

# Teaching American Law in China

**Martha C. Franks \***

St. John's College in Sante Fe, New Mexico, USA

Toward the end of my first semester as a high school teacher in China, the headmaster called me into his office to talk about what courses I would offer in the spring. By that time I had become somewhat less bewildered than I was at the beginning of the year. I now had a calmer and more educated appreciation for the creative uncertainty going on around me. When my husband Grant Franks and I had accepted positions at a school in Beijing I had thought that we would be entering a well-established program. Instead, we found ourselves in the midst of China's experiment in improving its educational approaches. Dalton Academy, where we worked, was an experimental section of the Affiliated High School of Peking University. Dalton had been founded to respond to a directive from the Central Committee to provide "general education." No one was sure what that meant, and all over China educators were trying out different ideas.

The experimental focus of Dalton Academy was on students taking responsibility for their own education. We teachers had a great deal of

---

\* Martha C. Franks is an attorney, and also a part-time faculty member at St. John's College in Santa Fe, New Mexico, USA. She and her husband, Grant Franks, who is a full time faculty member at St. John's, taught high school at Bei Da Fu Zhong (北大附中, BDFZ) during academic years 2012–13 and 2013–14.

freedom in what we would offer to teach, and students chose what they wanted to learn. In the first semester, when I had asked the headmaster what courses he wanted me to offer he answered with a question: "What is your favorite book?" "Well," I replied, taken by surprise, "I suppose my favorite book is *Moby Dick*." "Teach that," he said. So I did.

In the second semester, forewarned of my freedom, I had given the matter more thought. Our general job was to teach humanities in English to Chinese students who were intending to get their higher education in the United States. Where, I wondered, is the crossroads between what would be most useful and interesting to these students, and what I could best offer?

I decided to take advantage of the fact that my primary career has not been teaching, but lawyering. For more than twenty-five years, I have practiced water law in New Mexico, an arid state in the American Southwest. Issues about what law could and should do had been a big part of my life. Should water, a resource essential to life, be privately owned and subject to market forces? Even in capitalist America most state governments say "no." How would my students think about such property questions in a communist China that was adopting a market economy? What did these kids believe about politics and law? They seemed very familiar with Western pop culture, but I did not know what they thought about other issues, such as human rights, property and the competing values of communal responsibility and individual initiative. So I offered a course in American Law.

Eight students signed up for the class. Neither they nor I were sure what to expect. If nothing else, they would deepen their knowledge of English,

and get used to reading, talking and writing in English; good practice for second language learners. In addition, my experience teaching at St. John's College, which is a school devoted to conversation about great books, had persuaded me that reading, talking and writing are the best way to approach education in general.<sup>1</sup> For my students, the experience of grappling with the issues presented in the law would serve as practice for formulating and thinking through complex matters of any sort.

A memorandum distributed to all our students in their Humanities classes stressed the importance of reading, talking and writing. We included within it a quotation that reflects the St. John's approach to education, from Sir Francis Bacon:

Reading maketh a full man, conference a ready man, and writing an exact man.<sup>2</sup>

This epigram has to be edited to be understood in a modern, less sexist world, but I love those notions. Reading fills a person up. Talking (conference)

---

1 For a description of the history, philosophy and practice of St. John's College, see Franks (2016).

2 Bacon's ideas on education are well worth reading today. The line quoted here comes from his essay *Of Studies* (1625), which lays out his view of the importance of experience as part of education:

[Studies] perfect nature, and are perfected by experience: for natural abilities are like natural plants, that need [pruning], by study; and studies themselves, do give forth directions too much at large, except they be bounded in by experience. Crafty men contemn studies, simple men admire them, and wise men use them; for they teach not their own use; but that is a wisdom without them, and above them, won by observation. Read not to contradict and confute; nor to believe and take for granted; nor to find talk and discourse; but to weigh and consider. . . . Reading maketh a full man; conference a ready man; and writing an exact man.

makes a person quick, and ready to converse. Writing forces a person to be exact; that is, precise. A good education should attend to all three of these skills.

## **The First Day of American Law Class**

I brought these themes to the beginning lecture of the first day of the American Law class. I explained that the skills of reading, talking and writing were especially important in the practice of law. A good lawyer like Sir Francis Bacon, who was the Attorney General of England, does the reading and research necessary to know the law, thinks and speaks quickly enough to apply the law in the critical moments of courtroom confrontation, and writes legal arguments that are precise, logically sound and clear. More famously than his legal career, Sir Francis Bacon was the founder of the scientific method in the West, the thinker who envisioned how science, once put on a rigorous, cooperative basis, could remake human life. I like to believe, and argued to my students, that it was from his work as a lawyer that he developed the clarity of mind and the certainty of the central place of practical wisdom that caused him to see such a vision.

The American Law class met in a small classroom, with desks arranged in a circle. One wall was lined with windows looking into a courtyard between classroom buildings; the other three were covered with corkboard, on which Grant and I had put up portraits of people we talked about in class. Plato, Socrates, Kant, Marx and Chairman Mao were there already. As the weeks went by, they were joined by Eleanor Roosevelt, Sojourner Truth,

René Descartes and the First Emperor (黃帝). For my American Law class, I added Francis Bacon, Abraham Lincoln and Clarence Darrow, a famous American progressive lawyer who fought for human rights. My students sat among that crowd of faces, and I liked to imagine that figures from the past looked into this Chinese classroom and watched their ideas come alive again in a setting that might have surprised them. Pleased them too, I hope, although there was no knowing which way their transplanted ideas might grow when grafted onto modern Chinese history.

That first day I told the American Law students something that I have always believed: that law is the laboratory of philosophy. In Humanities classes that all the students had taken the semester before, they read Platonic dialogues and discussed abstract principles. In their science and history classes they were concerned with more practical, material issues, experimenting with the physical world for practical ends. In our class on law they would study an intersection of the abstract and the practical. How does a society make a general, vague, undefined idea like justice apply to the practical transactions of the marketplace?

