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A Better Way to Fail: Teaching Critical Thinking to Chinese Lawyers[1]

Abstract: This article argues that American LL.M. Programs should consider ways to help all foreign lawyers meet their goals of improved English, strong critical thinking and writing skills, and opportunities for work experience needed for global legal practice. In the course described here, using real-time and computer-assisted learning, the Professor and foreign-trained Teaching Assistants help Chinese students bridge this divide in a course that addresses the interaction of racial politics and the law.

Keywords: critical thinking, teaching, Chinese lawyers, English language, racial politics, law

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"Ever tried. Ever failed. No matter. Try again. Fail Again. Fail Better."
-Samuel Beckett,
Worstward Ho, 1983

1 Introduction

In a recent issue of The New Inquiry, novelist Ned Beauman suggests that the phrase "'Fail Better' is now experimental literature's equivalent of the famous photograph of Che Guevara: "flayed completely of meaning and turned into a successful brand with no particular owner…[w]hen Beckett talks of failure he's often talking about how language can't withstand the weight of meaning we want to put into it, and in that sense his unintended ubiquity is ideal. What better argument for the feebleness of determinate meaning than the tawdry afterlife of 'fail better.'" Like Beauman, I reduce this phrase to an aphorism along the lines of "Keep Calm and Carry On." [2]In the present project, I further invoke this pessimism to prepare the reader for a less myopic view of the phrase's seemingly upended meaning that arises when working with Chinese lawyers.[3]

[1] My somewhat presumptuous title suggests that Chinese lawyers lack Western-style critical thinking skills, and that any effort to teach these skills may, at best, produce a somewhat better failure. Although "failing better," as I describe it, cannot ensure predictable assessment outcomes, it stands a better chance of introducing teaching critical thinking skills than many methods that I have tried before. While it is no teacher's desire to see students fail, Beckett's phrase captures something of the recursiveness of U.S. Legal Writing, not unlike the French "reculer pour mieux saute."
[2] Beauman, Ned, "*Fail Worse*," www.thenewinquiry.com
[3] *Id.*

The "failing better" to which I refer can be illustrated with an anecdote relating to 50 students from Temple's LLM Rule of Law Program in Beijing[4] -- an incident that alerted me to a problem completely new after twenty five years of teaching university English and legal writing. The students had been studying U.S. law in English in China for 10 months before travelling to Temple's Philadelphia campus for an intense Summer Semester of Legal Writing, Trial Advocacy, and Legal Ethics. The U.S. law program in Beijing is taught in English by U.S. Law Professors, who must negotiate considerable language difficulties and a heavy syllabus of doctrinal material. They evaluate students by means of one exam at the end of term. Add to this that virtually all the students speak Mandarin outside the classroom (and often to one another in the classroom), and we can assume exposure to U.S. legal culture was entirely second-hand.

Despite this lack of exposure to U.S. style legal communication, the schedule required students to learn legal writing during the Summer Session in Philadelphia, close to the end of their Program. Despite their having studied U.S. law in English for close to a year, students had widely varying levels of U.S. spoken English and comprehension, and minimal grasp of U.S. legal discourse.[5]

Another Professor and I showed the students a documentary film – "The Road to *Brown*." Neither of us spoke more than a smattering of Mandarin. The students concentrated on the film, taking notes, intent on understanding the legal and social history of the pre and post- Jim Crow U.S. Yet, when the film shifted to period cartoon depictions of black children cavorting and dancing Minstrel-style, the students laughed nervously. My colleague and I were distressed. Despite our awareness of the cultural defense mechanism of nervous laughter, we admonished the students sternly, but did not successfully explain why their behavior was inappropriate.[6]

Recognizing that they had offended their Professors, the students became discomfited and withdrawn. The best laid plans for a contextually rich discussion of a deadly serious subject were foiled by their earnest Professors' failure to, if not calibrate, then at least

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[4] Temple's Rule of Law Program in China "Is the first and only foreign law degree-granting program in China… over 260 students have graduated from Temple's LL.M. program for Chinese judges, government officials, and attorneys." Temple Law School International Law and Programs brochure.

[5] In an earlier article, I explained that the students from Temple Law School's Beijing Program "have entry level instruction in Legal English [to] provide them with enough legal terminology to conduct future reading and research in the more specific doctrinal areas of interest, and to develop legal skills such as briefing cases, but … the development of these deceptively complex skills cannot be guaranteed in a pre-program." Robin Nilon, *The Calculus of Plagiarism: Toward a Contrastive Approach to Teaching Chinese Lawyers*, 2 S. C. J. INT'L L. & BUS., note. 14 (2006); Despite adequate qualifications, students come to this prestigious program without a grounding in U.S. legal culture. Students have difficulty adjusting to U.S.-style "classroom conventions" present in the Beijing Program, much as Foreign LL.M. students have trouble adjusting the U.S. classroom culture when they come to the U.S. to study, *see* Julie M. Spanbauer*, Lost in Translation in the Law School Classroom: Assessing Required Course work in LL.M. Programs for International Students*, 35 INT'L J. LEGAL INFO. 396, 419-20 (2007) (arguing: "Regardless of how knowledgeable nonnative speakers may be about discipline-specific content areas, they may not be able to effectively communicate that knowledge, either in speaking or writing, because of their lack of familiarity with more general communicative patterns in U.S. academic and work environments. One of the communicative environments most unfamiliar to many ESL students when they arrive to study in the United States is, in fact, the American classroom.")

[6] Culturally-specific notions of laughter were taken into consideration, but we reacted before we had a time to think through the reaction. Nervous laughter can be a sign of discomfort in many other cultures, including Western culture. Our discomfort triggered our reaction as much as theirs did their reaction. See e.g. Ed. Wen-Shing Teng, *Handbook of Cultural Psychiatry*, 792, "[While] nervous laughing … is one kind of coping mechanism commonly used by some Asian people. When a person is nervous, particularly in an embarrassing situation, instead of manifesting feelings and gestures of nervousness and embarrassment, he may laugh nervously. By bursting into laughter, a person may save himself embarrassment by concealing his feelings of nervousness. This culturally shaped behavior may look awkward or strange to outsiders, who are not familiar with it, and might interpret it as odd, while actually it is a culturally shaped defense mechanism."

address, students' cultural understanding of the legal and social history of the pre and post Jim Crow U.S.

My epiphany here was to appreciate that the intertwined threads of history, culture, and racial politics should never be expected to be understood in one "teaching moment." In fact, such threads must be woven into the fabric of a student's education. Chinese students draw from an ancient pedagogy that relies on memorization and paramount attention to the teacher's position and opinions with regard to "legal article, legal principle, legal philosophy."[7] The *Brown* documentary thus could not realistically have been understood in context unless that context was fore-grounded, something my colleague and I failed to do. A depressing failure, but also an opportunity to fail better. I determined to use the intersection of race and law as a means by which to cross a distinct and highly marginalized cultural border. Legal writing would serve as the vehicle.

As others have observed, even native speakers of English must acquire a new language when learning U.S. law.[8] It follows, of course, that foreign lawyers must add a "third language" of U.S. legal writing to their standard English and foreign legal writing language.[9] Added to these difficulties is the problem—observed by U.S. law professors – of competing with traditional Chinese pedagogy as they try to impart critical thinking skills.[10]

I argue that for Chinese law students, a lack of awareness of audience expectations in a "target language," leads to a dearth of the contextualized legal analysis and critical thinking common to U.S. legal culture. I am aware that a significant amount of work has been done to promote cross-cultural communication and respect for differences, and that this cannot but help Chinese lawyers and their professors meet their goals. However, this article urges a method of teaching critical thinking skills to students who have had little opportunity to develop them. I believe it could be adapted for any cross-cultural legal writing program offered to foreign lawyers seeking U.S.-style legal study.

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[7] Matthew Erie, *Legal Education Reform in China through U.S.-Inspired Transplants*, 59 J. LEGAL EDUC. 60, 68 (2009), *see also* Pamela N. Phan, *Clinical Legal Education in China: In Pursuit of a Culture of Law and a Mission of Social Justice*, 8 YALE H.R. & DEV. L. J. 117, 126-7, n. 55 (2005) (explaining "[B]eginning in elementary school Chinese students are expected to learn through a system the Chinese call "stuffing the duck" (tianya shi), cramming facts, figures, and theories into hours of classroom lectures, followed by hours of memorization at home.")

[8] *See* Jill J. Ramsfield, *Is "Logic" Culturally Based? A Contrastive, International Approach to the U.S. Law Classroom,* 47 J. LEGAL EDUC. 161; Erie *supra* note 7, 417 (2007) (explaining that even for native speakers of English, the properties and conventions of U.S. legal writing registers and genres present "a new culture, a new English, and new rhetorical preferences. As such, international students have the additional task of learning the "new language" of U.S. legal writing registers and genres while they continue to build their command of Standard English (arguing that "it is [thus] important for those of us who teach these ESL students to understand that legal analysis in the U.S., which incorporates its own logical structure, adds another layer of cultural logic upon a language which itself incorporates a causal structure or logical organization.")

