

## Book Signing Remarks

首发式致辞

Ronald J. Allen

罗纳德·J. 艾伦

Beijing, China

中国·北京

September 28, 2014

2014年9月28日

Thank you. May I say to President Huang of ZhengFa University, Prof. Chen Guangzhong the Founding Father of procedural law reform in China, Zhang Baosheng who was my first Chinese Student, Professor Zhang Wenxian of Jilin University who is Zhang Baosheng's teacher and co-director of the Judicial Civilization Center, my many friends and former students from ZhengFa University (Wang Jinxi, Zhang Zhong, Wang Zhuhao . . .), the Judges of the People's Supreme Court and the Beijing Municipal Higher People's Court, faculty from Beida and Renmin Universities, the Editor-in-Chief of Renmin University Press, other distinguished guests, thank you all very much for coming to this event this evening and for hosting Julie and I on this trip. I am both touched and humbled by your presence here tonight, and acutely aware of how undeserving I am of all this attention. I have not done anything out of the ordinary to justify your taking time out of your busy lives to be here tonight. I have simply pursued my career path of research and teaching. The people who have done extraordinary things are the Chinese students of evidence and procedure in this room, beginning perhaps with Prof. Chen who began reconstructing knowledge of the fields of procedure and evidence following the devastation wrought upon the Chinese universities and legal system by the Anti-Rightist Movement and the Cultural Revolution. People like Prof. Chen should be heroes in your country. He and others steered China from the abyss of ignorance and destruction and set it on the path toward success that the country is now following.

感谢。尊敬的黄进校长、陈光中先生、张保生教授（我的第一位中国学生）、张文显教授（张保生的老师）、我的挚友和学生们（王进喜、张中、汪诸豪等等）、最高人民法院和北京市高院的大法官们、来自北京大学和中国人民大学的老师们、中国人民大学出版社贺耀敏总编，以及在座的各位嘉宾，非常感谢你们来参加今晚的活动，也很感谢你们对我和茱莉在这次旅行中的悉心关照。今晚，对于你们的到来，我很感动，亦诚惶诚恐，我自知有愧于如此高的关注。除了完成日常工作之外，我并没有做出过什么非凡之事能令你们今晚要放下手头繁忙的工作抽空来到这里。作为一名教师，我仅仅是对自己的教学和科研工作不敢懈怠。而真正取得了卓越成就的是中国证据和诉讼领域在座的各位。中国的大学和法律体系在反右运动和文革期间遭到重创后，正是以陈光中先生为代表的你们开

启了诉讼和证据领域的知识重塑之路。陈先生这样的人物是你们国家的英雄。正是以陈先生为代表的你们带领着中国走出了无知和破坏，将这个国家领上了现在所遵循的通往成功之路。

The generation following Prof. Chen, so well exemplified by my first Chinese student, Zhang Baosheng and so many others of you in this room, are equally deserving of the praise of your country. Many years ago, it became clear to Prof. Zhang that an important—and perhaps the most important—contribution to China’s path toward success would come from the rule of law and that absolutely critical to the rule of law was furthering knowledge of evidence and procedure in China. And so, with the blessing of his University, he traveled to Chicago to become my student. When he arrived (forgive me for telling the truth here, Bensen), he could barely speak English, and yet it was clear to me when I first met him in 2002 that he had a burning desire to learn and to bring back to China whatever useful knowledge he could obtain in the United States. Shortly after he arrived in the winter of 2002, he sent me an email that perfectly exemplifies this intensity and dedication. In it, he said, and I quote: “Professor Allen, I feel very happy to stay at your school of law and study with you. Although I meet some difficulties in listening class, I believe that I can study hard and make progress as soon as possible.” In truth, he met enormous difficulties, but he overcame them all, and he inspired others from China to follow in his path. I have had more than 30 Chinese scholars and Ph.D. students study with me in the United States, and hundreds in China in classrooms and lecture halls, and each of them demonstrated the intensity and desire to learn that Prof Zhang showed that first winter in Chicago. And they all share a deep love for China and a desire to assist it in its path of development that in fact is quite inspiring to me.