Also, I told them, I was interested in what they knew and how they felt about any differences they saw between American law as I would be presenting it, and law in China. I asked them to back up any points they wanted to make on that. Show me China's constitution, I asked. Tell me about a case they had seen in a newspaper. My inability to read or speak Chinese (beyond what I needed to ask for meals in the dining hall) was something of a barrier but, in a complicated way, it was a bond as well. My students were constantly struggling with their English, and they both

laughed and sympathized when I struggled with Chinese.<sup>3</sup>

The students cheered when I announced that there would be no tests in the class. I never gave tests in my Dalton classes. Chinese students have too many tests. I wanted them to be interested in our conversations, not preparing for yet another test. Naturally some took advantage of that freedom, although fewer than I feared. Many more thought they were taking advantage when, having failed to do the reading to prepare for a class, they eased their consciences by talking a lot while they were there. They did not know that I was content with this strategy. Of course I wanted them to both prepare and talk in class, but if I had to choose between the two, I would choose for them to talk in class. When people begin to talk about their opinions and ideas they get invested in them. Under those circumstances the ideas will chase them, returning and returning like the Hound of Heaven by Francis Thomspson (1859–1907)<sup>4</sup> until they are thought through. That's what I wanted for all my students, to be chased by ideas until, whether through interest or mere irritation, they turned around to face them.

---

3 All of these students had been studying English since they were very small. And yet their experience in my classroom was different. In all of their previous English classes, the teacher had been bilingual. If they had a hard time saying something in English, they could lapse into Chinese and ask how to say it. They could not do that with me. If they couldn't make me understand their English, they would have to consult with their classmates until the class' collective knowledge of English managed to get something said. All of this was a good thing for everyone involved. The English speakers on the one side and the Chinese speakers on the other side were forced to confront the unbelievable fact that people use this other language not as some sort of silly, clumsy code, but as a primary means of communication. Until they were brought face to face with my ignorance, I think they assumed that I secretly spoke Chinese behind their backs.

4 See Thompson (1917). The poem tells of someone being relentlessly chased by God until he surrenders. I want my students to feel relentlessly chased by curiosity.

With these housekeeping matters out of the way, there were only a few minutes left on that first day in which to set the stage for how we would talk about American Law. When I began with the question “What is Justice?” they laughed and rolled their eyes, remembering discussions from their Humanities class on Plato. There were several Socrates jokes. In this class, however, my plan was to suggest why, in a practical, laboratory-of-philosophy way, people are still arguing about this question twenty-five centuries after Plato put down his pen. This class would consider the question within practical circumstances, including history, rather than in the rarified, consequence-free air of philosophical discourse. My first assignment was the American Declaration of Independence, and I wanted to make vivid for them that having an opinion about the nature of justice could, in many ages of the world, including perhaps, our own, put someone in danger of death. Socrates, after all, was executed as a criminal. All of the signers of the Declaration would have been executed also if they had not happened to win the American Revolution.<sup>5</sup>

---

5 As Benjamin Franklin remarked after signing the Declaration of Independence, “We must, indeed, all hang together, or assuredly we shall all hang separately” (Franklin, n.d.).

The closest analogy to Socrates in Chinese tradition must, I suppose, be Confucius, as they are both famous, sage teachers whose followers wrote down what they said and whose thinking was the fountainhead of a long tradition. The differences, however, are as interesting as the similarities. Confucius, although he did not get the job he wanted as an advisor to a king, was honored in his lifetime and died in venerated old age. For centuries his works were the subject of imperial examinations that could lead to a high appointment in government—he was the great champion of order and hierarchy. By contrast, the City of Athens threw Socrates in jail and executed him. I think this rather shocked some of my Chinese students. We never pushed this topic as far as Jesus, who was also executed by the government, but the students’ reactions made me wonder whether it has an effect on the way Westerners understand the world that two executed criminals hold such prominent places in Western tradition.

I asked them about revolutions. Are revolutions against the law? They went quiet. No one would answer. You could hear minds furiously calculating, “Yes, of course revolutions are against the law, but they are the work of heroes and benefactors! Like the 1949 revolution and Chairman Mao. What about revolutionary unrest now, though? That’s bad! I think. Well, some of them are good. Others are not.” Concluding that the question was unanswerable in any safe way, they sat silent.

I tried again and asked: are revolutions ever justified? They wanted to know what “justified” meant. Demanding a definition in response to a difficult question is a time-honored move in discussion, and especially available to second language learners. From the student’s point of view, it turns attention away from them and back to the teacher who, with luck, will continue to talk until the class ends. “Answers delayed are answers avoided!”

I re-phrased the question: are revolutions ever the right thing to do? To this one they felt confident they had a correct response. Yes, revolutions were right sometimes, a natural pushing back against oppression and corruption, part of the unfolding of human progress.

Okay, I continued, how can you tell when oppression and corruption have gotten so bad that revolution is the right thing to do?

Another silence, this one was unbreakable. There was no way they would answer that question. That reluctance, aligned with a general shyness about talking in a first class, meant that we could get no further that day.

I was not unhappy though, as I handed out copies of the Declaration of Independence and told them to think of questions about the first two



paragraphs. It was too soon to tell, of course, but it seemed to me that a few hounds had woken up in some people's minds.

## **Reading Original Texts—The Declaration of Independence**

I was a few minutes late to our second class, not being used to the new semester's schedule. As I hurried to the classroom I found all eight of my students hanging out in the hall, gossiping and eating breakfast. Every door in the large granite and concrete complex in which Dalton operated had an electronic lock and most of them were locked all the time, including the classrooms. The students could not get in the room until I arrived with my card key. It seemed odd to me that students should be locked out of their classrooms, but the whole system was less harsh than it appeared at first. Everyone in the school knew of certain windows and doors that could be propped open or otherwise jimmied, so the locks never seriously impeded anyone.