[9] *Id.*

[10] Erin Ryan, Xin Shua, Yuan Ye, You Ran, & Li Haomei, *When Socrates Meets Confucius: Teaching Creative and Critical Thinking Across Cultures Through Multilevel Socratic Method*, 92 NEB. L. REV. 290, 332, (quoting a Chinese source describing the differences in learning styles as follows: "In China, the underlying assumption shared by law professors and students, consciously or unconsciously, is that students know nothing until teachers tell them. Before students understand the basic theory, it's not worthwhile to hear their premature ideas. Law professors teach us the right ideas and the standard answers. Students with different ideas do not usually have enough courage to express them because they expect them to be of little value. Students don't even bother to critically think through what they are taught because we subliminally assume everything professors teach us is the 'true and only answer.' Chinese law professors often teach with an authoritative tone, suggesting '*This is the only accurate explanation to the problem; all other explanations are wrong.*' For example, one professor highly proficient in international law told us outright that "polluting" his classes with discussion would bring nothing but superficiality and never reach the depth of theory or principle to which he aims his teaching."

In an effort to walk that tightrope between normative cultural views and the cultural relativism that parodies difference and stymies thought, I have experimented with a variety of interdisciplinary approaches based on contemporary writing theory and rhetoric. My essay chronicles my ever evolving efforts to help me, my Teaching Assistants (whom I will refer to as Teaching Assistants, culture brokers, or e-moderators), and my students "fail better"--in virtual time and real time, working on the always unstable platform of critical thinking. These experiments began in the Summer Session 2014, using on-line and real-time critical thinking methods with my students from Beijing. Those methods, discussed here, will be employed on a larger scale during the 15-month distance learning/real-time class that will begin in September of 2014, and be completed by October, 2015.

With little critical thinking in place, students I offered were largely unprepared for a discussion of the institutionalized racism illustrated in the *Brown* documentary. I believe that this lack of focus on critical thinking skills also encumbers Chinese lawyers after they have obtained an American LL.M. In Part II, I argue that with the increased competition for spots in U.S. LL.M. Programs, and the steep drop in J.D. applications, all U.S. LL.M. Programs must consider ways to help Chinese law students meet their key goals: improved English, strong critical thinking skills, and opportunities for work experience in the U.S. Course design must be fine-tuned to help students attain these aims.[11] I explain how Chinese students can be mainstreamed into American legal education and ultimately move graduates from what Matthew Erie refers to as "thin" reasoning to "thick" reasoning, with the goal of reading, writing, and explaining legal materials in the social contexts in which they were written.[12]

Part III displays one effort to "fail better" at imparting critical thinking skills. I detail the course that I taught in the summer of 2014 during which I introduced and promoted critical thinking skills through Blackboard based e-learning and real-time. I based my method on Gilly Salmon's Five Stage model of E-learning' adapted by me for use in e-learning and in real-time.[13] Salmon's five stage model "works through a structured and 'scaffolded' series of "e-tivities designed to encourage creativity and learning."[14] The course can also establish the foundation of a legal research and writing method that will be developed when the students arrive in Philadelphia 10 months through their Program. The scaffolded styles preferred by U.S. law professors are compared to the rhetorical styles that Chinese readers prefer. I demonstrate how students synthesized the scaffolded practice during their "real time" study in Philadelphia when they prepared briefs and oral arguments for a target audience of Federal Judges. It is at this stage that the interaction among the different cultures of the courtroom, the classroom, and U.S. and Chinese argument styles must be navigated with best possible attention to context.

In Part IV I encourage long distance communication using an "inverted" classroom." Catherine Lemmer describes the an "inverted" or "flipped" classroom as "a pedagogical model supported by theories of active learning that replaces the traditional in-class lecture

[11]Carl F. Minzner, *The Rise and Fall of Chinese Legal Education*, 36 FORDHAM INT'L L.J. 393 (2013) (arguing that "[F]or American law schools, the real challenge in the coming years will be to create reasonable priced programs that actually improve the employability of their graduates – both foreign and domestic alike. This requires analyzing the actual needs of Chinese students and employers. It requires customizing existing programs to cater to them. And it requires mainstreaming Chinese students as fully equal customers of American legal education").

[12] Erie, *supra* note 7 at 77-78.

[13] Gilly Salmon, *E-tivities: The Key to Active Online Learning*: 2nd. ed. London: New York, Routledge, (2013).

[14] *Id*. at 12 (describing how "[W]orking with others online can be playful, liberating and releasing. Online participants are often more willing to try things out in a dynamic way than they would be face-to-face, which means that e-tivities can be more fun and still promote learning."

format with predelivered instructional materials and an in-class learning lab[15] I propose predelivering to students in China materials intended to develop thick reasoning skills early in the Program.

I conclude with the aspiration that learning thick reasoning – through stages and repetition—will "fail" far better than modelling exercises so commonly used.

2 "Thick" Reasoning as a Model for Critical Thinking

The failure of Chinese universities to train law students in critical thinking, along with the glut of law school graduates have been recognized as two causes of the graduates' inability to find employment.[16] These domestic employment difficulties compel many young Chinese lawyers to seek an American LL.M. degree, in the hope that it will make them more employable when they return to China. While most Chinese law graduates see the undoubted advantages of an American J.D., they might recognize they lack either the skills or the time to make it a reality.[17] The LL.M. is, then, often the default choice for a Chinese student seeking to improve job opportunities. But, as Carole Silver says, what is more troubling for those of us who teach LL.M. students is that according to some administrators: "[R]ight now, Chinese students are beginning to view LL.M. programs as a 'side door' into J.D. programs. They score too low on the LSAT to be admitted in the front door, so they apply to a school's LL.M. program, burn up the track, and then transfer into the J.D. program."

This is, of course, the hope of the student, not the likely outcome. These students often have insufficient skills to do LL.M. level work, suggesting that even after a year of study they will still be ill-equipped to do J.D. work. In general, program directors do not encourage LL.M. graduates to apply to J.D. Programs and "[I]ronically, the LL.M. graduates likely to do well enough to get admitted to the JD Program will do perfectly fine professionally without it: those who need it most are unlikely to satisfy all the requirements for admission."[18] This insight confirms my own experience, and suggests that the Chinese student well prepared *through* an LL.M. need not depend on the J.D. to increase the chances of success in the global legal market.

Foreign legal education is a requirement for a foreign license under Chinese regulations. In addition to admission to a bar and the LL.M., Chinese students are expected to have

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[15] Catherine Lemmer, *A View from the Flip Side: Using the "Inverted Classroom" to Enhance the Legal Information Literacy of the International LL.M. Student*, 105 LAW LIBR. J. 621 (2013); *See generally* Roberta K. Thyfault & Kathryn Fehrman, *Interactive Group Learning In The Legal Writing Classroom: An International Primer On Student Collaboration And Cooperation In Large Classrooms*, 111 J. MARSHALL L.J. 135, 136 (2009) (providing an overview of techniques for ensuring that students retain the skills learning in a legal writing classroom by providing "… active learning experiences: experiences that allow students to solve problems, complete projects, and discover knowledge and conclusions for themselves….This process of inexorably involving students in their own learning processes can be known as 'experiential learning,' 'kinesthetic learning' or 'active learning.'")

[16] Erie, *supra* note 7 at 35 (arguing "the flood of new law graduates is only one factor behind rising unemployment and underemployment…[P]oor education in the later 1990's and 2000's led to the overnight proliferation of many programs where 'everything from the teachers and students to the training actually provided is characterized by the academic and theoretical focus that does little to prepare students for actual careers."

[17] Carole Silver*, The Variable Value of U.S. Legal Education in the Global Legal Service Market*, 24 GEO. J. LEGAL ETHICS 49 (2010) (quoting a Chinese LL.M student "I'm thinking to get a J.D. at the very beginning. But I'm really too busy and I don't have time to prepare for the LSAT…. I think most of LL.M., they would like to continue for J.D. just because they want to get the same pay, it's unfair. In China there are a lot of LLMs, so it's really difficult to get a job."

[18] *Id*. at 49 n.196

practiced abroad.[19] Theoretically, then, a Chinese LL.M. graduate and member of a bar would have a much better chance for success in China if she were adequately prepared to do legal work in the U.S. by the end of her LL.M. In reality, this goal is not going to be met unless the student has been immersed in English and U.S. legal culture throughout her studies and perhaps after completing her studies. In my model, the immersion might reasonably take hold within the 15 months of on-line and in-class study.

A lack of critical reasoning skills not only encumbers students' understanding of U.S. legal culture, but it may even help fuel the desire for the J.D. and even the S.JD. And that, in turn, devalues the U.S. LL.M. degree. Carole Silver argues "Because of the lack of standardization, the importance of the LL.M. is less about the credential itself and more about particular experiences and lessons that it enables.[20] Given a decidedly optimistic spin to my model, then, an LL.M. program that immerses Chinese students in U.S. legal culture might well improve the fortunes of U.S. administrators of LL.M. Programs, the Professors who teach in these programs, and the students themselves.

