

*New Observation on the Death Penalty
through the Fog*

穿越迷雾：

死刑问题新观察

赵秉志等 | 编著

中国法制出版社
CHINA LEGAL PUBLISHING HOUSE

京师刑事法文库48

促进死刑改革系列十三

赵秉志 总主编

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图书在版编目 (CIP) 数据

穿越迷雾：死刑问题新观察/赵秉志等编著. —北京：
中国法制出版社，2009. 9

ISBN 978 - 7 - 5093 - 1488 - 3

I. 穿… II. 赵… III. 死刑 - 司法制度 - 研究 IV.
D914. 04

中国版本图书馆 CIP 数据核字 (2009) 第 176676 号

策划编辑 张岩

责任编辑 王兵

封面设计 蒋怡

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编著/赵秉志

经销/新华书店

印刷/三河市紫恒印装有限公司

开本/640 × 960 毫米 16

版次/2009 年 10 月第 1 版

印张/22.25 字数/258 千

2009 年 10 月第 1 次印刷

中国法制出版社出版

书号 ISBN 978 - 7 - 5093 - 1488 - 3

定价：39.00 元

北京西单横二条 2 号 邮政编码 100031

传真：66031119

网址：<http://www.zgfzs.com>

编辑部电话：66022958

市场营销部电话：66033393

邮购部电话：66033288

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北京师范大学刑事法律科学研究院

京师刑事法文库

总 序

现代化的国家是法治国家。现代文明进步的社会是法治社会。我国依法治国、建设社会主义法治国家之基本治国方略的确立及其贯彻，对社会的发展进步至关重要。而现代刑事法治则在现代化法治国家中扮演着非常重要的角色。改革开放后的二十多年来，我国的刑事法治已经取得了长足的进步。但是，在新世纪建设社会主义法治国家的进程中，无论是刑事法学理论还是刑事法治实践，都仍需要进一步发展完善，以更为充分地发挥其应有的作用。

北京师范大学刑事法律科学研究院于2005年8月建立，系专门从事刑事法学理论研究的、中国刑事法学领域首家且目前唯一的、独立的实体性、综合性学术研究机构。研究院以一批中青年专家学者为中坚，并聘请了包括老一辈著名刑法学家、中央政法机关专家型领导以及重要国际组织领导人在内的国内外知名刑事法专家、学者担任特聘顾问教授、专家委员会委员、兼职教授（研究员）。研究院的设立，旨在建设全国领先并与国际知名刑事法学机构看齐的新型刑事法学术机构，本着刑事法学一体化的精神，逐步全面发展中外刑法学、国际刑法学、区际刑法学、刑事政策学、犯罪学、刑事执行法学、中外刑事诉讼法学、刑事证据法学、刑事司法制度等刑事法的诸多学术领域，培养高级刑事法学专门人才，为中国法学研究和高层次人才培养进行新的探索，力争为中国依法治国、建设社会主义法治国家的伟大事业在刑事法学领域作出更大的贡献。

为达此目标，研究院成立伊始即创办“京师刑事法文库”。研究院的主要成员在中国人民大学刑事法律科学研究中心工作时，亦曾设立

“刑事法律科学文库”与“国际刑法研究所文库”，并已颇具规模。为获得更为广阔的学术发展空间与学术交流平台，数位首批加入北京师范大学的专家学者创立了全国首家实体性的刑事法律科学研究院。学术事业是薪火相传、继承发展的事业，为使刑事法学术事业得到进一步传承和发扬，北京师范大学刑事法律科学研究院遂在我们设立的原“刑事法律科学文库”与“国际刑法研究所文库”的基础上，重新创办了两个系列著作项目，并定名为“京师刑事法文库”和“京师国际刑事法文库”。两个文库是分工不同、相辅相成的姊妹项目，前者以国内刑事法著作作为范围，后者以国际刑事法著作作为范围。两个文库以百年名校北京师范大学深厚的学术积淀、悠久的历史传统和浓郁的文化氛围为依托，凭借北京师范大学坚实宽广的人文社会科学和自然科学的综合实力，并广泛争取和吸纳中外刑事法学界的支持与帮助。“京师刑事法文库”的出版领域主要包括国内刑事法律与刑事法学方面（包括刑法、犯罪学、刑事执行法学、刑事诉讼法学、刑事侦查、刑事物证技术等领域）的有新意、有深度、有分量的著作与译作，也会涉及我国港澳台地区刑法暨中国区际刑事法等领域的科研成果，可以是专题研究、综合研究，也可以是论集、有价值的文献资料等形式。同时，为积极关注刑事法治领域内的重大现实问题，“京师刑事法文库”还将相关专题的著作予以集中，设立若干系列，并聘请著名刑事法学专家担任总主编。文库的作者以研究院专职、兼职研究人员为主，并向其他专家、学者开放。