Lots of things seemed to be like that in China, including the Internet. Draconian obstacles and prohibitions would be announced, but people routinely found their way around them. A rule was not what the authorities *said*, but what they chose to enforce. It was a dance that people did with authority. As a teacher of law, in which the question of the exercise of authority is absolutely central, I found the situation interesting.

As we filed into the classroom on that second day, I wrote on the free-standing whiteboard the word "Authority." After making sure they all knew

what the word meant, which entailed some use of electronic dictionaries;<sup>6</sup> I asked them where authority came from. The customary initial silence followed. By far the hardest task I had at Dalton was convincing my students that I actually wanted them to talk in class. Talking in class was severely at odds with their lifelong experience in Chinese education. Most Chinese education is highly rigid. The test taken by most students<sup>7</sup> at the end of high school, the Gao Kao (高考, Big Test), is fiercely competitive. The classroom years leading to the crucial three days of the Gao Kao are spent working toward scoring well on that test. Students are passive in class and are expected only to absorb information in a form that can be returned verbatim on the test papers. It took my students a while to believe that I wanted them to offer their own ideas rather than to absorb mine.

I kept asking, and finally a few timid answers trickled in uncertainly.

“Your parents? Your friends? The Government?”

Faster now.

“Books? Tradition? Logic?”

All of these suggestions were in the form of questions, as the students

---

6 A constant tension surrounded the use of electronic devices in class. They could not be forbidden, because so many students really needed them in order to look up English words. Besides, sometimes they were helpful. I often asked my students to track down answers on the spot when a conversation took us into unexpected places. And yet, of course, some students used them for social media or even movies under the table. Especially because I could not read Chinese, I could never be sure, even when I looked at a screen, what the student was doing. In the end, there was no real alternative to an honor system. I guess I will never know the extent to which they found their way around my authority. It was a little dance we did.

7 Except our little group in Dalton, and others who had opted to go to the United States for school. These students, however, had transferred to the SATs all of their cultural focus on the Gao Kao, so that when an SAT test was looming it was all I could do to get them to come to class, let alone to be interested in learning. Very frustrating.

scanned my reactions to try to see which answers were right. I wrote them all on the board, and asked: If someone wanted to start a revolution, which of these sources of authority would he or she look to? Again, it took a while to make sure the question was understood. These kids were very, very smart, but also unsure of their English. Slowly, hesitantly, they hammered out that a revolutionary could not look to the government she wanted to overthrow, and probably not to her parents.

Probably not tradition, either, although it could go both ways; loyalty to government was one tradition, but if the government was itself violating tradition there might be a loophole.

Friends, logic and books, yes. “What about Nature?” someone broke in excitedly, “Isn’t that a source of authority?” It went up on the board. Perhaps that person was thinking of the Declaration of Independence, although I noticed that no one suggested the particular phrase that occurs there: “Laws of Nature and of Nature’s God.”<sup>8</sup> I have idealized the conversation, of course. Some kids were sleepy and others remained warily silent. Still, I told myself hopefully, voices were coming forward. Feeling this tepid approval of how the class was going, I was unprepared for a burst of sudden excitement when we got to the Declaration itself. A crowd of questions leapt up around the line “We hold these truths to be self-evident, that all men are created equal . . . .”

---

8 The students were all over the map with regard to religion. I had assumed they would be scornful of the Judeo-Christianity of the West, and some were. Others were intrigued and asked me a great many questions about it. Most had been raised with no religion at all, although there were a few who spoke with respect of their grandparents who were Buddhists. One of the students in my American Law class in that first year came to visit me in America a year and a half later. He had been one of my most hard-edged and cynical students and it was a surprise when he told me that he was about to be baptized into a Christian church.

It turned out that passions ran high on this claim. Apparently there had been arguments over it in the dormitory the night before. “Good for you, Thomas Jefferson!”<sup>9</sup> I thought, and did my best to pour gasoline on the fire.

Some kids thought that the Declaration was right and that equality among people was in fact self-evident. “Look at tiny babies. All of them are the same,” they argued. Others thought it was self-evident that people are *not* equal. Some are tall, some are short, some are smart, some are artistic, and some are musical. Everybody is different!

If America is founded on the claim that everyone is the same, it is founded on a lie. Is there a difference between being the same and being equal? Even if there is, how can you say that anything is self-evident about it? Maybe the smarter people really are better. Certainly it’s the smarter people you want running the government. But people who think they are smart can be the stupidest of all. The practical workers should run the government.

I had dropped out of the conversation, but pretty soon they all turned to me to show them the way out of this disagreement. Chinese students may dislike disagreement more than American students, who often take satisfaction in having unusual opinions. Colleagues at the school had warned us that Chinese students are upset by disharmony, and it appeared to be true. I’m sure that part of my Chinese students’ tendency to be quiet in class was simply a shyness about complex discussions in a second language, and part

---

9 Thomas Jefferson, who became the third president of the United States, wrote the first draft of the Declaration of Independence, with some assistance from Benjamin Franklin. Interestingly, Franklin edited this crucial line. Whereas Jefferson had drafted, “We hold these truths to be sacred . . .” Franklin struck out “sacred” and put in “self-evident.” See Isaacson (2004).

was their disbelief that I wanted them to talk, but a contributing cause was the ever-present fear of disagreement causing discord. On this occasion, they waited for me to make the classroom harmonious again.

They were disappointed when I only complimented them on their arguments and handed out the United States Constitution. I wanted them to live with disagreement in the air. Perhaps it was their desire for harmony, ironically, which prevented them from challenging me in this.

### **Reading Original Texts: The United States Constitution**

Alas, on its face the United States Constitution is not a riveting document. It is not easy or compelling to read. As constitutions go it is blessedly short, but it is written in the language of lawyers. The classes that followed were painful exercises in trying to convey to my Chinese students how enormous amounts of meaning and importance can be packed into boring, mostly colorless but (often because it is so precise) confusing English. Phrases like “due process” and “equal protection” seem dull until you learn how individual people’s livelihoods, and indeed their lives, may turn on how they are interpreted.