To understand the difficulty of Chinese students' immersion in U.S. legal culture, one must understand how legal reasoning is taught in China. Matthew Erie views the LL.M. Program at Tsinghua University School of Law as a test case in teaching critical reasoning to Chinese lawyers.[21] Much contemporary Chinese legal education has been informed by reform-minded Professors who have returned to China from study in the U.S., intent on emphasizing critical reasoning skills.[22] In Matthew Erie's view, however, these efforts fail to move beyond "thin" critical reasoning, e.g., test preparation (yingshi jiaoyu) to far more analytical "thick" reasoning.[23]

> 'Thin' critical reasoning applies to the exercise of analytical reasoning as applied to legal materials to further the client's interests. It has close affinities with formal logic…Thin critical reasoning informs many aspects of lawyering: conducting research including reading cases and statutes as well as examining evidence; developing (multiple and alternative) case theories; drafting memos or contracts; and oral advocacy and client consultation.[24]

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[19] *Id*. at 41 [arguing "Because ***Chinese*** regulations require a ***foreign*** license, ***foreign legal*** education is the crucial entry point." But the ideal candidate for an international firm (who may begin as a ***Chinese*** lawyer) has more: Practice experience outside of China also is important. A lawyer working in the China office of an international firm explained, "If someone has only an LL.M and the bar…there is not big advantage. The advantage comes from working experience in the U.S. In China, then, ***legal*** practice experience outside of China is an essential element of professional capital."]

[20] *Id*. at 39, 55 (arguing that "Global lawyers become global only in context…Even these are not uniformly relevant in each host country, and will be interpreted differently by foreign and host country firms.") While this essay deals specifically with Chinese students only, the principle of contextual learning is applicable overall not only to the growing numbers of Chinese students seeking the degree, but other cultures as well.

[21] Erie, *supra* note 7 at 64 (explaining TULS is seen as one of the pioneering law schools in China today because of its experimentation with curriculum, teaching, and overseas connections….The U.S. exchange program for which it is most well-known is the LLM Program in U.S. law taught by Temple University's Beasley School of Law, a program supported by a range of private and public donors including the U.S. State Department. Thus, TULS has strong ties to both the PRC government and the international community and, as such, provides fertile ground for the study of the cross-pollination of legal education reforms.") Although Temple no longer receives as sizable a grant from the State Department, it continues to educate many of China's future legal leaders.

[22] Erie, *supra* note 7 at 77 (These educators "spent time in the U.S. either as graduate students or visiting professors and serve as 'culture brokers' who possess both transnational symbolic capital as well as 'local knowledge. However, their effectiveness in adapting U.S. teaching approaches to China depends on a number of factors including the duration the Chinese educator spent abroad and the extent of his or her exposure to an involvement in U.S. law teaching.)

[23] Erie, *supra* note 7 at 70-72.

[24] Erie, *supra* note 7 at 77-78.

Students may be lulled into false confidence with a combination of strong "thin" reasoning skills and high TOEFL scores as they begin studying in a U.S. law school, but the reasoning method taught in China rarely prepares them for law study in the U.S. or critical thinking in general.[25] The confidence that an already confident students may feel may be further boosted if they attend one of the special "pre-Programs" for incoming LL.M.s.[26] But all told, none of this can substitute for a gradual yet intense acquisition of legal culture in context.

To synthesize materials into legal reasoning on a level expected by US lawyers or Judges, a law student must develop a grasp of "thick" critical reasoning:

> 'Thick' critical reasoning widens the purview of analysis by focusing not only on policy per se but further, on politics and institutions of authority more generally, whether governmental, corporate, religious, or ideological. This form of critical thinking is not an explicit objective of instruction in formal educational institutions such as law school; more likely, it is acquired from repeated exposure to and immersion in diverse forms of cultural media outside the walls of the school. Thick critical reasoning forms the basis for political mobilization whether democratic, such as Kangan's "adversarial legalism," or socialist, as in classical Marxist thought.[27]

Chinese students are likely to have internalized a great deal of critical thinking in line with their cultural norms, which dictate that one forgoes criticism for those with greater authority than themselves.[28] Often, they have had little opportunity to showcase even constructive criticism simply because "thin" critical reasoning consistently bears fruit. Put more simply, for most Chinese educators, "thick" critical reasoning is not the chief determinant of their students' successes.

Often, teaching "thin" critical reasoning seems more than enough of a task. Chinese law students learn through civil law inductive reasoning. Erie cites one Chinese law student who planned to follow his studies in China with study at a U.S. law school:

> After Studying the American LSAT, I understand critical reasoning in U.S. law schools to divide legal arguments into evidence, assumptions, and conclusion. Any one of these can be wrong or inaccurate which weakens the legal argument. In critical reasoning as is taught in Chinese law, we are not taught to think like this. In our approach, analysis proceeds by: one, stating the definition and then, two, elaborating a beautiful system (wanmei tixi), but we are not taught to look for flaws.[29]

LSAT test-taking skills favored by Chinese educators draw on "thin" reasoning. Thus, students matriculating in a U.S. law Program, either here or in China, will find it difficult to make the leap into "thick reasoning." Ultimately, most U.S.-trained doctrinal professors teaching in China, like those teaching in Temple's Program, do not stray from their course materials, and don't have the time or training to teach written legal analysis, a key to "thick" reasoning.

Teaching Assistants as "Culture Brokers"

Professors who seek to impart thick reasoning skills unique difficulties." Teaching "thick" reasoning to those who have been rewarded for their "thin" reasoning skills means

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[25] Xiaoye You, *The choice made from no choice: English writing instruction in a Chinese University*, 13 J. SECOND LANGUAGE WRITING 97 (2004) (arguing that despite the development of Western writing pedagogies in China, "English writing is taught under the guidance of a nationally unified syllabus and examination system. Rather than assisting their students to develop thoughts in writing, teachers in this system are predominately concerned with the teaching of correct form and test-taking skills."

[26] *See e.g.*, Teresa Brostoff, Ann Sinsheimer & Megan Ford, *English for Lawyers: A Preparatory Course for International Lawyers*, 7 J. LEGAL WRITING INST. 137 (2001).

[27] Erie, *supra* note 7 at 77-78.

[28] Erie, *supra* note 7 at 79.

[29] *Id.*

crossing the line that separates the social relationship of student and teacher.[30] Erie suggests that this relationship is "politicized in the PRC.[31] As such, Chinese law students face difficulties when learning the expectations of those in positions of authority, e.g., Judges.

Crossing back and forth over the borders of U.S. legal education and Chinese-style legal education thus depends to a great degree on the mentoring provided by a core group of Teaching Assistants I will refer to as "culture brokers," a term that derives from anthropology in the mid-1900's.[32] These students—sometimes U.S. law students, native and non-native born, (and sometimes foreign LLMs and SJD candidates)—are chosen because they share an interest in Chinese law, language, and culture. A foreign legal Teaching Assistant (who may or may not be Chinese), however, is most valuable because she has had to interpret the language and culture of U.S-style legal education, whatever her first language may be. Having graduated with a law degree from a foreign law school followed by an LLM or JD in U.S. law, the Assistant has learned first-hand the value of U.S.-style critical reasoning and teaching, and the difficulty with which both are acquired.[33]

Culture brokering, as I use the term, assumes facilitating communication in English, at least in the "U.S.-law school environment." Just as a Legal Writing Instructor might look for a strong student from the first-year class to serve as Teaching Assistant during her second-year, I look for the student who has succeeded in navigating a new language and legal system.[34]

A non-U.S. Assistant may be best equipped to help students recognize and address the different cultural contexts our Chinese students encounter, both on-line and in real-time, but this method is best approached in what Ulla Conner refers to as "interlocutors."[35] The collaborative nature of the student/Teaching Assistant relationship assures the students that

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[30] Erie, *supra* note 7 at 79

[31] *Id*. (explaining that "Both JM and LLM students told me that most professors prefer questions to be asked one-one-one after class. In these conversations, ideas of respect (zunjing) or "saving face" (ai mainzi) were recurring. Students repeatedly analogized respect for the professor to respect for the judge, law firm partner or other authority figures. These hierarchical relationships determine the extent of "free speech" inside and outside of the classroom and the "thickness" of critical thought.)

[32] CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 89 (Basic Books 1973) (observing that culture is "an historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate, and develop their knowledge about and their attitudes toward life.").; *See* Michael Michie for a review of the literature by educators as cultural workers. The rule of culture brokers in intercultural science education: A research proposal, http://members.ozemail.com.au/mmichie/culture_brokers1.htm.

[33] *But see id*. "Cultural brokers are not the same as interpreters, although facility in both languages (if there are two languages involved) is almost an essential factor and they can act as language interpreters as well. The most important part in their role is that they can interpret culture for one or both groups." I hold that this is best done in English whether or not the broker speaks Chinese.