陈先生身后的一代中国法学家——我的首位中国学生张保生及在座的许多人就是很好的代表——同样应得到你们国家的赞扬。许多年以前，张保生教授就意识到法治是中国通往成功之路的重要，乃至最为重要的保障，而法治的关键在于要提升中国证据法和诉讼法的知识水平。为此，在单位支持下，他不远万里到美国芝加哥来做我的学生。初来乍到（保生，请原谅我在此说实话），他几乎不会说英语，然而 2002 年第一次见到他时我就能明确感受到他身上有一股强烈的求知欲并将带回中国任何他在美国可以获得的有用知识。在抵达芝加哥后不久的 2002 年冬天，他给我发了一封邮件，内容充分体现了这种决心和专注。邮件中提到：“艾伦教授，我很高兴能来到您的法学院并跟您学习。虽然我在听课方面遇到了一些困难，但我相信自己会努力学习并尽快取得进步。”事实上，他遇到了巨大的困难，但他都一一克服了，并且他激励了许多其他中国人前来追随他的轨迹。时至今日，我在美国带过的中国学者和博士研究生已逾 30 名，在中国的教室和讲堂上我亦已为数百名学生授课，他们中的每一个人都展现出了当年在芝加哥的第一个冬天里张保生教授所表现出来的那种强烈求知欲。并且，他们全都深爱着中国且均致力于要为中国的发展贡献自己的力量，在这一点上我深受启示。

I may have been a catalyst for some of these people and for change in China, but remember what the definition of a catalyst is: a catalyst is “a person or thing that provokes or speeds significant change or action without itself undergoing any permanent change.” Well, in one sense that would be me. As my Chinese students were coming in increasing numbers to the United States, and I was being invited more and more frequently to come to China to teach and lecture (this is my 18<sup>th</sup> trip), I simply treated my Chinese students, whether in Chicago and Beijing, as I would my American students—and I should add, I have the same high expectations of them, expectations that they have consistently met or exceeded. But, in large measure I simply taught my classes and continued with my research program. If my teaching, lecturing, and research have had a positive impact on China, the credit goes to my students, and not to me. They are the ones who have drunk deeply with an insatiable thirst from the font of knowledge that has become available to them, of which I am only a small part; they are the ones who processed and adapted this knowledge to the Chinese context, and are now putting it to very good use to assist in the development of the country.

对于这些人中的一部分以及对于中国所发生的变化，我或许充当了催化剂的角色，但请记住催化剂的定义：催化剂是“发动或者加速剧烈变化或行为的人或物，而催化剂本身不经历任何永久性变化”。从某种意义上说，这就是我。随着我在美国的中国学生越来越多，且被越来越频繁地邀请来中国授课和讲演（这是我第 18 次中国之旅），我所在做的就是将我的中国学生（无论是在芝加哥还是在北京）与我的美国学生一视同仁地对待，并且我想补充的是，我对他们有着同样高的期许，而他们的表现往往都能达到甚至超过我的预期。尽管如此，总体而言，我所做的仅仅就是上好每一堂课并继续我的研究项目。如果说我的教学、讲座和研究对中国已经产生了一定的积极影响，这些都归功于我的学生们，而不是我自己。是我的学生们在如饥似渴地学习他们所能获得的知识，而我所传授的仅仅是其中一小部分；是我的学生们针对中国实际情况处理和调整了这些知识，并在当下能很好地运用这些知识，助力中国的发展。

Indeed, to me it is somewhat ironic that we would be here tonight celebrating the publication of this book or over the next few days celebrating the China Friendship award, for I have gotten much more from you, my Chinese students and now collaborators, than ever I have or will bestow on you. A person like me is driven by two related desires. The first is to contribute to the growth of useful knowledge that may be of benefit to mankind, and the second is to prepare students for the time when they will be the ones guiding society. On both fronts, I have been astonished and gratified by what I have observed in this country. You have made tremendous progress in reestablishing your universities and law schools as distinguished centers of research, and you are now beginning to shape the future of your country. Nothing could be more gratifying to me than having played a small role in these developments. I take that back. Maybe something could be more gratifying and that is all the personal relationships that I have developed with so many of you based on mutual respect and admiration. So, in my opinion, I should be hosting this party tonight and over the next few days as an expression of gratitude to

all of you for the wonderful things you've brought into my life, and I believe I speak for my wife, Julie, here as well, who has been so moved by all the people she has met in Chicago and China and by the wonderful opportunities you have provided for us and my family. I have been blessed with a rich and rewarding life, and my experiences with China and my Chinese students have been a very important part of how fortunate I have been.