Studying law, at least the Common Law on which the legal systems of Britain and America are based, depends heavily on careful, dispassionate parsing of words and phrases. This attention to precision of meaning is part of the strangeness of “thinking like a lawyer,” and is challenging for anyone approaching the subject. I often wondered if, for my Chinese students studying in a second language, this challenge was complicated by differences between Chinese and English. Mandarin Chinese is so full of

homophones and overlapping meanings that there is much more room for interpretation, or at least that's how it looks to me. If that is so, it might have seemed especially odd to my Chinese students that words on paper should be taken so seriously and parsed so carefully, as if they stood alone, meaning some single objective thing, outside of human context.

Relatedly, perhaps, my Chinese students were generally doubtful about the way in which the American system relied so strongly on legal structures and procedures rather than on people. It sounded inhuman to them, like words out of human context. I had led up to the American state documents by way of the Enlightenment, which they had studied in other classes.

Enlightenment ideas, I claimed, especially economic ideas, abandoned the search for virtue in human beings, and sought to use human greed and ambition as an engine for a prosperous society. So the Constitution does not try to find a virtuous and competent President, or Congress, or Judiciary. Everyone *hopes* that these officials will be virtuous, but the government does not depend on their virtue. Instead, it sets up legal structures and procedures whereby these three branches of government will police each other.

This is the heart of the doctrine of the Separation of Powers. The great insight is that human beings must stop looking, fruitlessly, for a good king, or a trustworthy central organizing authority. No one can be trusted with power. In that predicament, the writers of the United States Constitution believed, the only thing to do was to invent procedures that will contain the inevitable quarrels among people seeking power and make those quarrels productive. Such a system should work whether the people in charge are good people or whether they are awful people.

My students hated this idea. They were sure that lots of people would do competent and honest, virtuous work, so that good government only required finding those virtuous people and putting them in charge. I tested this belief with as many questions as I could think of. “Do virtuous people want power?” I asked. “What kinds of people do want power?” And, “What happens to virtue when it gains power?” They were taken aback by these challenges. Every day for a week or two, I came into the classroom and wrote on the whiteboard a saying that is very famous in Western political thinking: “Power corrupts, and absolute power corrupts absolutely.”<sup>10</sup> Every day one of my students would object, having thought of a new argument to try to prove that saying false.

Many of those arguments revolved around education. This was an especially fun conversation because they had never thought about the purpose of education before, despite all the years they had spent being educated. Tasks had been set them, and information presented to them, and tests administered as hoops to be jumped through, but it had not occurred to them to wonder what they were being shaped for, or why they were studying the particular things they did.

“If a person has a good education,” a student would argue, “they will do right. They will not be corrupted by power.” So, I responded, “you are saying that education teaches virtue? Can virtue be taught?” They laughed, recognizing the question from their study of Plato’s *Meno* in the previous semester. I was glad to have them see, in the context of our class on Law, why people care so much about that question. If virtue could be

---

<sup>10</sup> “Power tends to corrupt, and absolute power corrupts absolutely. Great men are almost always bad men.” (Dalberg, 1907)

taught, and we knew how to teach it, societies would not need doctrines like the Separation of Powers. We would not need to worry about power corrupting people.

Someone remembered that, as small children, they had all taken classes on virtue and how to be good. That caused more laughter, as they mockingly quoted multiple choice tests they had taken on how to behave well: “If someone steals your backpack, you should

- a. beat them up
- b. steal theirs
- c. tell the teacher”

Mostly they had thought those tests were silly and boring. Anyone could see what answer the teacher wanted, so the students could always get a good grade by giving it. They were not inclined to think they had learned much about virtue from that exercise. They had only learned how to do well on tests.

Still, they did not want to concede that virtue could not be taught and that power would always corrupt. So, I asked, if virtue classes are not the way to make people good, is there a kind of education that will? What kind of education will cause people to become the good people you need in order to have good government and a good society?

“People should study history,” one student offered. “Learn which examples to follow and which to avoid.” This seemed like a wise approach, so we began to explore possible examples of good and bad people. Unless we went very far back in history, there was disagreement over whether a particular person was to be admired or not. Finally, I asked them who they actually admired—who did they themselves use as examples of people they most wanted to be like? Many of the names that came up were



those of celebrities, famous, wealthy and accomplished, but not primarily known for virtue.

It was an interesting conversation although, like Plato, we did not reach a clear conclusion about whether virtue could be taught. That was enough for my purposes, however. What I wanted them to realize was that the question was difficult enough that the strategy of the American government was a reasonable alternative to the task of creating virtuous people. Rather than hope for virtuous people, the strategy of the United States Constitution is to fashion a government that will operate successfully even if people are not entirely virtuous, but are acting for motives of greed and ambition. My students continued to be dubious about this strategy, but our discussions led them to see why it made sense to the writers of the Constitution.

I learned later that in raising these issues I had inadvertently stepped into an East vs. West discussion that had been going on elsewhere in the school. In their class on Chinese heritage, one of the teachers of that class often framed his presentations around comparisons between East and West.

“Chinese do not need Separation of Powers,” he claimed, “because we are not weak and greedy like Westerners!”

That, at least, is how my students characterized what was said. This particular teacher didn’t interact much with the foreign faculty. My students attributed to him what may have been their own reflections. They suggested in our discussions that the focus on the principle that power corrupts, leading to doctrines like the Separation of Powers, might be needed in the West because Westerners were simply not as culturally humane as Chinese.