[34] Katerina P. Lewinbuk*, Can Successful Lawyers Think in Different Languages? : Incorporating Critical Strategies That Support Learning Skills for the Practice of Law in a Global Environment*, 7 RICH. J. GLOBAL & BUS. 1, 11-12 (2008) (arguing: "In order to learn and comprehend legal skills that are critical to the practice in a global multinational environment, and to improve the form in which oral and written communication is expressed, the students need to think in the same language that they are practicing law."). There is, of course, a rich tradition of using second year law students as Teaching Assistants in the LRW classroom, *see e.g.*, Ted Becker & Rachel Croskery-Roberts, *Avoiding Common Problems In Using Teaching Assistants: Hard Lessons Learned From Peer Teaching Theory And Experience*, 13 J. LEGAL WRITING INST. 269 (2007).

[35] Lemmer, *supra* note 15 at 31. Ulla Conner's view of culture can be modeled by Teaching Assistants who have studied the law in cultures other than the United States stand as intermediaries because of their own experience in discovering and maintaining good social relations with the Professor. Conner explains: "In addition to maintaining that culture needs to be included in any model of intercultural rhetoric, that small cultures such as disciplinary cultures need to be considered, and that individual variation is a given, intercultural rhetoric considers negotiation and accommodation among interlocutors. In order to understand each other fully, speakers and hearers need to adjust to each other's styles and negotiation meaning.

the Assistants have successfully absorbed the culture of the U.S. LLM Program and encourages them to believe that they can take part in this process as well.

3 E-Tivities as a Method of Front-Loading Critical Thinking and Persuasion

In the summer of 2014, I piloted a method based on Gilly Salmon's Five Stage model of E-learning adapted by me for use in e-learning and in real-time. Despite the misgivings of some critics who object to models like Salmon's as short on "flexibility and reflexivity," I believe that with appropriate adjustments, this model would suit both a combination of on-line and real-time learning, and an on-line course. [36]

The attraction of Salmon's model's lay not only in bringing content to my constituency that was not possible before, nor in the valuable interaction of my Teaching Assistants now functioning as "e-moderators.[37] Rather, the attraction lay in the way the model put these two features into play in different interactions.[38]

Students in the Beijing Program draw on the technical support available through the Blackboard system, but the greater hurdle is the somewhat paradoxical student fears that they will not be able to meet their teacher's expectations, and concern that there is no real benefit in taking part in an on-line course for which they receive no credit. Salmon's on-line model affords different avenues for helping students assimilate to U.S. legal culture and communication.

"Live Controversy"

Salmon's model affords different avenues for helping students assimilate U.S. legal culture and communication. I thought a "real world problem would work better in promoting that assimilation. Especially in light of the reaction to the *Brown* documentary, a problem posed squarely at the intersection of law and race seemed ideal for this purpose. Philadelphia has a long, troubled history of allegations that the police force is insensitive to the civil rights of its citizens. In 1970, actions were brought in the Philadelphia Federal Court, in which various citizens and groups alleged that then Mayor Frank Rizzo's Police Department had engaged in a "pervasive pattern of illegal and unconstitutional treatment [that] was said to be

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[36] *See e.g.*, Bernard Lisewski & Paul Joyce, *Examining the five-stage e-moderating model: designed and emergent practice in the learning technology profession*, 11 ALT-J 55, 59 (2003) (arguing for the dangers of creating a "grand narrative or totalizing explanation" and "commodified higher education environment." The authors conclude that: "as a neophyte profession we need to establish a more self-reflexive, questioning, contestable, and research-based method of practice. Perhaps, given our relative youth as a profession it is understandable that the five-stage model of online interaction has become a dominant paradigm for one area of practice. However, this may simply be one of many that we yet to 'receive' and contest.")

[37] GILLY SALMON, E-MODER@TING: THE KEY TO TEACHING AND LEARNING ON-LINE 4-5 (3rd ed. 2011) (describing the "e-moderator [electronic moderator] presides over an electronic online meeting or conference, though not in quite the same ways a moderator does….The essential role of the e-moderator is promoting human interacting and communication through the modelling, conveying and building of knowledge and skills. An e-moderator undertakes this feat through using the mediation of online environments designed for interaction and collaboration. To learn to undertake an e-moderating role, whether coming to it fresh or as a change to previous teaching, coaching, or facilitating practice, takes a mixture of new insights and some technical skills, but mostly understanding the management of online learning and group working….The tutor, teacher, trainer-whatever you wish to call him, her or them [I call them e-moderators when they work online] – operate in the boundary between the educational establishment [represented by the curriculum and the provided learning technologies] and the learning experience – they adopt a wide variety of roles.)

[38] *Id*. at 31 (describing "three types" [of interaction]: "interaction with 'content' (course materials or references), interaction between tutor and the student (Berge, 2007) and, third, the much wider interaction between groups of peers usually with the e-moderator as the mediator and supporter. It is the third kind that the model focuses on whilst seeking to integrate the other two.

directed against minority citizens in particular.[39] In 1973, after two trials, the District Court required the police "to submit to [the District] Court for its approval a comprehensive program for improving the handling of citizen complaints alleging police misconduct."[40] The Third Circuit "upholding the District Court's finding that the existing procedures for handling citizen complaints were 'inadequate,' affirmed the District Court's choice of equitable relief."[41] A divided Supreme Court reversed on grounds of federalism and "concerns respecting existence of a "live controversy."[42] The problems giving rise to underlying the litigation remained, however, and were debated in Philadelphia political campaigns for decades.[43]

In 2010, a citizen class action suit was brought in Philadelphia Federal Court against the City, the Police Commissioner, and various officers, challenging the Police Department's "stop and frisk" policy. The defendants alleged, *inter alia*, as follows:

> The defendants have implemented and enforced a police and practice of stops, frisks, searches and detentions of persons, including plaintiffs, without probable cause and reasonable suspicion as required by the Fourth Amendment.
> The stops, frisks, searches and detentions by the Philadelphia Police Department officers are often based on constitutionally impermissible considerations of race and/or national origin in violate of the Equal Protection clause of the Fourteenth Amendment. The victims of such racial and/or national profiling are principally Black and Latino men.[44]

The case was subsequently settled with the entry of a consent decree requiring *inter alia*, the appointment of a Police Monitor (Joanne Epps, the Dean of the Temple Law School) and the reformation of the "stop and frisk" policy.

Philadelphia's "stop and frisk" policy was based on Chief Justice Warren's opinion in *Terry v. Ohio*.[45] There, the Supreme Court held that, for their own safety, police could, on less than probably cause, pat down, ("stop and frisk") an individual whose behavior is "suspicious."[46] The decision has spawned a wealth of case law and scholarship focused on whether Terry created a Fourth Amendment loophole that would allow race-based stops.[47]

U.S. v. Thomas Smith

Drawing on this troubling history of race relations and law enforcement in Philadelphia thus seemed the ideal way to lead students into thick reasoning. Throughout the Semester of this pilot Summer Program, students worked on a seemingly simple search and seizure problem. The facts as found by the Court may be paraphrased as follows:

> Thomas Smith, who is African American, stands at 9:30 outside "Norm's" bar in a "high crime" Philadelphia neighborhood with three Caucasian men. As they pass in their marked patrol car, police – who had received numerous citizen complaints of gun and drug crime outside the bar – order the four

[39] *Rizzo v. Goode*, 423 U.S. 362, 366 (1976).
[40] *Goode v. Rizzo*, 506 F.2d 542 (3d Cir. Pa. 1974)
[41] *Id.*
[42] *Rizzo*, 423 U.S. 362 at 378.
[43] *See* generally, Robert Beauregard*, Tenacious Inequalities: Politics and Race in Philadelphia*, Urban Affairs Review, 25 no. 3 420, March (1990); Carolyn T. Adams, Race and Class in George E. Peterson, Ed., Philadelphia Mayoral Elections, 133-32 in Race and Class in Big-City Politics, Governance, and Fiscal Constraints, Institute Press, Washington, D.C.(1994).
[44] Complaint, *Bailey v. Phila.,* (Civ. No. 10-5952) (EDPA 2011).
[45] *Terry v. Ohio,* 392 U.S. 1 (1968).
[46] *Id*. at 24.
[47] *See Fla. v. J.L.,* 529 U.S. 266 (2000) (and cases therein cited); *see also* David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches without Cause*, 3 U. PA. J. CONST. L. 296 (2001); Tracey Maclin, *Terry v. Ohio Fourth Amendment Legacy: Black Men and Police Discretion*, 73 ST. JOHN'S L. REV. 1271 (1998).