事实上，我们今晚集结庆祝本书的出版和接下来几天的中国友谊奖庆祝活动对我而言有些讽刺，因为我的中国学生们——我现在的好伙伴们，我从你们这里收获的要比我在过去或将来所能给予你们的要多得多。像我这类人的行动受两种相关期盼的驱使。其一是期盼能为惠及人类的有用知识之增长作出贡献，其二是期盼当自己培养的学生成为社会中坚时，传授给他们的知识能契合时代的需要。从这两方面来说，在中国的经历常常令我感到震惊和欣慰。在重建你们的大学和法学院、迈向一流学术研究中心方面，你们已经取得了重大进展，并且你们正在着手开始塑造中国的未来。对自己在这些大发展中能起到微小的作用，我感到无比欣慰。更令我感到愉悦的是我与你们当中许多人之间基于相互尊重和赞赏建立起来的个人关系。所以，在我看来，为了感谢你们所有人给予我人生的美好，主持今晚以及未来几天聚会的应该是我。在此，我相信我说这番话同样也代表了我的夫人茱莉。在芝加哥和中国遇到的所有中国人以及你们为我们及家人所创造的种种美妙机缘令她十分感动。能有如此富足和愉悦的人生是我的福分，而我在中国的经历以及我的中国学生们正是我之所以如此幸运的一个重要因素。

But, just in case you think in light of these remarks that I have become soft and sentimental over the years, let me assure you that that is not the case. When all these celebrations are over, we will return to normal, and what normal means is that I expect those of you in this room to fulfill your potential, indeed your destiny, of leading your country further down the path of development. In my opinion, the people in this room, and your colleagues across the country who study evidence, procedure, and are dedicated to the rule of law, comprise the single most important influence on your country's future. I mean this sincerely and literally. You who advance understanding of evidence, procedure, and their implications for the rule of law carry with you the hope of the country. This brings me to the book whose publication we are celebrating tonight, or more accurately it brings me to field of study—the field of evidence—of which it is a part.

但请不要因为我上述一番话就认为经过这些年我变成了一个柔软而感伤的人，那将会是误解。当所有这些庆祝活动结束之后，我们将恢复常态，所谓常态是指我期待着在座的各位能够发挥出各自的潜能，引领着你们的国家在发展的道路上继续前进，而这实际上也是你们的使命。在我看来，今晚在座的各位，以及中国各地正在钻研证据、诉讼并致力于法治的法律同行们组成了对你们国家的未来最具影响力的一股力量。对此，我深信不疑。掌握了证据法、诉讼法之精髓并深谙其对法治之影响的你们承载了这个国家的希望。这将

我的话题引到了我们今晚共同庆祝发行的这本书上，或者更确切地说，这将我的话题引到了对证据法领域的研究上，这本书的内容是其中一部分。

China and the United States have followed two quite different paths to where we are today. The last three hundred years of western civilization can aptly be called the post-Enlightenment period. Like all complex social phenomena, the Enlightenment has too many attributes to easily summarize, but in my opinion two stand out among all the rest. The first is the political aspect of the Enlightenment that inverted the relationship between the governed and the governors. Prior to the Enlightenment, it is only slightly an exaggeration to say that the people of a country or other political unit existed for the benefit of the governors. Peasants were referred to as cannon-fodder to be sent to their deaths in the pursuit of the grandiose ambitions of their lords. Under the influence of the thought of such people as Nicholas of Cusa and John Locke, the Enlightenment period slowly overturned this relationship to make the governors responsible to the people. The Declaration of Independence of the United States may have been the culminating political document where it says:

中国和美国发展到今天的程度，是走了两条截然不同的道路。过去三百年的西方文明可以被恰当地称作“后启蒙运动时代”。正如所有复杂的社会现象一样，启蒙运动有着太多的特性以至于难以总结，但在我看来其最显著的两个特性如下。首先是启蒙运动的政治意义，致使被统治者与执政者之间的关系反转。在启蒙运动之前，毫不夸张地说，一国的人民或其他政治实体是为了执政者的利益。农民被称作炮灰，至死都在为地主贪婪的欲望卖命。在尼古拉斯·库萨和约翰·洛克等人思想的影响下，启蒙运动缓慢地颠覆了这种关系，执政者开始要对人民负责。美国《独立宣言》可能是这种政治文献的巅峰之作，提到：