Reflecting on these arguments, I pushed them further in my own mind, experimenting with using my training as a lawyer to be an advocate for this teacher’s position. I had to admit, for example, that it was Westerners

who had come up with the theological notion of “original sin,” according to which human beings were so deeply, ineradicably flawed that only the sacrifice of God’s Son Jesus could rescue us.<sup>11</sup> Obviously, it might be said, Westerners recognized their own capacity for deep evil, an evil that the innocent Chinese had suffered from so horribly when oppressed by Westerners during colonial times. Chinese, by contrast, had never sailed around the world to exploit other peoples, but had been content to enjoy their own highly civilized society to themselves. China did not need the doctrine of the Separation of Powers, I imagined this teacher arguing, because China does not have a tradition of the uncompromising condemnation of human nature. Therefore, China can rely on its rulers to be fair and just.

The episode led to the awareness of a new dimension to my teaching experience. Once I had been alerted to it, I saw that a running comparison between East and West was a big part of my student’s lives. They liked and spent time with all things American: movies and music, Grant and me and the other Western faculty at Dalton, and especially technology. (Steve Jobs was enjoying a vogue in China when we were there.) But they sometimes felt rather bad about doing so, as if they were deserting their own traditions.

Dalton students in particular may have felt torn in this way because they had decided to go to America for their college education. It will be a continuing issue for education in an increasingly globalized world, I suppose. How do we offer to students the knowledge that should be common to all, and also affirm their very valuable pride in their own

---

11 See for example, Augustine, *Confessions*, Book II.

identity? Ideally, we should offer to students a place from which they can assess what they think is true about human nature, without regard to where the ideas come from.

## **Writing about Ideas—Constitutions and the Separation of Powers**

When the time came for the first paper in the American Law class, I asked the students to write on the United States Constitution. I told them I was particularly curious about how they would analyze this question of the Separation of Powers, as well as the related doctrine, the Rule of Law.

The Rule of Law is the principle, deeply embedded in American ideas, that the Law is the highest authority in the society, higher than any person. The most famous statement of this principle was made by John Adams, the second President, who proudly avowed that the United States is “a government of laws, not of men” (Adams, 106).

Several students compared the United States Constitution with the Chinese Constitution. One laid both the similarities and the differences at the feet of Confucius. The Chinese Constitution, this student pointed out, has clauses guaranteeing freedom of speech and freedom of the press, but somehow those guarantees do not play the prominent public role in mainland China that they play in America. This student argued that this has come about because the Rule of Law does not seem admirable when approached from the point of view of Chinese tradition. Laws should not control human beings, because true humanity was above law and better

than law. For Confucius, the ideal is to be good enough that you don't need laws. Good people can see when it is better to enforce harmony than to follow a divisive law. One effect of this attitude is that following a law is evidence that someone is not a good enough person. It's only Westerners who cannot trust themselves to be good, and who therefore need a Rule of Law that places laws above the human opinions of the rulers.

Of those who wrote about the Separation of Powers, opinions were mixed. Two approved of the doctrine, on different grounds. One thought that having three competing centers of power in government; the executive branch, led by the President, the legislative branch led by Congress, and the judicial branch led by the Supreme Court, made for interesting shifting alliances, avoiding a prisoner's dilemma situation that happens when two people are trying to decide whether to betray each other. Another, relatedly, pointed out that the three types of officials were chosen differently, so that they would have different people to whom they were grateful.

Other students expressed doubts about the doctrine, for similar but not identical reasons. These opined that a Separation of Powers arrangement was disorderly and inefficient, and likely to fall out of balance, even if it succeeded in reducing corruption. Most disliked it for that reason, but one was inclined to think the risks were worth it, as they would be smaller than the risks of having a single person in charge. She quoted a Chinese proverb that the relationship between the people and the Emperor is like the relationship between the ocean and a boat; the people can support the Emperor, or they can storm, rise up and overturn him. She argued that it might prevent storms and uprisings if the responsibilities of government were divided among the branches, rather than being concentrated on one

person as a target. The inefficiency and disorderliness of the Separation of Powers doctrine might be good, she thought.

Well, they were all thinking, so my job was done.

## Talking Together about Fields of Law

During the rest of the semester, we studied different areas of law and exchanged ideas about them. We studied the field of Property Law. I was interested in whether private property as defined by British and American common law would seem strange or offensive to my Chinese students. Not really. They loved the idea and were convinced that China was moving in that direction.<sup>12</sup> They also loved the field of law dealing with business arrangements, called Contracts. They saw in the principles of Contract Law lots of freedom to agree among merchants on the rules that would control a deal, rather than trying to remember and follow ones that the government had imposed. I set for them an exercise in contract negotiation, where some students took the role of clients with differing interests and decision-making authority, while others took the role of lawyers representing the clients at the bargaining table, trying to get the best deal on their clients' behalf. Tough negotiators, sharks and future deal-makers came surging forward, amid much giggling.

Responding to their interests, I gave them an overview of the strange and wonderful world of Financial Law, too. I had begun my legal career

---

12 The statement *zhifù guāngróng* (致富光榮 “riches are glorious”), is sometimes cited as the motto of Deng Xiaoping's economic reforms. It flies in the face of decades of Communist doctrine, but is squarely in line with many previous centuries of Chinese mercantile tradition.

working for a Wall Street firm, and it was a pleasure to offer a look into the unpredictable behavior of the world's economic structures.

Criminal Law, naturally, was the most attractively dramatic subject that we covered. My original idea for the course had been to stage as a final project a mock Supreme Court argument regarding some point of law. Seeing how interested they were in trials, however, I changed the plan and decided to do a mock murder trial. This greatly increased the dramatic possibilities, which seems appropriate when it comes to trial work. All of them had watched a lot of American crime dramas,<sup>13</sup> including a lot of courtroom scenes, so this part of the course came alive.

Switching to a mock trial as the final project also took advantage of some of the conversations we had had early in the semester about the Bill of Rights, the first ten amendments to the United States Constitution. I was pleased with that, because those early conversations had seemed to me important.