> to disperse. The three Caucasians immediately run in different directions, one apparently holding something dark in his hand. The police do not pursue any of the three, but drive on, returning 10 minutes later to see Smith still standing outside the bar. As the police stop and get out of their patrol car, Smith begins to run, holding something in his waistband with both hands. With police in close pursuit, Smith continues to run for blocks, disregarding their repeated commands to halt. After hurtling a fence, Smith surrenders to the police, then throws a handgun to the ground, saying "Ok, you got me." Smith is federally charged with possession of a firearm by a convicted felon. 18 U.S.C. §922(g)(1), 924(e)

In adapting the facts of a case from the docket from Eastern District of Pennsylvania, I hoped to preserve the "real world" context of an inner-city setting. I crafted facts to enhance their ambiguity and make it inevitable that students would interpret events, not just recite them. The problem is rife with policy issues, e.g., racial profiling, the balance between individual liberties and governmental interest, and always shifting Fourth Amendment concerns. It is this balance that the students must strike as they take on their roles as prosecutors and defenders.

The students are provided with a series of 4th Amendment decisions – the "closed universe" of legal authority on which they will ultimately rely. *Terry v. Ohio* [392 (US 1 (1968)](4th Amendment allows police to conduct a stop and frisk based on articulable, reasonable suspicion; *Illinois v. Wardlow* [528 US 119 (2000)](defendant's headlong, unprovoked flight from police in high crime area gives rise to reasonable suspicion justifying a *Terry* patdown); .

Florida v. J.L. [529 US 266 (2000)] (anonymous tip to police that a young black man standing at a bus stop was carrying a gun insufficient to warrant a *Terry* patdown); *California v. Hodari D.* [499 US 621 (1991)](seizure occurs when a defendant is physically restrained by police or submits to their show of authority); *U.S. v. Navedo* [694 f. 3d 463 (3rd Cir. 2012)] (mere flight from police insufficient to give rise to *Terry* patdown). Using these cases, students inevitably must discuss the problem of racially biased policing and the notion that racial profiling does not give rise to "reasonable suspicion.'

The Salmon "scaffold" courses are structured in five-week modules or "Stages" of e-learning, with each week devoted to single stage. I altered her model to accommodate the specifications for e-learning and real-time learning, and then adapted it to my problem. Because my students might not be familiar with working on-line in discussion boards, the emphasis during Stage 1 is on making technology accessible to a wide range of students.[48] What I find most challenging in Stage 1 and Stage 2 is trying to convince students that I am not interested in a prepared script: the purpose at this point is nothing more than to establish an on-line identity, and to reach out through a post to at least one other participant.[49]

At Stage 3, some Professor feedback to selective "e-tivities"[50] occurs. In Stages 4 and 5, the potential for discussions both demanding and controversial develops, and e-moderators can facilitate the collaborative efforts of the students by "weaving" and "summarizing" ideas.[51] With proper support from the Professor, e-moderators are engaging in high level

[48] Salmon, *supra* note 37 at 35.

[49] Salmon, *supra* note 37 at 68. In a more sophisticated version of this model, students create on-line identities through avatars. Salmon explains: "Virtual worlds are social environments, not games; their participants each have at least one avatar (a virtual representation of themselves), able to move around in the 3D environment and interact with other avatars."

[50] Salmon, *supra* note 13 at 6 [Explaining (E-tivities) were first developed using text-based computer-mediated environments such as bulletin boards or forums. That's the easiest place to start….Learning resources and materials (what people once called 'content') are involved in the design and delivery of e-tivities, but these are to provide a stimulus or a start (the 'spark') to the interaction and participation rather than as the focus of the activity. So e-tivities give us the final break point from the time-consuming 'writing' of online courses."]

[51] Salmon, *supra* note 13 at 184-185.

("thick") reasoning with students in what Salmon calls a "constructivist" approach to learning.[52] The chief moderator – the Professor – assumes the responsibility to create the "sparks" that allow for more sophisticated and reflective learning.

The facts of *Smith*, with the overlay of U.S. cultural history, force the students into the "thick" areas of race relations and the judicial system. Each Stage is accompanied by ungraded discussion sessions and in-class discussions with culture brokers and me. Students thus have the opportunity to make headway into the social, political, and legal issues that they will confront reading the law. As I said initially, the outline described here will be adapted to a distance model followed by a real-time component, but in the limited set of examples that follow, it can be argued that thick reasoning skills develop – suggesting the methods described are worth the effort. With the vast scope of cultural influences to inform the practice of teaching foreign lawyers, we can begin to envision practices where every stage of the writing process offers opportunities for intercultural communication.

Salmon's Stage 1: Induction Phase – Access and Motivation

The moderator, e-moderators, and technical support staff facilitate early virtual communications. Every effort is made to ensure students have access to Blackboard discussion posts and technology for synchronous and asynchronous communication, as well as all other interactive features available. [53]

During this Stage, discussion messages always clarify the purpose of the activity, or as Salmon renames it, "e-tivity."[54] For instance, I posted this message to the students: "In one or two sentences, describe whether you have any expectations for this legal writing course. For example, what knowledge are you hoping to gain, and what skills are you hoping to develop?" Among the responses I received are the following:

> As an in-house counsel, I expect to get some knowledge about how to do legal research more efficiently and obtain some skills that could help me continuously improve my language capability toward highly professional, precise and persuasive legal analysis and writing.
>
> In the legal research course of many months ago, I always got the comment "less is more" from the professor. So I hope to be concise and to the point in my writing.
>
> I am a public prosecutor and my job requires me to write a lot of legal documents. I want to learn more analyzing skills and writing skills to improve my work in the future.
>
> From my personal angle alone, it is never suspicious that legal writing is greatly significant. Therefore, I would like to learn all of the knowledges about legal writing course.
>
> I want to write materials clearly and sentences with words that don't have to be deleted. But it seems really a long way to go. I hope to shorten my searching time and get relevant information quickly and precisely.
>
> I hope to reinforce my writing skills as a professional legal practitioner. I hope to improve and perfect my English writing skills.
>
> I hope to grasp the essential skills of legal writing in order that I might communicate better with counterpart lawyers by drafting legal memos, opinion and other legal documents more logically and professionally.

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[52] Salmon, *supra* note 38 at 53-54. Salmon's view of social constructivism enable allows participants "to reflect on and discuss how they are networking and to evaluate the technology and its impact on their learning processes. These higher-level skills require the ability to reflect upon, articulate and evaluate one's own thinking. Participants' thoughts are articulated and put on view online in a way that is rarely demonstrated through other media. In that sense, the role of reflection contributes in a unique and powerful way to each individual's learning journey (Hunt 2001).

[53] Every class in Beijing has 2 elected class monitors whose job is to oversee the welfare and academic participation of their fellow classmates. It can be an effective way for a professor to "get the word out" in ways that might not be possible otherwise. So there is no small irony that I have had to resist drawing the Beijing class monitors into the effort of bringing their fellow classmates into the mix when trying to assure group participation. It is surely a mark of ethnocentrism that I refused to have students police students, and it is surely a problem worth studying for its cultural contextual importance.

[54] Salmon, s*upra* note 13 at 5.

> I want to be a better storyteller in professional work. I am quite interested to learn how powerful writing and persuasion can be forged.

This short sampling demonstrates the diversity of responses: from the common but unrealistic wish to "perfect" one's writing, to the far more Western goal of becoming a better "storyteller." I chose to respond to the post regarding the Professor in Beijing who had remarked that the student should remember "less is more." It suggested that students were being given excellent advice, but insufficient practice actually to begin the process of editing. I had students discuss the idea of "less as more" as a goal in writing. After some discussion, they concluded that the class they had just attended focused on finding cases and case briefing. Although the students could "tell" me what skills they had learned, it was not yet clear that they were proficient in "showing". Why should less be more?

The discussion served as good preparation for teaching the skills of summarizing and paraphrasing. The earlier posts had been mandatory, but Teaching Assistants now posted a message to which students could respond or not: "X student responded to professor's message by saying she wanted to "perfect" her English. Do you think this is a realistic goal? What help do you think you could use in improving you own writing"?

These discussion boards addressed concerns students could not easily raise in a conventional classroom setting with a Professor. Some students suggested that they would like to have help correcting grammar and punctuation. In response, the Teaching Assistants stressed that editing and organization were greatly valued in this community, and that getting started writing was often far more difficult than learning grammar and punctuation. But the most common requests were for "models" of writing. E-moderators are usually more successful than moderators in explaining the questionable value of models.

