

## A Better Way to Fail: Teaching Critical Thinking to Chinese Lawyers<sup>1</sup>

**Robin Nilon**

Assistant Professor of Law  
Temple University, Beasley School of Law  
1719 North Broad Street | Philadelphia, PA 19122  
Phone: 215.204.4975  
robin.nilon@temple.edu | www.law.temple.edu

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

### Introduction

In an issue of *The New Inquiry*, novelist Ned Beaman 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 Beaman, I reduce this phrase to an aphorism along the lines of “Keep Calm and Carry On” but I do so to alert the reader to the dangers implicit in trying to “brand” any conventional legal communication pedagogy for U.S. law schools’ ever growing population of civil law trained foreign lawyers.<sup>2</sup> Those of us teaching legal writing to foreign lawyers could better serve our LL.M. students by exposing them to “U.S. legal sociolinguistic and cultural norms...”<sup>3</sup> an undertaking that requires

---

<sup>1</sup> Although “failing better,” as I will describe it, cannot ensure predictable assessment outcomes, it may prove an effective method for helping students develop their critical thinking skills. While it is no teacher’s desire to see herself or her students fail, Beckett’s phrase captures something of the recursiveness of U.S. Legal Writing, not unlike the French “reculer pour mieux saute.”

<sup>2</sup> Beaman, Ned, “*Fail Worse*,” [www.thenewinquiry.com](http://www.thenewinquiry.com)

<sup>3</sup> Catherine A. Lemmer, *A View from the Flip Side: Using the “Inverted Classroom” to Enhance the Legal Information Literacy of the International LL.M. Student*, Law Library Journal Vol. 105-4, 468 [2012-2025]. Lemmer argues We need to provide our students (even those who are practicing attorneys in their home countries) with training and exposure to the ‘U.S. legal sociolinguistic and cultural norms’ as a way to assist them in adjusting to these norms. This training comes from reading legal texts, writing documents, and researching the law.

continual experimentation. This essay is my first installment in an attempt to “fail better,” to better expose students to U.S. legal culture and better draw on their own critical thinking skills legal analysis.

I trace my decision to “fail better” to an experience with my 50 students from Temple’s LL.M. Rule of Law Program in Beijing.<sup>4</sup> The students study U.S. law in English in our campus in China for 10 months before travelling to our 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. The professors 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 it is no surprise that U.S. legal culture is largely gleaned through classroom English and less formal conversation with U.S.- trained lawyers in English.<sup>5</sup> The bulk of their exposure to U.S.-style legal communication, then, takes place during the Summer Session in Philadelphia, close to the end of their Program. My focus is the legal communication that takes place in their course in Legal Writing and Communication.<sup>6</sup>

---

The training should also incorporate learning opportunities that reflect the real-life practice of the law. This substantive and professional exposure to U.S. legal English and legal culture is what students seek in U.S. LL.M. programs. Ironically, this is the very experience many international LL.M. programs fail to deliver.”

<sup>4</sup> 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.”

<sup>5</sup> This is true even with the increasing number of students in the Program already working in firms or corporations where English is required. Doctrinal professors understand the value of incorporating more skills in the classroom, but time limitations make this difficult to manage.

<sup>6</sup> 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**

At one of the first summer session meetings, the students were shown a documentary – “The Road to *Brown*”- preparation for a criminal problem that pitted facts suggesting race discrimination against facts that stressed police and public safety concerns. 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. I admit now that I overreacted and concluded that students were laughing to cover their embarrassment<sup>7</sup>

I assumed the students were adopting a culturally specific defense mechanism based on behavior that I believed would be considered inappropriate in U.S. law schools. Rather than simply asking students to reflect on their reactions, and discussing those reactions, I continued force feeding information: “stuffing the duck.”<sup>8</sup> I began then to think more carefully about my own failure in thinking I could compress such dense cultural information into one class session. Acquiring cultural information through coercion is a common stereotype about Chinese teaching methods; and here it was a method I was following. Clearly, the intertwined threads of history, culture, and racial politics could never be grasped in one “teaching moment,” but the *Brown* documentary could not

---

**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.”)

<sup>7</sup> Culturally-specific notions of laughter were taken into consideration, but I reacted before I had a time to think through my 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*, Academic Press, 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.”

<sup>8</sup> 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, “Beginning 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.”

realistically have been understood in context unless that context was fore-grounded. I began to construct possible methods using students' considerable critical thinking skills in understanding the intersection of race and criminal justice in U.S. legal culture.

As others have observed, even native speakers of English must acquire a new language when learning U.S. law.<sup>9</sup> 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.<sup>10</sup> Further, it is commonly assumed that 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, the aforementioned "stuffing the duck."<sup>11</sup> After that class, I vowed to rethink what little I knew about traditional Chinese pedagogy, especially the commonly held belief that Chinese students do not bother to think critically because ultimately the teacher will give them the answer.<sup>12</sup> Failing better, then, must entail new methods to teach U.S. critical analysis across a distinct and highly marginalized cultural border.