Many of the students noticed that the Bill of Rights was deeply concerned with Criminal Law. Furthermore, as they saw it, the document was aimed specifically at *protecting* criminals. That seemed immensely odd to them. Why was the United States Constitution so concerned with how the government treated criminals? Criminals are bad people, surely. Why would great figures like George Washington or Benjamin Franklin or Thomas Jefferson care so much about them? When I turned the question

---

13 I showed them some as part of the course. *Anatomy of a Murder* didn't grab them, but they loved *My Cousin Vinny*, and had a lot of questions about *Twelve Angry Men*, which they found impressive.

back on the students, asking them to try to answer it themselves, there was a long silence. For a while it was a genuinely puzzled silence. Then, slowly, the silence became a wary one, instead. Finally someone found a way to say something:

I guess its all part of the same distrust of the authority of government. Government gets to decide who is a criminal. That's a big power.

More silence. No one wanted to pursue the implications of that thought. I decided not to press on it.

## **Preparing for Trial—Making Stories**

The possibility of sympathizing with criminals was made more fun as we cast parts for our mock trial. I had found materials for a mock trial on the Internet, which consisted of lots of background documents, briefs,<sup>14</sup> an arraignment,<sup>15</sup> some court opinions on preliminary issues, as well as depositions<sup>16</sup> from each of the proposed witnesses. All of these official papers took a lot of explaining. My students were surprised by how public

---

14 A “brief” is the document that a lawyer files with a court, containing the lawyer’s argument on behalf of a client or Defendant.

15 The “arraignment” is the proceeding in which the Defendant who is accused of a crime is brought to court before a judge in order to plead guilty or not guilty. Only if the Defendant pleads “not guilty” does the judge set the matter down for trial.

16 A “deposition” is a proceeding that takes place outside a courtroom, when the lawyers ask questions of all of the witnesses to an alleged crime in order to find out what the witnesses will say at trial.

all the proceedings are in America, how lawyers challenged everything, how written law governed so much instead of the judge, and, as a consequence of all that, how much of a written record there is in a criminal case. These things reinforced their surprise at how tenderly criminals seemed to be treated. They became increasingly doubtful about this system.

At one point I quoted to them Lord Blackstone's famous dictum that it is better for ten guilty people to go free than for one innocent person to be wrongly punished (Blackstone, circa 1760). They were frankly flabbergasted by such an idea. When they got over their disbelief that any responsible person had said such a thing, they concluded that perhaps the principle was sweet in a way, but that it was ridiculous, naïve and dangerous in practice.

Perhaps it is. Certainly it is not always honored, even in Britain and America. In China, where there are still strong memories of a more devastating social disorder than Americans have felt since the days of our Civil War, it may seem impossibly foolish, even to an idealistic set of high school students, to let a suspected wrong-doer free on some technicality.

Whatever their reservations about the American trial system, they agreed that, considered as theater, trial was nothing but fun. The materials of the legal case worked fine as a script, for the most part. The case was one of attempted murder, so both the accused and the victim would have a chance to testify at our mock trial. The students did a great job throwing emotion into both parts. Costumes were carefully considered, expressive inflections practiced, and gestures chosen. These kids did a lot of drama as part of the Dalton program, and they loved it.

Law is not entirely a scripted play, however, as the students discovered.



They could practice direct examinations<sup>17</sup> and opening statements<sup>18</sup> as if they were lines learned for a play, but they did not know what to do with cross-examination,<sup>19</sup> and they couldn't plan a closing statement fully until the results of cross-examination were known. They were puzzled about how to prepare. There were too many loose ends. They would have to speak and think quickly on the day of trial in order to do well.

My chief piece of advice for them was to turn their case into a story. Storytelling is what trial presentation is all about. A good lawyer looks at a pile of facts and chooses from it what to emphasize in order to make a persuasive story. The prosecuting attorney, whose job it is to convict people accused of crimes, looks at the facts to which the witnesses testify and chooses to emphasize the ones that seem to prove motive and guilt, that seem to show that the Defendant both committed the crime and intended to commit the crime.

The defending attorney, whose job it is to defend people accused of crimes, looks at the same facts and chooses to emphasize the ones that

---

17 A "direct examination" is when a lawyer asks questions of a so-called "friendly witness" that the lawyer wants to testify.

18 An "opening statement" is when a lawyer, prior to bringing any witnesses before the jury, explains what the lawyer intends to prove during the trial. It is the moment when the lawyer tells the jury the story as the lawyer wants the jury to see it.

19 A "cross-examination" is when a lawyer gets to test the evidence of a witness that is saying things that are damaging to the lawyer's client; a so-called "hostile witness." In cross-examination the lawyer can ask very pointed questions designed to show where there are flaws in the witness' testimony, or evidence that supports a different way of looking at things. Cross-examination cannot be rehearsed because no lawyer wants to give away to the witness what questions will be asked. Therefore, lawyers and witnesses both must guess at what is likely to be asked and make plans for the answers. Only on the day of the trial does the real examination unfold.

show innocence, that the prosecution has the wrong person, or, if not that, that whole occurrence was an accident and no harm was meant. Any human situation generates evidence that will support many stories. The job of a lawyer is to tell the evidence-based story that is most helpful to the client's interests. Then, after the stories have been told, it is the job of the jury, the twelve people listening to the evidence and the statements of the lawyers, to decide which story to believe.

My students had a very hard time thinking of things in this way. I made the assignment twice, with two different approaches. First they had to tell the story of what happened from their client's point of view. I wanted them to show me which facts in the materials they used to build that story, and which facts seemed to point against that story. They did not understand that assignment and simply turned in lists of facts. Facts should be facts, they thought. The idea of "good facts" and "bad facts," so familiar to a lawyer, seemed wrong to them.

I tried again. We talked at length about the legal concept of "relevance," and I asked them to list the statements in the materials that were *relevant* to the way their clients saw the events. They disliked this assignment even more. Again it seemed wrong to them that facts could be more important or less important. They felt it was more honest to present everything. The more we talked about it, the more it became clear that the notion of an advocate, especially a paid advocate, was very troubling to them. A lawyer should be on the side of truth. They thought that if they downplayed some facts in favor of others they were being dishonest.

