant the degree to which subjects had a pre-existing basis for thinking they were more expert in the moot court issue than their peers. Similarly, one would expect that making moot court arguments is not for everyone. Some feel more comfortable speaking in public than others. Controlling for the ease or difficulty of making the arguments is one way of finding out what percentage of the variation in advocacy scores is explained by participants' confidence, independently of their assessment of how hard or easy it was for them to participate in moot court.

The pre-existing experience measure is based on participants' responses to the following survey question: "How would you rate your experience or expertise with the issue you argued BEFORE moot court began?" This was scaled on a five-point scale of "none," "below average," "average," "above average" and "excellent." The difficulty of arguing the issue measure is based on responses to this survey question: "How difficult or easy was it for you to argue this issue?" This was scaled on a seven-point scale ranging from "very difficult," to "very easy." The other covariates have already been explained above.

3. How Confidence in Merits Impacts Success in Moot Court

We used OLS regression of the moot court scores on the merit confidence index and the moral confidence index, and controlled for the six covariates discussed above. Table 4 summarizes the output of these analyses for merits-based confidence and Table 5 summarizes the output for morals-based confidence. In short, confidence in the merits of their claims robustly predicts *worse* moot court scores, particularly when controlling for the two covariates of the greatest theoretical importance: pre-existing subject-area expertise and the difficulty of arguing the issue. Confidence in the relative moral value of their claims does not correlate at all with success in moot court. Even though confidence in the legal merits significantly and positively correlates with moral confidence¹⁶ ($r = .337$; $p < .05$), moral confidence does not correlate significantly with moot court scores, but merit-based confidence does.

The meaning of this finding is ambiguous. It may be that increasing (unjustified) over-confidence in the legal merits of one's case causes the quality of representation to fall, perhaps by blinding advocates to weaknesses in one's case. Alternatively, better advocates may simply be less prone towards overconfidence. In this view, overconfidence does not cause lower quality representation, but rather is symptomatic of lower quality advocacy.

¹⁶ This was mentioned to be the case for the entire surveyed population including all three schools, and holds true for just this school as well.

TABLES 5 & 6 ABOUT HERE

Interestingly, the moot court participants at the two extremes for performance expressed diametrically opposite views of the confidence in the legal merits of their assigned arguments. The student with the highest moot court score (42.9) had one of the lowest confidence index scores (1.5). The student with the lowest moot court score (15.2) had the highest possible confidence rating (6). Based on the full model in Table 3, one could predict that controlling for all six of the control variables identified, that a one point increase in the confidence (or a 16% increase based on the relative 0-6 scale) corresponds with a lower moot court performance score by approximately 2 points, or a 4.7% worse performance. Figure 6 is a scatter-plot of the moot court scores and their corresponding merit confidence index values, and a prediction line.

FIGURE 6 ABOUT HERE

VI. Conclusion

Our survey of moot court students leads us to several conclusions. Participation in advocacy is causally associated with increased confidence in the merits of the side that the lawyer is advocating. Overconfidence in one's arguments is not only the result of lawyers' selecting clients with whom they agree or electing to practice in an area in which they believe all clients on the chosen side should win. Moreover, the degree of increased confidence is considerable. Assign an average law student to argue for respondents and she will become roughly as confident in the strength of respondents' case as the most pessimistic advocate assigned to represent the petitioner. The degree of overconfidence caused by arguing for a side was not significantly associated with gender, the amount of time spent preparing a brief nor the intention to become a litigator. Moot court participants of both genders and varying amounts of time spent on the case exhibited the same degree of overconfidence. These findings are inconsistent with previous work on gender and with dissonance and escalation of commitment theory, which predict that males and those who spend more time on a case should be more confident than their counterparts. Assignment to the role of respondent was associated with more confidence—understandable given the respondent's ability to rely on the opinion of the court below.

The overconfidence caused by the act of representation can have important impacts on the ability of lawyers to settle cases. When both sides' lawyers perceive their cases as high probability winners, they are less likely to settle and may be less likely to prevail upon their clients to settle. The impact of representation on confidence also offers a cautionary tale to lawyers considering a practice area in which they do not agree with their clients—merely practicing in the area is likely to shade the lawyer's views on the legal and moral merits of the issues.