---

<sup>9</sup> 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."))

<sup>10</sup> *Id.*

<sup>11</sup> 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."))

<sup>12</sup> 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.

This article urges a method of teaching critical thinking skills to students by strengthening audience expectations when legal and cultural concepts are moved into the fore-ground. In an effort to walk that tightrope between normative cultural views and the cultural relativism, 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 (to whom I sometimes refer as “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.

In Part II, I explain how Chinese students can better adapt to American legal education and ultimately promote a move 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.<sup>13</sup> This process relies on Teaching Assistants who serve as “culture brokers” and offers a bridge between me and the students that I can pass through yet keep the learning and cultural assimilation “learning based.”

In Part III I detail the approaches my Teaching Assistants and I used to help students adapt their own critical thinking skills through Blackboard Posts and real-time discussions and writing. I based my method on Gilly Salmon’s Five Stage model of E-learning’ adapted by me for use in a fairly limited period.<sup>14</sup> Salmon’s five stage model “works through a structured and ‘scaffolded’ series of “e-tivities designed to encourage creativity and learning.”<sup>15</sup> I demonstrate how students synthesized the scaffolded critical thinking during their “real time” study in Philadelphia when they prepared briefs and oral arguments for a target audience of a Federal Judge. It is at this stage that the interaction among the different

---

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.”

<sup>13</sup> Erie, *supra* note 11 at 77-78.

<sup>14</sup> Gilly Salmon, *E-tivities: The Key to Active Online Learning*, 2<sup>nd</sup> ed. London: New York, Routledge, (2013).

<sup>15</sup> *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.”)

cultures of the courtroom, the classroom, and U.S. and Chinese argument styles must be navigated with best possible attention to context.

I conclude with the aspiration that learning thick reasoning will “fail” far better with methods that stress the socialization process rather than methods that approximate more formal approaches designed with U.S. students – already comfortable with U.S. culture – in mind.

## Part II: “Thick” Reasoning as a Model for Critical Thinking

Although it would be facile to suggest that engaging students’ immersion in U.S. legal culture is simply a question of repairing their critical thinking skills, some concepts may certainly be interrogated. For example, Matthew Erie views the LL.M. Program at Tsinghua University School of Law as a test case in teaching critical reasoning to Chinese lawyers.<sup>16</sup> He argues that 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.<sup>17</sup> In 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.<sup>18</sup>

“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;

---

<sup>16</sup> 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.

<sup>17</sup> Erie, *supra* note 11 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.)

<sup>18</sup> Erie, *supra* note 11 at 70-72.

developing (multiple and alternative) case theories; drafting memos or contracts; and oral advocacy and client consultation.<sup>19</sup>

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.<sup>20</sup> The confidence that an already confident student may feel may be further boosted if they attend one of the special “pre-Programs” for incoming LL.M.s.<sup>21</sup> 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, says Erie, 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 Kagan’s “adversarial legalism,” or socialist, as in classical Marxist thought.<sup>22</sup>

Chinese students are likely to have internalized a great deal of critical thinking. Some of this thinking is in line with their cultural norms, which dictate that one forgoes criticism for those with greater authority than themselves.<sup>23</sup> 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.

---

<sup>19</sup> Erie, *supra* note 11 at 77-78.

<sup>20</sup> 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.”)

<sup>21</sup> 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).

<sup>22</sup> Erie, *supra* note 11 at 77-78.

<sup>23</sup> Erie, *supra* note 11 at 79.

My course posits that drawing out or navigating the borders of U.S.-style critical thinking and Chinese-style critical thinking depends, to a large degree, on the mentoring provided by a core group of Teaching Assistants or “culture brokers,” (a term that derives from anthropology in the mid-1900’s.)<sup>24</sup> Second and third year students are used in many research and writing classes for a variety of reasons and possess many of the qualities that I look for.<sup>25</sup> However, the students who elect to work with my constituency as a TA—foreign LL.M.s and SJDs who have completed my course and have made the transition into the JD Program -- are chosen because they share an interest in Chinese law, language, and culture. Most legal writing professors seek Teaching Assistants who can model what an excellent law student should be,<sup>26</sup> but a foreign legal Teaching Assistant (who may or may not be Chinese but was trained as a lawyer in a civil law country), 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 LL.M., JD, or SJD in U.S. law, the Assistant has learned first-hand the value of U.S.-style critical reasoning and communication, and the difficulty with which both are acquired.