As they became more frustrated with the idea of telling a story, they became restive over the desire to know what "really" happened to

the Defendant and victim in the case.<sup>20</sup> This, I believe, flowed mostly from TV and movies, although perhaps it was reinforced by a desire for harmony. They wanted to see some great police work, a scientific expert witness, maybe, that would resolve the question of whether the Defendant was guilty in such a way that everyone would harmoniously agree. Once again, they hated all these loose ends. How can you run a justice system, they complained, when so much is left in doubt? The police should keep investigating until they were sure of what happened, and then there would be certainty and harmony. There must be a way to avoid doubt.

We had a lot of discussion about this. I claimed over and over that, in many cases, especially the ones that got as far as a jury trial, there is nothing that can be done to make the situation indisputably clear. Often an issue comes down to which witnesses the jury believes, and there is no way to put it on any other footing. A bank clerk testifies that she recognizes the Defendant<sup>21</sup> as the person who robbed the bank, whereas another person says that she saw the Defendant elsewhere at the time the bank was robbed. Who should be believed? Either could easily be perfectly sincere but wrong. Eyewitness testimony is notoriously unreliable, yet, in many cases, it is all we have. That's why we have juries, to represent the community in making such decisions.

The students didn't like this idea, either. Who were the people on a jury that they got to decide such things? Wouldn't it be better if a trained judge made those decisions—or maybe a scientist?

---

20 The case we did in our American Law class was a fictional one, so there was no answer to that question.

21 The "Defendant" is the legal name for the person who is accused of a crime.

These conversations seemed to me immensely important; a crossroads of ideas that I wanted my students to bring out into the open. Philosophical issues were at stake that connected to the discussions we had at the beginning of the semester around the Separation of Powers doctrine and the Rule of Law. Are all human beings fallible as well as corruptible, kings, judges, lawyers and witnesses, too? Is it better to seek harmony at some cost to the rights of accused criminals, or to take the risks of protecting rights and live in doubt and disagreement and perhaps danger? People have been reading, talking and writing about these matters for all of human history.

The most important point of all, and the one that the students had the most difficulty grasping, is that each of us *makes* the coherence of experience. A surprising aspect of this class, as I have already mentioned, was how hard the students found it to create a story out of a pile of facts, and to take on the role of advocate for such a story. Yet, as I saw it (perhaps in my Western way), the creation of a story is the only means by which the big philosophical questions get decided, either in a personal life or for a nation. No king or judge can prove to us scientifically that human beings are or are not corruptible and need a Rule of Law or a Separation of Powers doctrine. No king or judge can set scientifically the right balance between societal harmony and individual human rights, or even prove that the two things are in tension.

Instead, people tell different stories about those things. The theological idea of “original sin” is a famous story about human nature, for example. Another story about human nature is implied in the statement that “we hold these truths to be self-evident,” and yet another in the story that Marxism tells about the inevitabilities of history. We choose what to believe about

human nature or about history on the basis of which story seems persuasive. We all act as jurors about history, listening to various advocates tell stories that try to account for the facts, and then choosing which story to believe. My students were not immediately persuaded by this way of seeing things, this story, but they were thinking about it.

## The Day of Trial

The day of the trial arrived. We set up a judge's bench on the stage of a theater that holds about a hundred people. Grant, also a law-school graduate, agreed to be the judge. I took the role of bailiff,<sup>22</sup> seated on stage to the left of the judge's place. A chair for witnesses was on the judge's right side. The whole school was invited to be the jury from the audience perspective, and the seats were pretty full. My students sat at two counsel tables, one for the prosecutor and one for the Defendant, in the space between the audience/jury and the stage. They would speak to the jury from a podium between the tables.

The students looked *great*. All of them rose to the occasion. Those playing the role of lawyers dressed with professionalism, and behaved with forensic dignity. Those playing the role of witnesses were jauntily in character. I especially liked the Defendant, the person who was accused of attempting to murder the victim. She is a self-contained, soft-spoken student in daily life, but she now displayed a loud, emotional, impulsive persona, even while people were milling around getting ready. It looked

---

22 The "bailiff" is the person who polices the courtroom, swears in the witnesses and generally does the practical errands that make the trial run smoothly.

like a quarrel would spring up between her and the victim. The lawyers kept them apart.

When enough of the audience was looking expectant, I stood up and commanded, in a near shout, “*All rise.*” The audience was confused by this, as it is not an English expression they were used to, but my students stood up, and the audience saw the idea and somewhat raggedly followed. I pursued my script, trying to establish a legal atmosphere with stentorian tones:

Hear Ye, Hear Ye! The Circuit Court of the State of Lone Star<sup>23</sup> is now in Session, the Honorable Grant Franks presiding.

Uncertain giggles and whispers arose as Grant walked in with slow judicial poise, sat down in the central judge’s chair, and startled everyone by banging a loud gavel (in this case a claw hammer we had unearthed from a closet). He said “You may be seated” into the sudden silence. The audience subsided into their places, a little awed.

The case itself was entitled *The State of Lone Star v. Lisa Richardson*. Ms. Richardson was accused of attempted murder for having shot her boyfriend, Paul Tu, in front of his house somewhere in the fictional town of Armadillo. Richardson and Tu had begun their relationship some years earlier in an Armadillo bar. What began as a love affair evolved into a friendly business venture, which then became a *failed* love affair and a very *unfriendly* business dispute. She wanted to marry him; he wanted to

---

23 The State of Lone Star was a fictional state invented by the mock trial materials.

have nothing to do with her. At the end of a brusque confrontation in front of his house, guns came out and he wound up lying on the driveway, shot in the chest. Was it a crime of passion, or had she acted in self-defense when he reached for a weapon?