Finally, we found that overconfidence was associated with inferior moot court performance. The more confident the student, the worse he did in moot court. While we are hesitant to draw any firm causal conclusions about this finding, it suggests that overconfidence may not be a necessary cognitive process that enables lawyers to function. Undoubtedly, and anecdotally verifiably, clients are often impressed by attorneys' expressions of confidence in their abilities to reach a positive outcome for them. So, it would behoove any researcher to advise lawyers to be less confident generally. However, lawyers are likely best served to reserve expressions of overconfidence to client meetings and rain-making opportunities. Perhaps by more carefully and thoroughly internally acknowledging the shortcomings of substantive merits of their clients' cases, they would learn their opponents' arguments better, making themselves stronger legal advocates, better able to value settlements and otherwise represent their clients.

All of these findings imply that legal training should inform students about the likelihood of overconfidence and about the dangers that overconfidence offers to their clients and to themselves. Further information about the effects of advocacy on the advocate can be obtained by future studies examining the "natural experiments" of moot court competitions.

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FIGURES

FIGURE 1: Histogram of time spent writing & preparing with kernel density plot

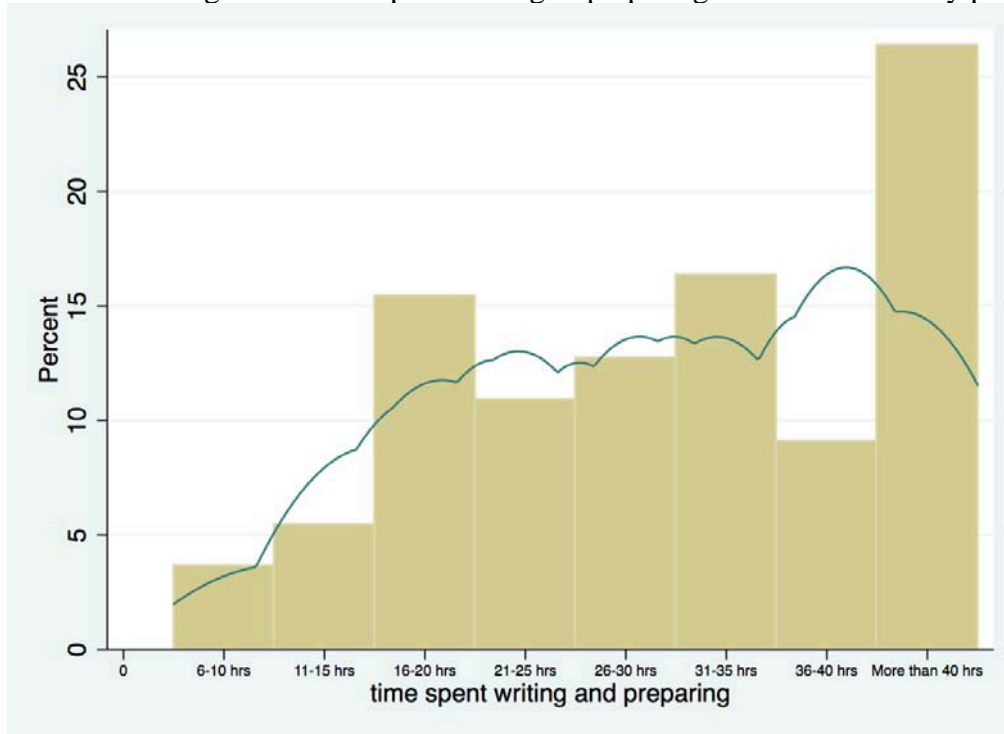


FIGURE 2: Histogram of merits confidence index with kernel density plot

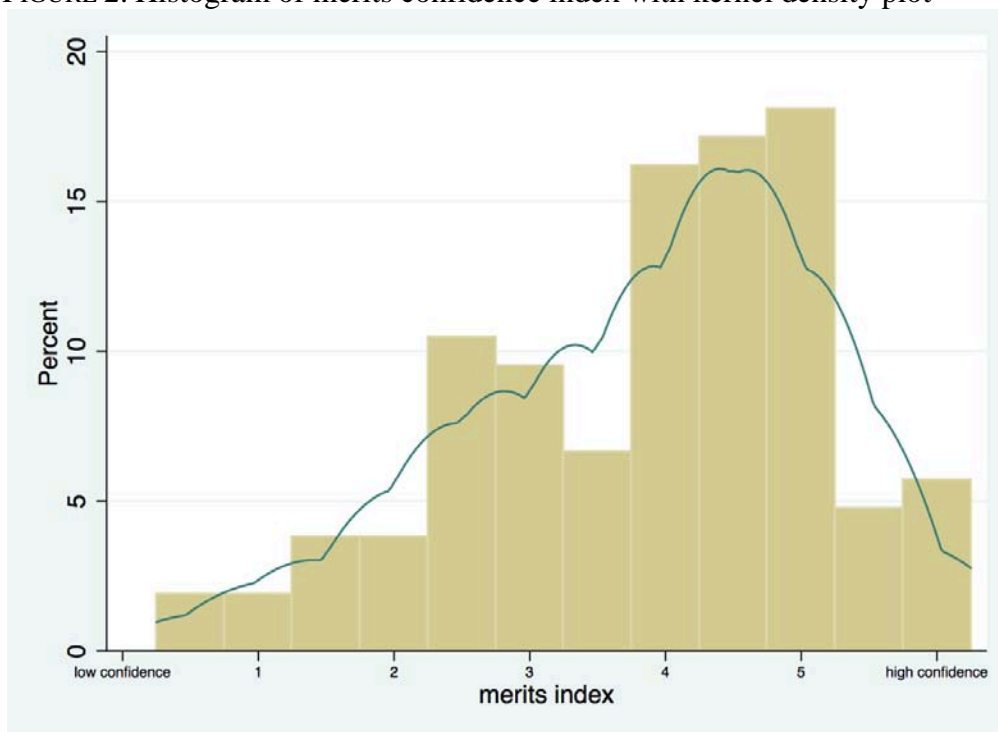


FIGURE 3: Histogram of moral value confidence index with kernel density plot

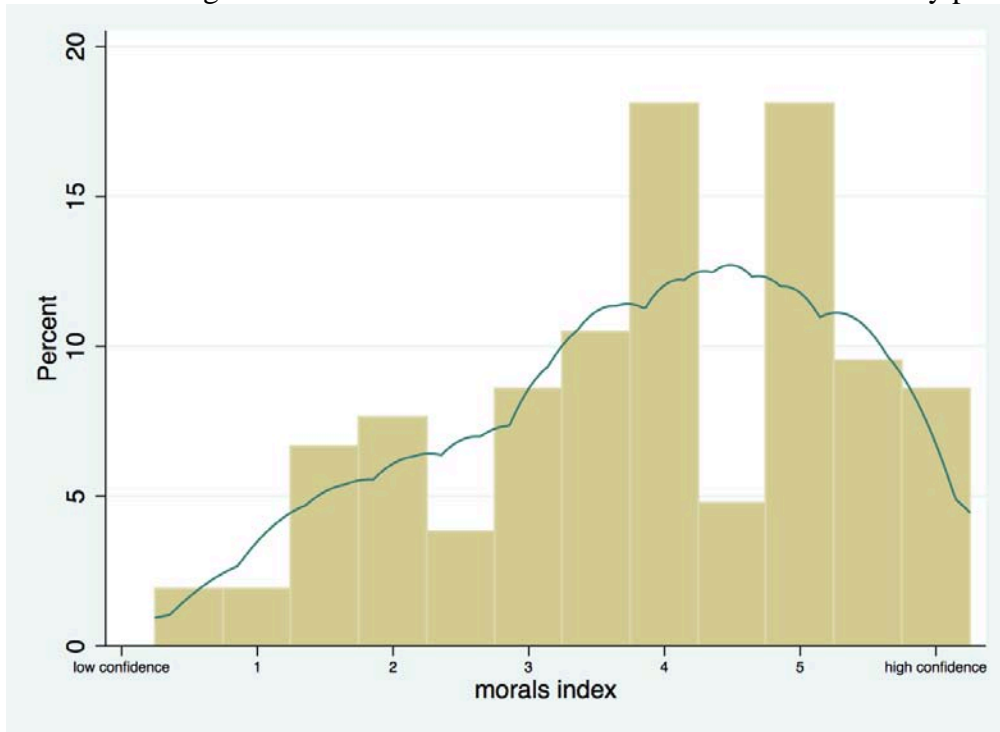