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, -- That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

我们认为以下真理不证自明：所有人生而平等，造物主赋予他们若干不可被剥夺的权利，其中包括生命、自由和追求幸福的权利。为了保障这些权利，人们才组建政府，而政府的正当权力是经被统治者同意授予的。任何形式的政府一旦对这些目标的实现起破坏作用时，人民便就有权予以更换或废除，以建立新的政府。新政府所依据的原则和组织其权力的方式，务使人民认为唯有这样才最有可能使他们获得安全和幸福。

China followed a different path and for understandable reasons. You were a great civilization when people in the West were living in hovels, ill-educated—indeed not educated at all—and barely able to sustain life. Before the foundations of modern western civilization were laid, China was concerned about governing a vast empire and suppressing chaos so that its people could flourish. No simple historical theory explains the present, and I do not wish to overemphasize this single point, but whatever the confluence of causes, communitarianism—subordinating the interests of the individual to the interests of the community—has played a much more vital role in your history than it has in ours. China, and again for whatever reasons, has been much more concerned about chaos and the West much more concerned about individual flourishing.

中国追随的则是另一条道路，且出于可以理解的原因。当西方人还在棚舍居住且无知时——毫无教育可言、几乎无法维持生活，你们已经成就了伟大的文明。在西方现代文明诞生之前，中国就已经在关注如何治理一个庞大的王国并抑制混乱，以便人民可以享尽繁华。尽管没有任何一种历史理论进行过解释而且我也不希望过分强调这一点，但无论个中缘由如何交错，与我们的历史相比，社群主义——强调个人利益从属集体利益——在你们的历史中发挥了更为重要的作用。不管出于什么原因，中国是对社会中的不和谐因素更加关切，而西方则更为关注个体繁荣。

The manner in which individual flourishing was protected and nurtured in the West was through the articulation of rights, and in particular rights against the Government that limit and control it. Indeed, were you to ask educated individuals in the West what best characterizes and preserves its way of life, most would answer individual rights. It is interesting that you in China are becoming increasingly focused on individual rights under the rule of law. I am not in a position to give you advice for you know your own conditions better than I do, but my intuition is that these are positive developments in your ongoing political evolution. However, and this is my main point, as important as rights and their reciprocal—obligations—may be, they are inadequate by themselves. This brings me to the second great revolution of the Enlightenment, the epistemological revolution that replaced dogmatic knowledge with empirical knowledge. Knowledge no longer was just what a person in authority asserted but instead involved observation of data that could be done by any intelligent person.

个人繁荣在西方受到保护和培育之方式是通过权利的制定，尤其是那些限制和控制政府的权利。事实上，如果你问西方的文化人，什么是对其生活方式的最佳描述和保持，绝大多数人会回答是个体权利。有趣的是，在法治环境下，中国的你们也开始越来越关注个体权利。你们比我更清楚你们自己的处境，在此我并非是要给你们什么建议，但我的直觉认为这是你们正在进行中的政治改革之积极进步。然而，以下才是我的主要观点，权利和与其相对应的义务固然重要，但光谈权利和义务是不够的。这将我的话题引到了启蒙运动的二次革命，一场以经验知识取代教条知识的认识论革命。知识不再仅仅出自权威的表述，而是包括进了任何智者可以做到的数据观察。

Why does this matter? Here is the key point. Rights and obligations are dependent upon what facts are found and are derivative of them. The significance of this point cannot be overstated. Tying the rule of law to true states of the real world anchors rights and obligations in things that can be known and are independent of whim and caprice. This point is truly universal. Neither rights nor obligations, on the one hand, nor policy choices on the other, can be pursued in the absence of knowledge of the actual, relevant states of affairs. Take a simple example—the existence of property. What does it mean to own something—like the shirts, blouses, pants, and dresses that each of you is wearing? The conventional answer is that you have the right to possess, dispose, control, and consume that physical item. But what happens when I demand that you give me the shirt off your back because I assert it is mine? You will find a fact finder to whom you will present evidence of sale, gift, creation, or discovery of the property, to convince the fact finder that the universe was in a certain state at a certain time such that you rather than I have the right to possess, alienate, control, and consume the item in question.