我们希望通过文库形式能逐步积累学术成果，繁荣、深化和开拓刑事法领域的学术研究，促进国内外刑事法学界的交流合作，不断提高我国刑事法理论与实践水平，进而有力地促进国家现代法治之昌盛和社会的文明进步。

北京师范大学刑事法律科学研究院

院长 赵秉志 教授

谨识于乙酉年初秋

Criminal Law Library of BNU

Preface

A modern country and a modern civilization should be governed by law. The establishment and actualization of the principal guideline of rule by law is crucial for our society to make progress in the efforts of constructing socialism under rule of law. Modern criminal law, playing a very important role in the development of modern society under rule of law, has achieved great progress in the past two decades since 1978 when the reform and opening-up policy was carried out. Whereas, further development and reform for both theory and judicial practice of criminal law are required in the process of building socialist legal democracy, so as to bring it into full play.

The College for Criminal Jurisprudence Studies of Beijing Normal University, founded in August of 2005, is the first and, at present, the only academic research organ in China specializing in criminal jurisprudence that is independent and comprehensive entity. The College is staffed with a group of famous young and middle-aged criminologists as academic nucleus and a group of criminologists and scholars known home and abroad as specially invited consultative professors, member of experts committee, guest research fellows (professors), including those senior professors, leaders with judicial expertise from the central procuratorial, judicial and public security departments and leaders of some important international academic organizations. The college, aiming at turning into a new national leading academic body which can keep pace with international prestigious organs of criminal jurisprudence, is gradually extending its research fields covering

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Chinese and foreign criminal jurisprudence, international criminal law, trans-regional criminal law, criminal policy science, criminology, criminal executive law, Chinese and foreign criminal procedure law, criminal evidence law, criminal judiciary and so on following the spirit of integrated criminal science. Meanwhile, the College trains high-level criminal jurisprudence professionals and makes new exploration into research of jurisprudence and cultivation of high-level professional in China. We are trying our best to make a greater contribution in the field of criminal law science to the great cause of building our socialism under rule of law.

Cherishing this hope, the College initiated the Criminal Law Library of BNU as soon as it is founded, with the working experience of Criminal Jurisprudence Library of Renmin University of China (RUC) and International Criminal Jurisprudence Library of RUC which had been established in the Criminal Jurisprudence Research Center of RUC and in a rather large scale before the main staff's transfer to the College. In order to obtain a broader space for academic research, we six scholars transferred from RUC to BNU and founded this first and the only one independent academic entity in our country—College for Criminal Law Science of BNU. Learning is a continuous business, so the College re-establishes two book-series programs named “Criminal Law Library of BNU” and “International Criminal Law Library of BNU” based upon the former two libraries so as to further develop our academic cause. The two sisterly programs undertake different missions and supplement each other. The domain of the former focuses on domestic criminal jurisprudence literatures and the latter on international criminal jurisprudence literatures. Depending upon the profound academic deposit, centuries-old historical traditions and full-bodied cultural atmosphere of the prestigious Beijing Normal University and with BNU's comprehensive and powerful integrative strength in both fields of humanity social science and nature science, the two libraries will attract and accept the contributions from the field of criminal jurisprudence home and abroad. The publications of Criminal Law Library of BNU cover the creative and profound works and translations on domestic and foreign criminal jurisprudence (criminal law,

criminology, criminal execution law, criminal procedure law, criminal investigation and criminal evidence etc.) and those academic and research fruits in the field of extroversive criminal law (including international criminal law ,comparative criminal law ,foreign criminal law and criminal laws of Hong Kong ,Macao and Taiwan). The publications may be of either special topics or general topics or translations of foreign literatures and codifications. Meanwhile, in order to attract active concerns with important realistic issues, publications on the related topics will be collected and affiliated to Criminal Law Library of BNU as new book-series with famous criminal jurisprudence specialists as their chief editor. The authorships of Criminal Law Library of BNU are mainly entitled to full-time and guest research fellows besides other experts and scholars engaged in criminal jurisprudence.

Through these programs of libraries, we seek to help to accumulate academic fruits, to exploit and deepen and thrive the academic researches on criminal jurisprudence, to facilitate exchanges and co-operations between domestic and foreign colleagues engaged in criminal jurisprudence and to gradually improve our theoretical and practical expertise of criminal law so as to accelerate the prosperity of our country under rule of law and the progress of social civilization.