FIGURE 4: Scatter-plot of merits and moral indicies with prediction line

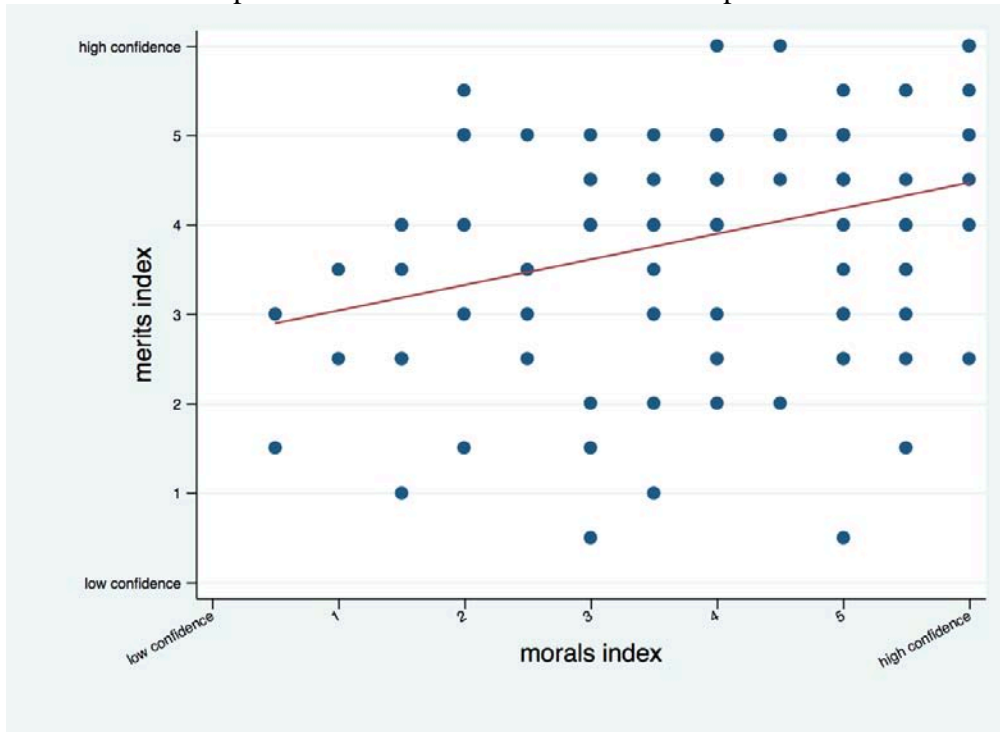


FIGURE 5: Histogram of moot court scores with kernel density plot

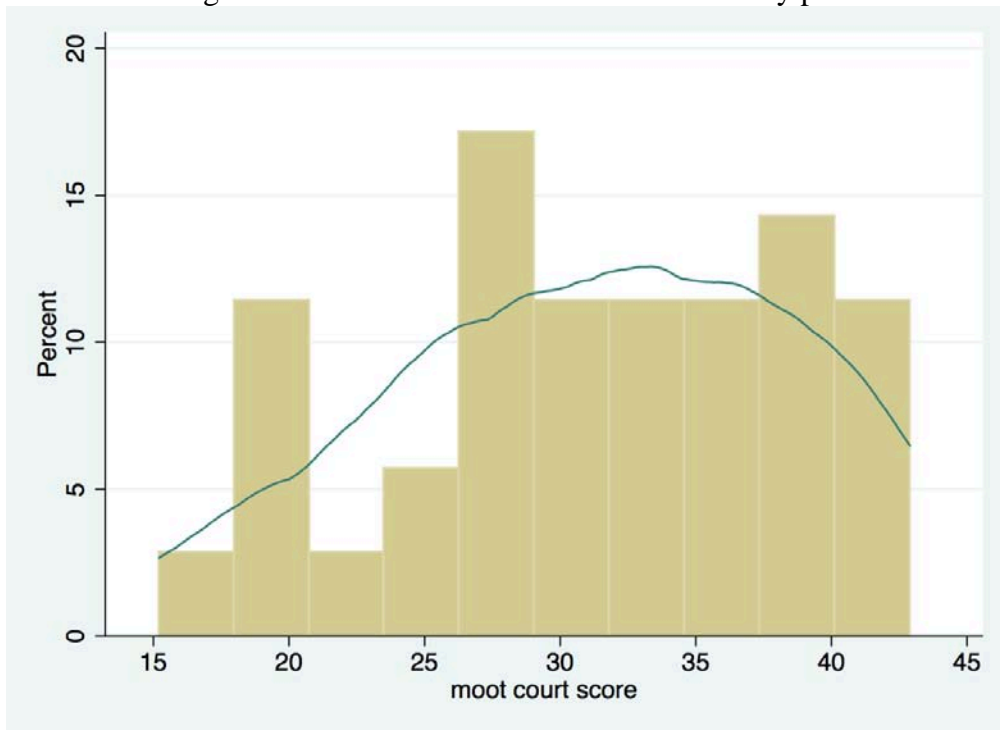
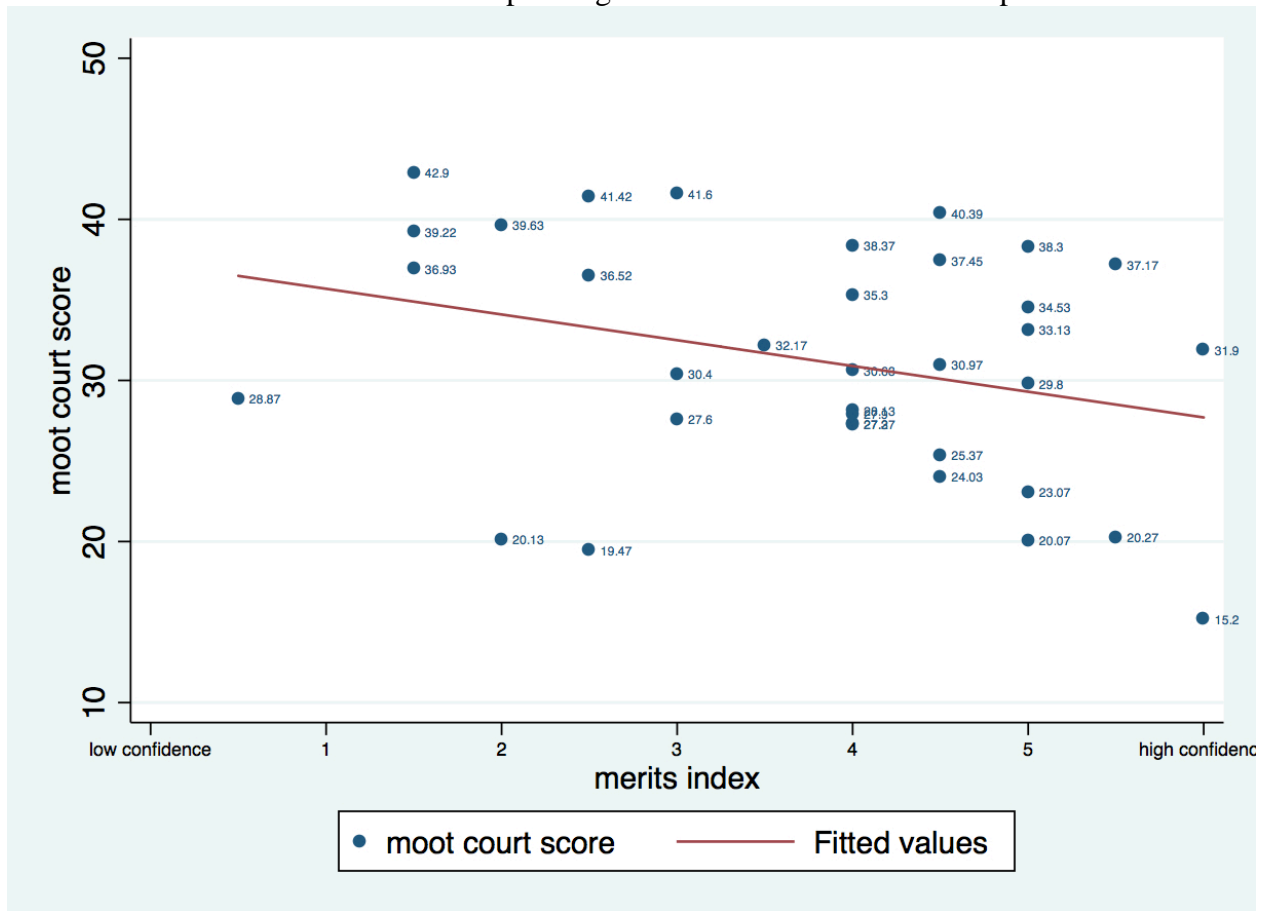


FIGURE 6: Moot court scores and corresponding merits confidence index with prediction line



TABLES

TABLE 1: Moot court score percentiles for survey respondents and non-respondents

Percentile	Survey Respondents	Survey Non-Respondents
10 th	20.13	25.96
25 th	27.27	28.82
50 th	30.97	32.03
75 th	37.45	37.13
90 th	40.39	39.27