为什么说这一点很重要？要点如下。事实先于权利和义务，并且是权利和义务的决定因素。这一点的重要性不言而喻。把法治与真实世界的实际情况相联系的努力，锚定了可知事物中的权利和义务，并使其摆脱了反复无常和任性的支配。这一点具有真正意义上的普适性。在对实际、相关发生状况缺乏了解的情况下，无论权利、义务还是政策选择都无从谈起。另一方面，将权利与事实相联系赋予了权利以可靠性和稳定性，使得其不会被专横地剥夺。举一个简单的例子——财产权的存在。拥有某样东西——如你们每人所穿着的衬衫、上衣、裤子和裙子意味着什么？传统的回答是你们有权占有、处置、控制和使用该物件的权利。但是，假设我要求你们归还给“我的”衬衫。也就是说，我坚持你们所穿着的衬衫实际上是属于我的。你们会找到一个事实认定者，将你们所购买、制作、捡到或被赠予的证据呈现给他，以便说服该事实认定者某个特定时间下世界的特定状态，因而是你们而非我对该争议中物件拥有占有、让与、控制和使用权利。

Generalize this point. Rights and obligations, of any sort whatsoever, are meaningless without accurate fact finding. It does not matter whether the question is the right to possess, consume, and dispose of your clothes or the right to be free from torture, or the right to do anything whatsoever. It is the attachment of rights and obligations to the bedrock of facts—to how the universe actually was at a particular moment in time—that gives them substance. In addition to securing rights for their holders, grounding rights on facts permits people to negotiate around them in many different and important senses. Rights grounded in facts provide clear landmarks for both the holder and others, informing everyone of the legal potentiality and limits of rights. Choices can be made and lives planned with greater security with such knowledge. Equally important, the secure foundation of rights makes possible the emergence of markets in them—they can be alienated in the various ways permissible within market economies—which has led to the astonishing growth of wealth in those parts of the world that adhere to such commitments. That is why those of you who are studying and advancing knowledge about evidence, procedure, and the structure of legal systems, and bringing that knowledge to bear to

reform your law are absolutely fundamental to the continuing progression of your country. As you have moved from a less arbitrary to a more predictable legal system, your prosperity and ability to flourish have improved commensurately. I commend you for your astonishing achievements, am humbled to have played a small role in them, and wish you well in continuing these efforts.

概而言之，若没有准确的事实认定，任何权利和义务便都失去了意义。问题究竟是有关占有、使用和处置你们衣服的权利，还是有关免受折磨的权利还是做其它任何事的权利，都不重要。重要的是要将权利和义务锚定于事实的基石上——世界在某特定时刻的实际状态——是事实赋予了权利和义务以实质。除了为持有人争取权利，将权利固定在事实之上使得人们能够在许多不同和重要的意义上就其展开交涉。固定在了事实上的权利为持有人和其他人提供了清晰的指示，告知了所有人权利的合法潜质与限制。这种认知使得选择可以做出并且生活可以更安全地进行安排。同样重要的是，权利的安全基础使得其下市场的出现成为可能——权利可以市场经济中允许的各种方式进行转让——这已经使得那些信守此种承诺的国家和地区中财富得以惊人地增长。这就是为什么你们中那些正在学习并不断精进有关证据、诉讼和法律体系结构方面知识，并将这些知识运用于中国法律改革的人，对于你们国家的可持续发展至关重要。随着你们已经从较不任意专断的法律体系过渡到了更具有可预判性的法律体系，中国繁荣兴旺与蓬勃发展的能力也相应提升了。我为你们惊人的成就而由衷地赞叹，为自己在其中所起到的微小积极作用而感到荣幸，并将为你们继续向前努力而助力。

China, at least as judged by my students and what I know of other work being done here, has made tremendous strides in advancing knowledge about evidence and procedure. To the best of my knowledge, most of this work has focused, as it should in my opinion, on what I call the *Epistemological Problem*. The Epistemological Problem is just the problem of knowledge, which in turn determines how and what facts are found, which in turn determines rights and obligations. This is the most fundamental and most important aspect of the law of evidence, but there are other aspects to the field of Evidence and in my opinion they need your attention as well. The law of Evidence does not just structure fact finding; it does at least four other things as well that exist in a complex relationship with fact finding.