Prof. Zhao Bing-zhi
Dean of College for Criminal Law Science
Beijing Normal University
Autumn of 2005

“促进死刑改革系列”序言

历经长达两个半世纪之争论，死刑的限制与废除已被越来越多的国际法律文件所认可，废除死刑的呼声可谓日渐高涨。1948年《世界人权宣言》作为人权国际保护的纲领性文件，强调了生命、自由和人身安全的权利，为死刑的限制和废除奠定了法理基础。1966年联合国《公民权利和政治权利国际公约》第6条，首次在国际公约中对适用死刑明确加以限制。随后的《美洲人权公约》以及联合国《关于保障面临死刑的人的权利的措施》，对死刑则作了进一步限制性规定。20世纪80年代，《〈欧洲人权公约〉关于废除死刑的第六议定书》、《旨在废除死刑的〈公民权利与政治权利国际公约〉第二项任择议定书》以及《〈美洲人权公约〉旨在废除死刑的议定书》先后问世，废除死刑在一定范围内开始成为国际法规范。上述国际性法律文件不仅为限制或废除死刑确立了国际法依据，使成员国在限制、废除死刑问题上承担了相应的法律义务，也为限制或废除死刑的运动建立了国际保障机制。死刑不但已失去了其以往在刑罚体系中的核心地位，而且限制、减少死刑乃至废除死刑已成为世界性的潮流与趋势。伴随着此一社会发展趋势，死刑存废问题亦已成为今日中国刑事法治领域的热点话题，而其中关于非暴力犯罪的死刑废止问题更是引起了中国社会的广泛关注。经过实务界与理论界多年来的共同努力，中央有关领导机构已做出英明决策，决定将死刑立即执行案件的复核权收回最高人民法院。而最高人民法院也正在为现行死刑复核制度的完善和改革作充分准备。虽然这只是实务程序性的改革举措，但必将给中国限制、废止死刑之路带来质的突破。这样一个彰显社会文明与法治发展进步的历史性变革，当然离不开刑事法学界的积极参与和鼎力协助。就死刑制度而言，无论是刑事立法还是刑事司法，亦无论是刑事实体法还是刑事程序法，都亟需学界同仁广泛调研、深入研究，并提出切实可行的改革与完善

措施。

北京师范大学刑事法律科学研究院（以下简称刑科院）作为专门从事刑事法学研究的、中国刑事法学领域首家且目前唯一的具有独立性、实体性、综合性的学术研究机构，自建立以来得到了法学界与法律实务界的广泛支持并被寄予厚望。刑科院自当以促进中国刑事法治发展为己任，努力为国家刑事立法和刑事司法的改革与完善建言献策。研究院的主要成员近年来十分关注并致力于推动我国限制与逐步废止死刑的法治进步事业：2003年我们组织一批专家学者在《法制日报》率先提出并集中研讨了在中国逐步废止非暴力犯罪死刑的重大现实命题，在此基础上我们于2004年3月出版了中英文本的《中国废止死刑之路探索——以现阶段非暴力犯罪废止死刑为视角》一书，从而引起社会的关注，并在人权保障和法治进步方面产生了良好的国际影响；2004年5月我们与湘潭大学法学院合办了“死刑的正当程序学术研讨会”，并于2004年12月出版了《死刑正当程序之探讨——死刑的正当程序学术研讨会文集》一书；2004年8月和12月，我们又主持召开了“中英限制死刑适用范围合作项目系列专题论坛”第1-4次论坛，对经济犯罪、财产犯罪中的死刑废止问题进行了理论与实务相结合的探讨；2005年3月，我们与英国大使馆文化教育处联合主办了“中英死刑适用标准及死刑限制学术研讨会”，集中对死刑适用标准及死刑限制问题进行了研讨；在我们近几年来进行的中美、中韩等刑法学术交流活动中，死刑的改革也都成为重要议题之一。而研究院于2005年8月成立后，死刑问题更是成为我们关注与研究的重点课题。研究院成立伊始便创办了“关注死刑改革系列论坛”，由著名刑法学家或者知名刑法学者担纲主讲，旨在配合最高人民法院收回死刑核准权、推动死刑改革的理论研究。2006年1月，研究院将专职研究人员与部分兼职研究人员近年来关涉死刑问题的重要研究成果，以及主要研究人员在所组织的学术活动中收集到的部分相关重要论文汇编成集，正式出版了《死刑制度的现实考察与完善建言》一书，以期为国家限制与逐步废止死刑的法治实践和相关学术研究提供参考。同时，刑科院主要成员还就死刑改革问题向国家立法机关、中央政法领导机关提交了多份研究咨询报告。诸如：《五种常见多发犯罪之立法完善研究——以死刑适用标准的立法完善为重点》、《当代中国死刑问题聚焦——死刑的存废、