TABLE 2: Mean comparisons and t-tests across the three schools of moral-based confidence

Comparison	N	Mean	SD	t-test p value
School "A"	45	3.54	1.54	.04
Schools "B" & "C"	60	4.13	1.32	
School "B"	38	4.24	1.37	.056
Schools "A" and "C"	67	3.68	1.45	
School "C"	22	3.95	1.25	.79
Schools "A" and "B"	83	3.86	1.49	

TABLE 3: Mean comparisons and t-tests within each school of merits-based and moral-based confidence by moot court role (respondent / petitioner)

School	Role	N	Merits Index			Morals Index		
			Mean	SD	t-test p value	Mean	SD	t-test p value
School "A"	Respondent	22	4.27	1.27	.03	3.02	1.54	.02
	Petitioner	23	3.43	1.27		4.09	1.36	
School "B"	Respondent	14	3.78	1.42	.71	3.53	1.59	.01
	Petitioner	24	3.96	1.31		4.64	1.06	
School "C"	Respondent	10	4.60	1.05	.01	3.35	1.27	.03
	Petitioner	12	3.29	1.14		4.46	1.03	

TABLE 4: Mean comparisons and t-tests across six possible predictors of merits-based and moral-based confidence

Variable	N	Merits Index			Morals Index		
		Mean	SD	t-test p value	Mean	SD	t-test p value
Gender							
Men	49	3.70	1.39	.23	3.97	1.50	.87
Women	51	4.02	1.24		3.92	1.38	
Role Assignment							
Respondent	46	4.19	1.28	.02	3.76	1.42	.45
Petitioner	59	3.62	1.27		3.97	1.46	
Role Selection							
Selected	18	3.92	1.42	.87	4.05	1.10	.57
Assigned	87	3.86	1.29		3.84	1.51	
Preparation Time							
> 40 hrs	27	3.72	1.22	.49	3.39	1.26	.04
≤ 40 hrs	78	3.92	1.34		4.05	1.47	
Difficulty Arguing Case							
Easy	37	4.16	1.14	.03	4.27	1.29	.02
Difficult	50	3.52	1.44		3.54	1.55	
Post-grad Intentions							
Litigator	57	3.85	1.22	.86	3.81	1.43	.57
Non-litigator	48	3.89	1.41		3.97	1.46	

TABLE 5: Regression Models of Moot Court Performance on Legal Merits Confidence
(Dependent Variable = Moot Court Score)

	(1)	(2)	(3)	(4)
Merits Index	-1.598*	-2.154**	-1.830**	-1.990**
	(0.863)	(0.901)	(0.893)	(0.945)
Female		2.651	3.078	3.030
		(2.471)	(2.406)	(2.458)
Subject Area Expertise (5-pt scale)		2.473*	2.346	2.031
		(1.455)	(1.411)	(1.473)
Ease of Arguing (7-pt scale)		1.094	1.334	1.153
		(0.957)	(0.938)	(0.978)
Hours spent preparing (8-pt scale)			1.008*	0.920
			(0.584)	(0.613)
Litigator Dummy				1.318
				(2.764)
Petitioner Dummy				-1.974
				(2.525)
Constant	37.29***	33.42***	27.07***	28.70***
	(3.481)	(4.021)	(5.357)	(6.164)
Observations	35	35	35	35
R-squared	0.094	0.242	0.312	0.336

NOTES: Standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1

TABLE 6: Regression Models of Moot Court Performance on Moral Value Confidence
(Dependent Variable = Moot Court Score)

	(1)	(2)	(3)	(4)
Moral Index	0.150	-0.0527	-0.327	-0.369
	(0.820)	(0.829)	(0.796)	(0.875)
Female		3.443	3.878	3.820
		(2.674)	(2.541)	(2.630)
Subject Area Expertise (5-pt scale)		1.527	1.615	1.373
		(1.539)	(1.458)	(1.546)
Ease of Arguing (7-pt scale)		0.551	0.996	0.828
		(1.017)	(0.987)	(1.040)
Hours spent preparing (8-pt scale)			1.301**	1.215*
			(0.617)	(0.664)
Litigator Dummy				1.686
				(2.998)
Petitioner Dummy				-0.965
				(2.784)
Constant	30.70***	27.39***	21.24***	21.60***
	(3.187)	(4.205)	(4.938)	
Observations	35	35	35	35
R-squared	0.001	0.098	0.217	0.232

NOTES: Standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1