至少根据我学生们的判决以及我所了解到的其它已完成的工作，中国在证据法和程序法的学科建设方面已经取得了巨大的进步。据我所知，这些工作大多集中于被我称之为**认识论问题**，而且我认同这么做。认识论问题就是一个知识问题，其反过来决定了事实如何认定及认定了什么事，进而决定了权利和义务。这是证据法最基本也是最重要的方面，但是证据法领域还有其它方面，且在我看来你们同样需要关注证据法的这些其它方面。证据法不仅是在构建事实认定；其至少还安置了其它四个方面，这些方面与事实认定之间有着复杂的关系。

*The Organizational Problem:* The law of evidence regulates the interactions of the various participants in the legal system: trial judge, jurors and other lay assessors, attorneys, parties, and witnesses (both lay and expert) and constructs the framework for a trial. It allocates both power and discretion to each of the actors. However, the general framework for trials and the role individuals play within that framework can be highly socially contingent. Thus, the reformer of the law of evidence must ask not just what makes most conceptual sense, but also and equally important, what are the social expectations of the various participants? These two variables interact, of course. Sometimes the reformer should defer to social expectations and sometimes not. The task of the scholar is to try to specify the conditions under which deference should occur.

**架构问题:** 证据法是规范法律体系中各方参与者——审判法官，陪审员和其他外行评审员，律师，当事人和证人（包括外行和专家）——之间互动的关键机制。证据法构建了审判的框架。它给每个角色成员分配了权力和裁量权。然而，审理的总体框架和个体在该框架内所扮演的角色可能需要视社会具体情况而定。于是乎，证据法的革新不仅需要追求在概念上有意义，而且同等重要的是，需要了解社会对于各类审判参与者的期望值。当然，这两个变量是相互影响的。改革者们有时应当遵从社会期望值，而有时候又不需要这样做。学者的任务是要尽量去明确在什么条件得到满足的情况下改革者们就应当遵从社会期望值。

*The Social Problem:* As important as accurate fact finding is, trials may serve many other purposes, such as the potential symbolic and political purposes of trial. Both institutions and individuals can make statements through the means of trials, and actually impart lessons of various kinds. There is, in short, an extraordinarily complex set of issues that inform the nature of trials, and the reformer must at least ask whether any of them should influence the law of evidence.

**社会问题:** 除了准确事实认定，审判还可以服务于许多其它同样重要的目的，比如审判的潜在象征性和政治性目的。组织机构和个人二者都可以通过审判的方式来发表声明，并在事实上传递着各式各样的经验教训。总之，有一系列十分复杂的问题昭示着审判的本质，改革者们必须至少要问问这些问题是否有应该影响到证据法的。

*The Governance Problem:* Evidence law does not just structure fact finding; it also create incentives of various kinds. One very important incentive is that the law of evidence effects how much individuals will be encouraged to litigate. The admission or suppression of evidence can favor or disfavor litigation generally as well as individual types of claims. In addition, the law of evidence can create, and in most countries does, incentives for various primary behaviors, by which I mean the behavior of everyday life. Privileges are one example, but there are many others. They range from rape relevancy rules that are designed to encourage the bringing of sexual assault cases to things like the repair rule that are designed to encourage

individuals to reduce the risk of harm by eliminating dangerous situations. Accurate fact finding is important, but the deep question here is how accurate fact finding competes with other social values.

**管理问题:** 证据法不止于构建事实认定; 其还创设了多种激励机制。其中一个非常重要的激励机制就是证据法会影响到个人在多大程度上被鼓励来进行诉讼。证据的采纳或禁制可以支持或不赞成整体意义上的诉讼或具体类型的诉求。此外, 在绝大多数国家中, 证据法能够为各种主流行为(在此我是指日常生活行为)创设激励机制。特免权就是一个例子, 此外还有许多其他例子。从为鼓励对性侵害案件提起诉讼而设计的强奸相关性规则, 到为鼓励个人通过排除危险情况来降低损害风险而设计的修复规则, 证据法中的激励机制不胜枚举。准确的事实认定固然重要, 但这里的深层次问题是准确的事实认定与其他社会价值之间是如何竞争的。

*The Enforcement Problem:* Many times in my trips to China, I have discussed the distinction between the law on the books and the law in action. It is one thing to write laws and rules; it is another to enforce them in the way anticipated by the drafter of those provisions. The drafter of an evidence code may think that allocating discretion to someone, whether trial judge or attorney, makes sense, but the drafter will have in mind an approach to exercising that discretion that might not be shared by those being regulated by the rule. More generally, it is hard to enforce complex codes in social events such as trials. The event itself, the trial, is often fluid and unpredictable, and in any event it would be impossible to have every decision made at trial second guessed by some other authority.