Stage 2: Online Socialization

At this Stage, participants benefit from e-moderators who are particularly suited to helping students work toward the always difficult transition from "telling" to "showing." "E-moderators" use posts to encourage students get to know one another as members of a group that will learn and grow together. In addition, letting an e-moderator post questions helped enormously is dispelling fears that students felt when addressing their teacher directly.[55]

At this stage, e-moderators facilitate socialization in seemingly simple ways. For example, the E-moderator offers the simple instruction: "What are the most popular given names in your culture?" "What is the origin of you name?" "Does it have any special cultural significance?" This question can be broadened a bit, for example, by asking. "Do you have an 'American name'?" "Was it chosen for you or did you choose it yourself?"[56] "Does it have any special significance – cultural or otherwise?"[57] As Salmon argues, however, these kinds of activities depend for their effectiveness on the e-moderators explicit directions and the degree to which she clarifies what does not need to be disclosed.[58]

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[55] Salmon, s*upra* note 37 at 213 (Salmon explaining "Asking direct questions can sometimes be problematic. For instance, in traditional Chinese culture, asking questions (particularly of teachers and parents) is not generally encouraged. So being urged by the e-moderator to ask questions online may not translate naturally into action, and may need active and continuous – albeit sensitive – prompting and support. As a corollary, in some cultures, there can be an expectation that the teacher will "tell" and the students will learn what the teacher says. A preoccupation with assessment and 'getting through the work' can follow. All of these may translate into an expectation of authority by the e-moderator on the part of the participants. It's impossible in a short time to change this. However, creating an atmosphere of equality and the e-moderator setting up structured activities will help.")

[56] This is a common practice for English Language learners in China.

[57]Questions based on those suggested for Stage 2 by Gilly Salmon

[58] Salmon, *supra* note 37 at 213-214, "Salmon explains "Personal disclosure online as part of socialization into the group, which some of us may take for granted if we are used to the Anglo-American style, is again not

In Stage 3, students are introduced to the concept of "stop and frisk," with seminal Supreme Court case *Terry v. Ohio.* In their first graded exercise, they are assigned the role of either defense lawyer or prosecutor, and must persuasively summarize and paraphrase the facts found by the suppression court in *U.S. v. Smith*. Anticipating that students have not yet practiced university or academic paraphrase and summary, Teaching Assistants offer on-line teasers to help orient students to the task. At this Stage, the students are largely unconcerned with the key question of whether the police based their actions on Smith's race. They are far more concerned with general issues of criminal procedure, and the fundamental differences between the Judge's role in the U.S. and in China. Accordingly, a Teaching Assistant's discussion board offered the following post:

> According to *Terry*, how would you determine the standard for a reasonable suspicion or probable cause to stop or/frisk a person walking on street? How much circumstantial evidence is needed for the police to find reasonable suspicion more objectively? Can the police officer make the conclusion depending more upon his own subjective perception? How would a judge be able to determine a subjective perception of the police?

Notably, there was only one response to this post:

> I think there should be some specific guidelines to help the police to decide in each specific situation. This kind of guideline may be made by experts, experienced policeman, also should be comprised with the spirit of criminal procedure law and the constitution. If every policeman performed with the police power according to the guideline rather than his own feeling, it can guarantee the objectiveness in some extent. In general, Judge should pay respect to the police guidelines in each case. But if judge don't agree with the specific rules of the guideline, he can put the rule aside in a specific case.

No one responded to this post, I suspect, because of the ambiguity of the student's message. Yet, the message that the e-moderator posted needed a good bit of unravelling by the students as well. Until very recently, Chinese Judges wrote very little, that might compare to the judicial opinions and orders so common in U.S. legal culture. After reading *Terry*, and certainly after reading *Wardlow* (the next assigned case), students are aware that police, lawyers, and Judges must follow (not make) the law. Additionally, the student who wrote the sole post seems to be wrestling with his own cross-cultural misconceptions about the limits of the police in determining reasonable suspicion. In China, a Judge's role is to gather facts and reach the correct decision. This, in addition to their sketchy grasp of U.S. criminal procedure, leads many students to misunderstand the role of persuasive language in a crafting a statement of facts.[59] One option would have been explicitly to correct those misconceptions. Thick reasoning is much more likely to be acquired, however, by interrogating the cross-cultural implications of procedure in China and the U.S. Accordingly, the e-moderator posed these questions:

> How would a police officer handle a "Terry-like" situation? Can you identify the U.S. Terry standard and compare the two jurisdictions. Are police in China encouraged to use objective or subjective methods of deciding when to question someone?

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necessarily the norm for all cultures. And some will be more generally reticent about articulating the thoughts online. Really good e-tivities exploring cultural differences at Stage 2 will help lay the ground for the valuing of all contributions. Make it clear that people do not need to disclose personal information, and avoid posting your own information based on marital status or career achievements, since they may otherwise 'set the tone.'"

[59] Students will not study criminal procedure, and so, would rather discuss the law than wrestle with the language. We limit the discussion of the law to the cases assigned, and the outline of a motion to suppress evidence as a necessity, not in any desire to stifle their desire to learn. Discussion boards, Lexis CALI lessons, and other materials are available to answer legal questions outside the purview of the problem.

The e-moderator then focused on *Terry* and criminal procedure issues to help students think of ways they could set out the facts that would highlight or minimize the reasons for police suspicion. She was able to weave isolated points with the Terry standard and so lead the students to begin to create a checklist of significant facts. Additional facts were added over the course of several posts, giving students both considerable information to work with and an atmosphere of collaboration and shared knowledge. Students were thus encouraged to harness and refine their language without fear that perfect answers were required.

This experience underscored the differences between the Chinese and American English rhetorical styles. Chinese students understand the role played by persuasive technique in the adversarial system – at least in theory. When faced with a question of rewriting facts to favor one side or the other, however, the demands placed on their language often lead them down the wrong path: what students hope to find is legal answer that will obviate the need to manipulate language. This is where they feel least comfortable and the first place the U.S. legal writer should be going when framing facts persuasively.

The assignment also demonstrated that students have difficulty omitting facts. They resist summary and paraphrase, using as much original language as possible. During their formal study of English, they were not taught the skill of varying language to suit different audiences. They are frustrated by our failure to provide them with models and our insistence that they make (and learn from) their mistakes.[60]

An atmosphere of trust is essential to overcoming these impediments. Examples of poorly expressed facts are placed on Blackboard (for all to review and discuss) and on Powerpoint to aid class discussions. A special effort is made to address the two categories of distortion most commonly found in the students' factual recitations – exaggeration or outright fiction. A typical example of defense counsel exaggeration:

> Some ten minutes later, while Thomas Smith was still standing outside Norm's Bar and enjoying the music spread from the outside, the marked police vehicle suddenly roared back and the two fierce policemen got out of the vehicle, running to Thomas Smith with curses in their mouths.

I witnessed reactions to this exercise in a real-time class. Interestingly, the student laughter that grew as they read the Powerpoint slide was far more confident than the laughter described at the beginning of this essay. This was shared laughter that suggested to me that the students were beginning to learn from their own hyperbole. If this exercise were to take place online, it would have been preceded with a discussion of using emoticons and "Netspeak."[61] This contrasts nicely with the student reaction to "The Road to *Brown*." With proper guidance, students were beginning collaborate to recognize and correct their mistakes. In this way, the subtler tools of persuasion began to be employed.

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[60] *See* Spanbauer, *supra* note 423 (arguing that for students educated in the ideology of collectivism, "It is not enough to simply provide models of examples of written analysis and to instruct students to use deductive or critical analytic paradigms in creating documents and arguments. It is also critical to explain why we use these models and though help students understand the models and instructions we provide by reference to their own system of legal writing and analysis so they can reflect up and consider how the two systems differ.")

[61] Salmon, *supra* note 38 at 64 (Explaining "I've used the term 'Netspeak' in this book for the kind of action-based communications I've tried to harness….Talking online, sometimes called 'Netspeak,' lacks the facial expressions, gestures and conventional that can be important in communicating face-to-face and in conveying personal opinions and attitudes. In most online platforms participants and e-moderators alike must always be alert to the potential for ambiguity. This phenomenon led to the development of 'smileys' or 'emoticons' as a substitute… [for example Netspeak uses <> to indicate an action, such as a giggle or a look. Get everyone to show an action in their own networds. Abbreviations for actions are fine if everyone understands them: for example, <g> for grin. It would be a good idea to explain new networds at least for the first two or three times you use them. If this exercise were to take place online, it would have been preceded with a discussion of using emoticons and "Netspeak.")

During Stage 3, Teaching Assistants concentrate on those who might need more guidance or support. Students are required to write a short bench memo applying the five assigned cases. Simple sequenced assignments ask students to summarize cases and weave together a growing analysis. Salmon points to two techniques that support the five-stage model:

> Weaving captur[es] key aspects of an earlier task that have not been discussed in sufficient depth and encourages additional exchanges…. Summarizing acknowledges participants' input and brings to discussion to an end, highlighting its key contributions. It may be produced by participants.[62]

Students will be unsure of what makes writing clear and persuasive. Although it might seem preferable to suggest the "IRAC" rubric earlier in the Semester, efforts to use facts to scaffold persuasive writing helps students cross boundaries between the legal argument style they have been taught in China and what they are learning in the U.S. [63] My goal here is to work students through the tiers of assembling an argument (without resorting to models) that the instructor can then edit.[64] At the same time, the Teaching Assistants and I continue to create discussion posts and exercises that allow the students to interact and understand the links between theory and practice.