The student acting as Paul Tu (now recovered) played the role of no-good, conniving jerk with real conviction. Everyone disliked him so much that they wanted him dead, but the jury instructions were clear that “He had it coming to him!” is not a legal defense in this jurisdiction. The audience was on the edge of its seats as the Defendant took the stand in her own defense. She told her own story on direct examination, and then faced cross examination from a prosecuting attorney who had seen too many bad television trial scenes. I had explained to the class that cross-examination is aimed at eliciting factual admissions from the witness, but the prosecutor wanted to make his witness break down on the stand and confess her guilt. The cross examination as he imagined it went like this:

Prosecutor: “Isn’t it a *fact* Ms. Richardson, that you were in love with Paul Tu!?”

Richardson: “Yes! I can’t hide it anymore!”

Prosecutor: “And isn’t it a *fact* that you wanted to marry him!?”

Richardson: “Oh, yes! God, yes. More than anything!”

Prosecutor: “And when he turned you down, you couldn’t stand it, could you?”

Richardson: “It hurt so much ....”

Prosecutor: “You wanted revenge, didn’t you? *Didn’t you?* He couldn’t treat you like that! You needed to make him pay, and pay good!”

Richardson: “Yes! Yes! He wasn’t going to get away with it ....”

Prosecutor: “... and that’s why you *pulled out your gun and shot him down in cold blood, ISN’T THAT RIGHT?*”

Richardson: [Weeping hysterically] “Yes, I admit it! I wanted him dead, and I shot him. With premeditation as defined in the State of Lone Star Criminal Code section 714 (b)(i) subparagraph (7)!”

In the real world, the cross-examination sounded more like this:

PA: “Isn’t it a *fact*, Ms. Richardson, that you were in love with Paul Tu!?”

Defense: “Objection! Badgering the witness.”

Judge: “Sustained. Try again, counselor.”

[Repeat *ad infinitum*.]

All the same, things looked bad for Lisa who had motive, means, opportunity *and* a smoking gun in her hand.

From my point of view as the bailiff, the trial went smoothly, if a little long. It was ten at night before everything was done. I was worried the jury would be bored, but passionate closing arguments had woken them up, just as they are supposed to do. I removed the jury from the room and led them into a classroom where I asked for a show of hands about guilt. They complained loudly—“Objection!” they called out, having learned something from the trial. They didn’t want to do a show of hands. They wanted to look at the exhibits and think about it, just like a real jury, and they had a lot of questions for me about the facts and law. We managed



a compromise, although the time I allowed them was brief. I was very conscious that the bailiff in this case was also responsible to the jury's parents for seeing that the jury got to bed at a reasonable hour.

Poor Lisa Richardson was found guilty, and the jury trooped solemnly back into the courtroom to seal her fate. The defending team of lawyers was disappointed, of course, although I assured them later (contrary to the ethics of bailiffing) that there had been disagreement and argument in the jury deliberations. Just as in any case there were hard feelings and claims that advantage had been taken in some way by opposing counsel, or that the judge had decided something wrongly. It would be easy to make them see how the whole appellate process came into being. Really, though, the semester was over in that blaze of glory. I left off being a teacher for a celebratory moment and congratulated all of my students on their excellent work.

## **Conclusion**

Looking back on it now, I try to imagine what, if anything will stay in the students' minds from this encounter with American Law. I'd like them to remember the lawyer Francis Bacon, the founder of the scientific method in the West, who believed in the value of experience and that lawyers must read and talk and write well. I'd like the questions of the sources of Authority and the corruptions of power to chase them like the Hound of Heaven. Probably in reality, what they will remember will be the courtroom, and all the exciting guesses and uncertainties that go with trial work.

If so, I hope they will carry away how, in the end, the trial was a clash of stories. The two students who gave the closing arguments told different stories about what had happened between Paul Tu and Lisa Richardson, and the jury's decision was about which story to believe. That process of developing and arguing for stories is common to everything they studied: philosophy with its proposed systems, science and history with their hypotheses and theories, and law as the laboratory of philosophy.

These students are a rising generation of Chinese. They may someday be part of shaping a country with a changing organizing story. Today, the Marxism story does not seem to persuade many people anymore. What will replace it?

An alternative story, the idealism of the American state documents, came off to my Chinese students as interesting and noble-sounding, but rooted in a shocking idea of the corruptibility of human nature, and perhaps impractical. Maybe it is just not right for China, if only because the story did not arise naturally there. What story can these students and their peers tell about what has happened and is happening in China that accounts for its proud history and shows a way into its future?

The jury waits.

## References

- Adams, J. (1851). Novanglus papers, no. 7. In *The works of John Adams*, vol. 4, C. F. Adams (Ed.).
- Blackstone, W. (circa 1760). *Commentaries on the laws of England*. The

- Avalon Project: Documents in Law, History and Diplomacy, Lillian Goldman Law Library, Yale Law School. Retrieved from [http://avalon.law.yale.edu/subject\\_menus/blackstone.asp](http://avalon.law.yale.edu/subject_menus/blackstone.asp)
- Dalberg-Acton, J. E. E., First Baron Acton (1907). *Letter to Bishop Mandell Creighton*, April 5, 1887. In J. N. Figgis and R. V. Laurence (Eds.), *Historical essays and studies*. London: Macmillan.
- Franklin, B. (n.d.). BrainyQuote.com. Retrieved February 8, 2015, from <http://www.brainyquote.com/quotes/quotes/b/benjaminfr151597.html>
- Franks, G. (2016). St. John's College: American liberal arts education redefined. *Journal of General and Liberal Education*, 8, 1–42.
- Isaacson, W. (2004). *Benjamin Franklin: An American life*. New York: Simon and Schuster.
- Thompson, F. (1917). The hound of heaven. In D. H. S. Nicholson and A. H. E. Lee (Eds.), *The Oxford book of English mystical verse*. Oxford: The Clarendon Press.