A non-U.S. Teaching Assistant serving as an interlocutor 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. The success of the collaboration among Professor/Student/Teaching Assistant depends on the students’ understanding that the Assistants have successfully absorbed the culture of the U.S. LL.M. Program. Finally, teaching assistant “war stories” embolden students to believe that they are a part of the process as well.

---

<sup>24</sup> **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.”)

<sup>25</sup> See, e.g., Patricia Grande Montana, *A Contemporary Model for Using Teaching Assistants in Legal Writing Programs*, Hamline, 11-12: “I elected against an open application process and instead hand-picked some of my strongest students from the first-year class. They were strong students not only because they were outstanding writers and performed well in both Legal Writing I and Legal Writing II, but also because they demonstrated excellent oral presentation and time management skills, had pleasant and encouraging personalities, understood the program’s goals, and were very respectful of my authority.”

<sup>26</sup> 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. 267 (2007).

### Part III: E-Tivities as a Method of Front-Loading Critical Thinking and Persuasion

#### 1. The Problem

Especially in light of the reaction to the *Brown* documentary, I chose a “real-world” problem for the Summer semester, a problem posed squarely at the intersection of law and race. 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 directed against minority citizens in particular.”<sup>27</sup> 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.”<sup>28</sup> 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.”<sup>29</sup> A divided Supreme Court reversed on grounds of federalism and “concerns respecting existence of a “live controversy.”<sup>30</sup> The problems giving rise to underlying the litigation remained, however, and were debated in Philadelphia political campaigns for decades.<sup>31</sup>

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

---

<sup>27</sup> *Rizzo v. Goode*, 423 U.S. 362, 366 (1976).

<sup>28</sup> *Goode v. Rizzo*, 506 F.2d 542 (3d Cir. Pa. 1974)

<sup>29</sup> *Id.*

<sup>30</sup> *Rizzo*, 423 U.S. 362 at 378.

<sup>31</sup> 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).

Amendment. The victims of such racial and/or national profiling are principally Black and Latino men.<sup>32</sup>

The case was subsequently settled with the entry of a consent decree requiring *inter alia*, the appointment of a Police Monitor (Joanne Epps, the then 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*.<sup>33</sup> 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.”<sup>34</sup> 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.<sup>35</sup>

### 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 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

---

<sup>32</sup> Complaint, *Bailey v. Phila.*, (Civ. No. 10-5952) (EDPA 2011).

<sup>33</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>34</sup> *Id.* at 24.

<sup>35</sup> 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).

hoped to preserve the “real world” context of an inner-city setting.<sup>36</sup> 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 4<sup>th</sup> Amendment decisions – the “closed universe” of legal authority on which they will ultimately rely. *Terry v. Ohio* [392 (US 1 (1968))](4<sup>th</sup> 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 (3<sup>rd</sup> 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.”

## 2. The Method

In the summers of 2014-2017, I piloted a developed 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.<sup>37</sup>

The attraction of Salmon’s model’s lay not only in bringing content to my constituency, nor in the valuable interaction of my Teaching Assistants now functioning as “e-

---

<sup>36</sup> The fictitious “Norm’s Bar” was located within three blocks of the law school and student dorm.

<sup>37</sup> 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.”)

moderators.<sup>38</sup> Rather, the attraction lay in the way the model put these two features into play in different interactions.<sup>39</sup> 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 in a process students come to see as integral to their success.

The Salmon "scaffolded" 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.<sup>40</sup> 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.<sup>41</sup>

---

<sup>38</sup> **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.)

<sup>39</sup> *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.

<sup>40</sup> Salmon, *supra* note 38 at 35.

<sup>41</sup> Salmon, *supra* note 38 at 68. In a more sophisticated version of this model, students create on-line identities through avatars. Salmon explains: "Virtual worlds are social

At Stage 3, some Professor feedback to selective “e-tivities”<sup>42</sup> 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.<sup>43</sup> With proper support from the Professor, e-moderators are engaging in high level (“thick”) reasoning with students in what Salmon calls a “constructivist” approach to learning.<sup>44</sup> 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. In the limited set of examples that follow, I argue 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.

The moderator, e-moderators, and technical support staff facilitate early virtual communications. Every effort is made to ensure students have access to Blackboard

---

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.”

<sup>42</sup> Salmon, *supra* note 14 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.”]

<sup>43</sup> Salmon, *supra* note 14 at 184-185.

<sup>44</sup> 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).

discussion posts and technology for synchronous and asynchronous communication, as well as all other interactive features available.<sup>45</sup>

During this stage, discussion messages always clarify the purpose of the activity, or as Salmon renames it, “e-tivity.”<sup>46</sup> 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.

---

<sup>45</sup> 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. 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.

<sup>46</sup> Salmon, *supra* note 14 at 5.

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.