Although most of my students will be competent speakers, only some students will be proficient at structuring an essay.[65] From an earlier but still very useful article discussing, among other things, Chinese writers' developmental style, I infer that my students frequently desire models of organization to practice -- or even copy --and strive for formal perfection in language because their competence in writing, organized units of thought is so delayed.[66] U.S. composition teachers must be mindful that many Chinese students have been taught to value correct sentences level writing over organized, revised writing.[67] Given that the students have a fundamental respect for judicial hierarchy, and are hard pressed to argue that published opinion should be distinguished, it is no surprise that the essays generated through

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[62] Salmon, *supra* note 38 at 64.

[63] Contrastive rhetoric scholars have long debated how language culture translates into discourse. Among the most controversial is Robert Kaplan's 1966 article "Cultural thought patterns in inter-cultural education. In T. Silva & P. K. Matsuda [Eds], Landmark essays in ESL writing. (11-25). Mahweh, New Jersey: Lawrence Erlbaum Associates, Inc. (2002). Here Kaplan categorized style by culture and geography, arguing that "Oriental" languages "would strike the English reader as awkward and unnecessarily indirect." (3). Criticism was plentiful and often harsh. Still, Kaplan's conclusions ushered in contrastive rhetoric as one way to approach how cultures learn argument and persuasion. More recently, scholars have asserted that Chinese pedagogy does value "conciseness" but those who embrace Intercultural rhetoric, e.g., Ulla Connor, see other facts less important in explaining Chinese writing style as "cultural orientations toward self, other, society, and social interactions." See Ulla Connor, Contrastive Rhetoric: Cross-Cultural aspects of second language writing. Cambridge: Cambridge University Press, 1996.

[64] See Spanbauer *supra* note 5, 420-421 citing to Benson & Heidish, *note* 72 at 317-318 (noting "[R]esearchers assert that 'teaching writing as a manageable and changeable process can be a powerful idea for many ESL students; the problem however, for writing teachers in getting ESL composition students to adopt a broader view of writing is in finding was to loosen their grip on the focus on the written product and its form, that which is so often viewed as the immediate measure of success in many writing classes.'" *See* also

[65] Bernard A. Mohan & Winnie Au-Yeung-Lo, *Academic Writing and Chinese Students: Transfer and Developmental Facts*, 19 TESOL QUARTERLY 515, 522 (1985) ("While English-speaking students may be competent speakers of the language, they are not necessarily competence at the discourse level is widespread.")

[66] *See Id.*

[67] *See* Bernard A. Mohan & Winnie Au-Yeung-Lo, *Academic Writing and Chinese Students: Transfer and Developmental Facts*, 19 Tesol Quarterly 515, 528 (1985) ("Thus, the difficulties of Chinese students writing in English may be better understood in terms of developmental factors: Ability in rhetorical organization develops late, even among writers who are native speakers, and because this ability is derived especially from formal education, previous educational experience may facilitate or retard the development of academic writing ability. In other words, be should be aware of the late development of composition ability across the board and pay particular attention to students' previous educational experience.")

Stage 3 are likely to contain elements of more traditional Chinese as well as Western learning techniques. In any case, ambiguities must be embraced and negotiated throughout.

Stage 4: Knowledge Construction

By Stage 4, students should no longer ignore policy issues as they search to find legal answers to questions. Yet they are reluctant to address race. For instance, a student in the role of a prosecutor argued:

> The Prosecutor is content to note that the case is controlled by Wardlow. Flight from police in a high-crime area at nighttime is enough for reasonable suspicion. Mr. Smith and Mr. Wardlow do the same thing. Both run from police for unprovoked reason.

Students in the role of defense counsel seek refuge in *J.L.* and *Navedo:*

> Fla. V. J.L. also can be applied in the present case. The core facts of J.L. case is an anonymous tip. Smith was seized because police received an anonymous tip.
> There are some reasons for applying United States v. Navedo in the present. Like in Navedo, Smith ran from the police. This is not suspicious.

This failure to address race suggests strongly that the students' thin reasoning is still at work. The Professor's goal here is to encourage students' thick reasoning so that they will understand on their own (not by copying models) that race is at the heart of this 4th Amendment problem.

These exchanges help students to explain, among other things:

1) Unlike in Smith, in *Wardlow* only one suspect fled.
2) How *Florida v. J.L.* addresses the questions of race,
3) Why the Court in *Navedo* stated that its decision would be the same regardless of whether or not the actions that gave rise to *Navedo*'s arrest took place in a "high-crime neighborhood."

During Stage 4, students must begin to manage their own construction of persuasive language.[68] The principles of critical analysis are engaged through active thinking and online interaction and include "critical analytical thinking including judging, evaluating, comparing and contrasting and assessing.[69] As Salmon envisions it, the Professor as e-moderator create "sparks" to promote independent thought.[70] The culturally provocative sparks "can introduce the idea that there may be multiple perspectives and solutions.[71]

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[68] Salmon, *supra* note 13 at 30.
[69] *Id.*
[70] Salmon, *supra* note 37 at 44. It is at this point that I recognized the wisdom of Salmons words: You may feel tempted to skip to Stage 4 from the start of your online programme! However, the previous stages are an important scaffold for success.
[71] *Id.; see* Salmon *supra* note 7 at 77-78. A telling example of improved skills occurred when the students viewed a video of Xi Jinping's 2014 New Year's Speech. I was confident that they would find his speech dull and unpersuasive and his manner wooden. I fully expected them to see their President as a speaker not to be emulated. I could not have been more wrong. Indeed, as students laughed during parts of the speech, I had not the slightest idea why. (Any more than I did not fully understand when they laughed at portions of "The Road to Brown.") They told me that it was a very Chinese speech and a very modern one. They were laughing because it was indicative of the kind of inclusiveness the President was seeking, which they found sophisticated, but, at the same time, a bit heavy-handed. He wanted to convey how much he disapproved of the rest of the world's war-mongering, but did so subtly. When I poked fun at the stiffness of this delivery, one student jumped up and gave a brilliant impromptu rendition of Chairman Mao's animated style, suggesting that if I preferred that kind of presidential rhetoric, then I could have it! After a brief rendition of a bit of President Ronald's Reagan

The students' final Smith assignment is the preparation of a persuasive memo or brief for the prosecution or the defense. Before their persuasive memoranda have been finalized, the students must present oral arguments to a panel of Federal Judges. Preparing for oral argument provides an opportunity for the students to prepare their language and hone their thick reasoning skills. Students can benefit by expressing their concerns about the final product, but their ideas need not be seen as complete and correct. Although they know that the issue of race will arise, they seem to be unprepared to respond to the question that puts the issue most starkly:

> How can it be reasonable to pursue the African American suspect but not the Caucasian suspect?

Students now readily discuss the race issue in class, in small groups, and on Blackboard's discussion board. By this Stage, they plainly understand that racial profiling could not comprise reasonable suspicion to stop and frisk Smith. And still, quite predictably, the discussions continue to reveal reluctance to discuss race in what was supposed to be a purely "legal" argument:

> Police stop only Smith, who is black. But if his behavior is suspicious how does race matter?

Or a question directed to the inflexibility of "legal law":

> American judges must follow legal law only. Why should judge care if Smith is not white?

To address their insecurities, a Teaching Assistant's discussion board offered the following post entitled "Feeling Confident"

> Take turns sharing a strategy you have used to feel more confident in public speaking, and also point to a strategy one of your fellow students has described and why it might be useful.

Many students responded to this post by capturing the very ambiguity of "thick reasoning":

> My classmate says that she must believe her story but the story I want to tell cannot be proved 100%. Imagine, when you believe you are telling a truth to someone. What will be in your mind? I am not lying. I must prove that. Let them know the real story. They should believe me. Then you will have no time to be nervous.

The cultural implications of this post include the question: how certain does one have to be before making an argument?

Stage 5: Finding the Audience

Presenting oral argument proved to be enormously helpful in moving students from thin to thick reasoning by requiring them to address issues of argument and audience expectations. This final section includes samples from draft briefs that students finalized after oral argument.[72] These materials, as well as discussion board postings, demonstrate the value of acquiring cultural dimension gradually, in a fully immersed English setting with Professor as moderator and Teaching Assistants as co-moderators.

"There you go again!" speech, we were able to come to terms with the relative successfulness of different styles of the rhetoric of politicians. Another student suggested rather gently that if I were more aware of Chinese rhetorical style, I would understand how much had been conveyed from the way the President used his fingers and tapped the table. A new understanding was being built.

[72] Using oral argument as a stage of the brief writing process will be discussed in a separate article.

As I reviewed the students' final drafts, it was apparent that the race issue gave rise to abundant examples of thick reasoning. Once again, absent racial profiling, the police plainly had a reasonable basis to stop and frisk Smith. The question of whether race played a role in their decision to stop only Smith (and not his Caucasian counterparts) touches on law, policy, and equity, but only now was it addressed.