**执行问题:** 在过去多次造访中国的经历中, 我已经提醒了你们书本上法律和实践中的法律两者的区别。编写法律和规则是一回事; 以那些条款的起草者们所期望的方式执行法律又是另一回事。一部证据法典的起草者也许会有理有据地考虑将裁量权授予某类人——无论是审判法官还是律师, 但其脑海中行使该裁量权的方法可能并不为该规定所规范的对象认同。更普遍地说, 在如审判这样的社会活动中执行复杂的法典是很困难的。社会活动本身, 比如审判, 往往是易变且难以预知的, 而且不存在可能性将审判中所做的每一个判决交由其他权力方来进行复议。

The point, which I suspect is obvious, is that notwithstanding all your achievements, you have a lot more work to do, as I should add we all do. The progression of knowledge is an ongoing river that never stops and never rests. For what it is worth, all of the points I have mentioned tonight are discussed in the various chapters of the book whose publication we are recognizing this evening. I am extremely humbled by the attention given to my work through the publication of this book, extremely grateful for the kindness that has invariably been extended to me and my family, and I must confess gratified that you think these various essays are worth being brought together and published in this format. But I just simply cannot end there. I must return one last time to the essence of a scholar and a teacher. Everyone like me hopes to

make contributions to knowledge, but we all realize we are but a small part of an ongoing conversation, a small part of a complex web of knowledge that continues to advance. It is a bit silly to invoke a great scientist like Newton, one of humanity's true geniuses while I am just a law professor, but even he said in a letter in 1676: "If I have seen further it is by standing on the shoulders of giants." This captures a fundamental aspect of the progression of knowledge, but it also captures a fundamental aspect of the nature of teachers: We may not be giants, but we want our students to surpass us and will be more than adequately compensated by the knowledge that we contributed to their success. Even Newton's crowning achievement, Newtonian physics, has now been supplanted by quantum mechanics and relativity theory. I hope that you find the substance of the various chapters of this book to be helpful to your research programs, but I look forward to the day when this book will just be interesting history, describing where thought and knowledge were but that have now been surpassed with new discoveries.

显而易见的一点是，虽然你们已经取得了斐然的成就，但仍然有更多的工作要做。在此我应该强调，你我都有更多的工作要做。知识的进步是一条永不停歇的河流。无论是否有价值，今晚我提及的所有观点均在首发式这本书各篇中进行了讨论。通过这本书的出版，对于我作品所受到的关注，我感到受宠若惊。非常感谢你们对我和我家人的恩惠，而且我必须承认，对于你们认为这些文章值得汇聚在一起以这种形式出版，我感到十分欣慰。所有像我这样的人都希望能为知识作出贡献，但我们都明白自己只不过是一场永恒对话中的微小部分，一张不断精进的复杂知识网里的一小部分。在此提到牛顿这般伟大的科学家有些荒谬，他是人类历史上真正的天才之一，而我只不过是一名法学教师，但即便是牛顿，也在 1676 年的信中提到：“如果说我看得比别人更远些，那是因为我站在巨人的肩膀上”。这句话很好地把握住了知识进步中的本质方面，同时还切中了教师本质中的一个根本方面：我们可能不是巨人，但我们希望自己的学生能超越我们，希望在他们通往成功的道路上我们能给他们补给充裕的知识。即便是牛顿的最伟大成就——牛顿物理学——如今也已被量子力学和相对论所取代。我希望你们会发现本书各篇中的内容会对你们的研究工作有益，但我所期待是在将来某一天这本书只不过是一部有趣的历史，讲述了过去的思想和知识，但已被新的发现所超越。

So, I am pleased beyond measure to be with you tonight, as Julie is as well. We thank you all very much for your hospitality not just tonight but over the years, and particularly thank you for taking time out of your busy schedules to be here tonight.

今晚能与你们相聚，我和茱莉都感到无比高兴。我们都很感谢你们不仅是今晚而是这些年以来的热情好客，最后还要特别感谢你们在百忙之中抽出时间来参加今晚的首发式。

(汪诸豪译)