

Book Signing Remarks of Professor Allen on Evidence (Volume I)

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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.

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.

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 18th 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.

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.

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.

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:

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.