As I have shown, employing "thin" reasoning, students initially were reluctant to tread into deeper, more charged waters. By the time they wrote their final drafts, however, this had changed. As might be expected, those students in the role of defense counsel made greater use of the race issue:

One student offered the following "Question Presented":

> Is the flight from polices of an African American defendant, with failure to pursue three Caucasians by polices [a] sufficient [basis to suppress].

In reciting the facts, one student pointedly noted that although the police pursued Smith because he held something in his waistband:

> 10 minutes before [the officer] also saw my client's white friend holding something dark in his hand [while he] ran [but] does not do anything.

In arguing that the gun should be suppressed, a student stated that he:

> cannot explain why [the officer] chased my client and not Caucasian holding something dark in his hand.

Another student asked:

> If reasonable suspicion is based from the experiences of the officers, why was the behavior of my client suspicious, not the Caucasians?

Another student put it more succinctly:

> The Terry investigation stop of a defendant by the police is not supported by reasonable suspicion if it is because of race.

Although the students assuming the prosecutor's role had greater difficulty with the race issue, they understood that they could not ignore it. One student stated the Question Presented as follows:

> Whether the police pursuit of the defendant was based on race?

The same student sought to answer this question in his factual statement:

> The Caucasian ran when the police told him to do so. The defendant run only when he thought the police might be searching him.

Another student argued as follows:

> By waiting to run until the police walked toward him, the Defendant acted more suspiciously than the three Caucasian friends.

Finally, a prosecutor offered the following policy argument:

> This case is about the general interests of crime prevention. The court needs to balance the interest against intrusion of undivided rights and the safety of the community.

Although not free of error, these analyses are both adversarial and reflective of thick reasoning–both essential to persuasion.

Over the course of the Semester the students have thus become more comfortable in the realm of uncertainty and "thick reasoning." Students are taught paraphrase and synthesis through multiple opportunities to put legal language into their own words. Although this method may not produce U.S. legal writers, it will likely produce Chinese lawyers with a commitment to improving their communication in English. Perhaps it will produce many Chinese lawyers with a modestly raised consciousness about adversarial argument, written and spoken.

From their readings and discussions in class with "culture brokers" and with me; from conferences; from exchanges with Judges; and from their own discussion groups on-line, the students have drafted arguments that reflect thoughtful and original analysis through their exercises in critical thinking.

Part IV: Towards a Better Failure – The "Inverted" Classroom

If there was single moment that I saw as the point of embarkation for my next failure, I would pick the post to which I referred earlier:

> My classmate says that she must believe her story but the story I want to tell cannot be proved 100%. Imagine, when you believe you are telling a truth to someone. What will be in your mind? I am not lying. I must prove that. Let them know the real story. They should believe me. Then you will have no time to be nervous.

To recognize the level of ambiguity that comes with a system that can come to different conclusions with identical facts suggests a powerful moment of "thick" reasoning. It further suggests that the scaffolded approach serves a real pedagogical purpose. It would not have been possible for the student to appreciate the purpose of adversarial writing without the earlier Stages.[73] While I think that Salmon's model can certainly be incorporated into a part-technology driven and part real-time curriculum, it might easily be incorporated into other methods with greater success.

The examples and ideas expressed here simply serve to shine light on the need for greater cultural context for Chinese students before they come to study in real-time in the United States. If our goal is to help students toward a necessarily gradual immersion in "thick" reasoning U.S.-style, then, I hold that it is the responsibility of Professors in China to take part in a collaboration of on-line and real-time "thick" reasoning exercises. The best vehicle for this, I believe, may be found in the model of an "inverted classroom" mentioned earlier.[74] An inverted classroom could offer just that opportunity for "negotiation" and "accommodation" in language and the law.[75]

In making my proposal, I assume a course of study in China followed by a shorter period of study in the U.S. Typically, legal research is taught early in the Semester by a U.S. instructor in China. The course consists of Lexis research and classroom lectures. Students are given a research plan for most legal problems. The instructor identifies the problem, moves to search terms, searching legal encyclopedias, ALR, and law reviews, then on to statutes, cases, and shepardizing. By the time the students come to the U.S., they need a refresher because they have done very little research in the intervening months.

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[73] Salmon *supra* note 38 at 44 (explaining that: "Most studies show that you can get students to exchange information [Downing et. Al., 2007] but a learning and interaction scaffold and skilled e-moderation intervention are essential for high-level constructivist collaboration.")

[74] Erie, *supra* note 7 at 35.

[75] Erie, *supra* note 7 at 31.

I propose introduction of cultural critical thinking at a very early stage. Students would thus have more time to develop the skills of "thick" reasoning," something that I hope have demonstrated is very difficult to do over a summer course. Some argue that the students have not used English long enough to acquire "thick" reasoning skills. But by coordinating the materials throughout the students' course of study in China and the U.S.— with a recurring focus on the question of race relations and U.S. law-- students may gain a nuanced and sophisticated background. Because instruction will be "inverted" using pre-delivered materials from the U.S. based summer instructor, the real-time Professor in China could conduct his class as a laboratory for research in the context of critical thinking.

Support for this method is well established, particularly by librarians who teach legal research and see the importance of legal information literacy.[76] Chinese law students presently have the far less demanding task researching the country's civil code. The sheer vastness of the U.S. legal system is bound to make their legal research exercises perplexing, at the very least.[77] My strategy, then, might be quite easily employed by the Professor introducing the research agenda in the context of the Fourth Amendment, Supreme Court case law, and secondary materials that allow for a gradual immersion in the social realities of stop and frisk.

With the "inverted" method, the Summer instructor might send students documentary films, such as *Pull of Gravity,* described as an "intimate portrait of three men in different stages of reentry from prison to society, offering compelling insights that can help shape responses from family members, parole officers, law enforcement officials, and the social networks upon which reentry is dependent."[78] The students might also view that website, and find reviews from sources heralding the importance of such a documentary, and a video from Philadelphia Mayor Michael Nutter including a description of the film: "This is real. This is Philly. It's real life. They didn't pull any punches. But they're telling a real story."[79] In addition, Hollywood fare like, "Anatomy of a Murder" might be included on a voluntary "movie night," (that already exists in Temple's Beijing Program). Again, these additions would be offered on a voluntary basis for now, but might serve as "sparks" for students' later study in the U.S.

There are limitations to how well a "flipped" legal writing classroom can work. Nevertheless, the Professor facilitating lab work in real time and the Professor offering "thick reasoning" materials can work together to help students learn in a more active environment. For instance, Evidence and Criminal Procedure Professors could almost certainly use some of their course time to guide general discussions that would support students' growing critical reasoning skills. Again, the critical thinking materials would be pre-delivered. These might include research hypotheticals that focus on areas that students are then studying.

Once so much groundwork has been laid, by the time students arrive in the United States, they will be far better equipped to take full advantage of their study here. With the inverted class, students' socialization in "the American tradition with its bristling adversarialism" will be far more attainable.[80] In the smaller culture of the U.S. classroom,

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[76] Lemmer, *Supra.* note 15.

[77] *Id*. at 463 (explaining "[T]he goal for those of us who teach legal research to international graduate law students is to develop their legal information, preventing this debilitating frustration and preparing them to successfully complete legal research using a broad array of U.S. legal and nonlegal materials."

[78] Amy Rosenberg*, Pull of Gravity* www.pullofgravity.com. "(U.S. Attorney) Memeger said the relationship with Sawyer and Kaufman grew out of the U.S. Attorney Eric Holder's mandate in 2010 to address violent cri me in cities through prevention and a focus on reentry as well as prosecution. 'You can't arrest your way out of the problem,' Memenger said…." Most offenders will get back into the community."

[79] *Id.*

[80] Erie, *Supra* note 7 at 78 and note 64. (noting "It is received knowledge that this is a learned behavior derived from the socialization process of law school. When I was pursuing my LLM at TULS, a woman from

students will have time to engage with Professors and decide what they truly need to know to be proficient in thinking critically and making a persuasive argument.

4 Conclusion

To help Chinese students begin to understand the foundations and purposes of U.S. models of legal communication, a classroom manner that is frank and pragmatic is a start. We must, however, make available to Chinese foreign nationals all the resources available to their U.S. counterparts. We must help them pass through the boundaries of culture with appropriate guides. Further, through new ways of delivering information – like those offered by Gilly Salmon and Ulla Conner in an inverted or "flipped" classroom – we may help our students realize their goals as writers and communicators in a space that is "post – ideological." In this way, "Failing better" might benefit the global legal community.
References (You may use footnote , but references should also be provided.)

Switzerland comments that the American students were exceptional to the extent that they challenged the professor. After studying in a U.S. law school for three years and comparing my interactions there with those at TULS, it seems the American classroom grooms its students to be assertive, outspoken, and argumentative. The cauldron of the U.S. law school classroom, through the Socratic Method, mock trials, mooting and like exercise, places a premium on oral confidence in making legal arguments. This suggests that Americans are the outlier in this regard. It is not that the Chinese lack this mode of engagement with the material and those who teach it, but in fact, most countries value less antagonistic approaches.")