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 notion 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 legal research class they had attended at the beginning of their program 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 while these skills were greatly valued in the legal community, attention to audience, getting started, development, and organization were often far more difficult than learning grammar and punctuation and should be at least equally valued. 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.<sup>47</sup>

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?”<sup>48</sup> “Does it have any special significance – cultural or otherwise?”<sup>49</sup> 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.<sup>50</sup>

### Stage 3: Information Exchange

At this stage, students are introduced to the concept of “stop and frisk,” and the 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. Significantly, students are largely unconcerned with the key question of whether the police based their actions on Smith’s

---

<sup>47</sup> Salmon, *supra* note 38 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.”)

<sup>48</sup> This is a common practice for English Language learners in China.

<sup>49</sup> Questions based on those suggested for Stage 2 by Gilly Salmon

<sup>50</sup> Salmon, *supra* note 38 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 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.’”

race. Although the defense lawyers see that the issue of race exists, they are far more concerned with issues of criminal procedure – a course that none of them has yet taken - - and the fundamental differences between the Judge’s role in the U.S. and in China.

Many of the students appeared reticent in exploring the “race question” at the heart of the fact pattern. Whether prosecution or defense, the issue would have to be framed. However, at this stage, I encouraged them to see the issue of race in America as a palimpsest – picking up layers and meaning as they read materials and analyze the problem and the facts. Accordingly, the Teaching Assistant’s discussion board offered the following post – a less direct approach to the fact pattern:

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?* (my italics)

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 understandably

limited grasp of U.S. criminal procedure (most knew only what we studied for this problem) led students to misunderstand the question.<sup>51</sup>

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?

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 isolate 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 a legal answer that will obviate the need to manipulate language and syntax. 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 how difficult a skill is shadowing facts without overshadowing them. In the early stages of composition, the students 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

---

<sup>51</sup> Students have not studied criminal procedure at this point, 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.

are frustrated by our failure to provide them with models and our insistence that they make (and learn from) their mistakes.<sup>52</sup>

An atmosphere of trust is essential to overcoming these barriers to persuasive language. 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. The student laughter that grew as students read the Powerpoint slide was notably more confident than the laughter described at the beginning of this essay – a neat contrast to the student reaction to “The Road to *Brown*.” 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.”<sup>53</sup> With proper

---

<sup>52</sup>See Spanbauer, *supra* note 6, 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.”)

<sup>53</sup>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 networks. Abbreviations for actions are fine if everyone understands them: for example, <g> for grin. It would be a good idea to explain new networks 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.”)

guidance, students were beginning collaborate to recognize and correct their mistakes. In this way, the subtler tools of persuasion began to be employed.

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.<sup>54</sup>

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.<sup>55</sup> My goal here is to work students through the tiers of assembling an argument (without resorting to models) that the instructor can then edit.<sup>56</sup> At the same time, the Teaching Assistants and

---

<sup>54</sup> Salmon, *supra* note 38 at 64.

<sup>55</sup> 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.

<sup>56</sup> 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*

I continue to create discussion posts and exercises that allow the students to interact and understand the links between IRAC theory and practice.

Although most of my students will be competent speakers, only some students will be proficient at structuring an essay.<sup>57</sup> Possibly the single most request that my Teaching Assistants and I receive is for “models” for the brief. 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.<sup>58</sup> U.S. composition teachers must be mindful that many Chinese students have been taught to value correct sentences level writing over organized, revised academic writing.<sup>59</sup> 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 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 can no longer ignore policy issues as they search to find legal answers to questions. Yet they continue to be 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.

---

<sup>57</sup> 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.”)

<sup>58</sup> *See Id.*

<sup>59</sup> *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....”)

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.

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 4<sup>th</sup> 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.<sup>60</sup> 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."<sup>61</sup> As Salmon envisions it, the Professor as e-moderator create "sparks" to promote independent thought.<sup>62</sup> The culturally provocative sparks "can introduce the idea that there may be multiple perspectives and solutions."<sup>63</sup>

---

<sup>60</sup> Salmon, *supra* note 14 at 30.

<sup>61</sup> *Id.*

<sup>62</sup> Salmon, *supra* note 38 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.

<sup>63</sup> *Id.*; see Salmon *supra* note 14 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.

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 Federal Judge. 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.

---

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 "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.

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: Development

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.<sup>64</sup> 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.

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:

---

<sup>64</sup> Using oral argument as a stage of the brief writing process will be discussed in a separate article.

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 reflect 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 and improved awareness of the practice adversarial argument, written and spoken.

From their readings and discussions in class with “culture brokers” and with me; from conferences; from exchanges with the Judge; 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.

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 would suggest that it is the responsibility of the students’ other professors to take part in a collaboration of on-line and real-time “thick” reasoning exercises.

### 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’s model – 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.