适用标准及改革完善学术观点综述》等等。此外，研究院还专门建立了汇集全国有关研究力量的死刑专门研究机构——北京师范大学促进死刑改革研究中心。该中心的建立，旨在配合国家逐步限制与减少死刑的法治进步，吸收全国性的研究力量就死刑改革问题开展专门研究，从而为国家切实推进死刑改革建言献策。总之，作为专门的刑事法研究机构，我们希望在死刑的限制与逐步废止这个关系到当代中国刑事法治进步的重大问题上做出积极的贡献。

也正是基于上述考虑，并在以往科研活动与学术成果的基础上，我们进一步创办了“促进死刑改革系列”，并整体纳入“京师刑事法文库”。本系列丛书可以是专题著作、研讨文集，可以有相当分量的博士学位论文，也可以是国外、境外相关著作的介译之作。著译者以研究院专职、兼职研究人员为主，并向国内外专家、学者开放。我们期待通过推出这一主题集中、题材广泛、视野开阔的“促进死刑改革系列”丛书，不仅可以将关涉死刑问题的研究推向纵深，而且能够使该问题得到社会进一步的关注与重视，以期为国家逐步限制与废止死刑之改革历程提供充分的理论准备，创造必要的社会与文化氛围。

事实上，当代法治先进国家和地区的发展实践已充分证明，刑事法治的现代化程度及与之相应的刑法基础观念的普及程度，乃是一个国家、一个社会法治文明、人权事业进步的重要标志。其中，死刑的法治命运和理念至关重要。我们相信，严格限制、逐步减少乃至尽可能地早日废止中国刑事法治中的死刑，有益于中国的法治文明、人权保障和社会进步。法界同仁有责任呼吁全社会共同关注中国的死刑问题，共同为促进中国的法治现代化和人权保障事业竭诚努力。

“促进死刑改革系列”总主编

赵秉志教授 谨识

2006年7月

Book Series on Facilitating Reform of Death Penalty

Preface

After about two and a half centuries of debates, restriction and even abrogation of the death penalty has been recognized by more and more international instruments, and the pitch of cry for abolition of capital punishment becomes higher and higher. Universal Declaration of Human Rights (UDHR) of 1948, as a programmatic document of international protection of human rights, emphasizes the rights of life, freedom and personal safety, which provides the jurisprudence basis for restriction and eradication of death penalty. The Article 6 of International Covenant on Civil and Political Rights (ICCPR) of 1966 of United Nations (UN) first specifies the restrictions on application of capital executions in an international instrument. The following American Convention on Human Rights (ACHR) and ECOSOC Safeguards Guaranteeing the Protection of the Rights of Those Facing the Death Penalty make a further restriction on death penalty. In 1980s, the Sixth Protocol Concerning Abolition of Death Penalty of European Convention on Human Rights (1985), the Second Optional Protocol Aiming at Abolishing Death Penalty of ICCPR (1989) and the Protocol aiming at Abolishing Death Penalty of ACHR were successively adopted, so it begins, in a certain extent, to become a rule of international law to abolish death penalty. The preceding international instruments not only provide the international legal sources for restriction and abolition of death penalty and impose party states with corresponding legal duties concerning restricting and

abrogating death penalty, but establish a international mechanism guaranteeing the movement of restricting and abolishing death penalty. The death penalty has lost its previous dominant status in the criminal penalty system and it has become a universal orientation to restrict, reduce and even eradicate death penalty. Along with this trend of social development, the issue of restriction and abrogation of death penalty has become a hot topic among the circle of criminal law in nowadays China. After years of joint efforts of theoretical and practical fields, the Central Authority has made a wise decision to retrieve the right of reviewing those cases with a possible capital sentence of prompt execution to the Supreme People's Court. Consequently, the Supreme People's Court is now making ready for reforming the current death penalty review system, which, although just a practical procedural reform, will certainly bring about a big breakthrough for restriction and abolition of death penalty in China. Such a historical reform reflecting our social civilization and legal progress is inevitably involved with the active participation and diligent working of the field of criminal law. As for the death penalty system, not only criminal legislation and criminal justice, but also criminal substantial law and criminal procedural law, still require the theory field to make extensive investigations and comprehensive researches and to propose maximum applicable reform suggestions.

The College for Criminal Jurisprudence Studies of Beijing Normal University, as the first and, at present, the only academic research organ in China specializing in criminal jurisprudence that is independent and comprehensive entity, has won far-ranging supports with high expectations from both fields of legal theory and practice since it was founded in August of 2005. The College, of course, will undertake the mission as its own responsibility to facilitate the development of criminal law and to try its best to make more propositions on reforming criminal legislation and criminal justice in our country. The main members of our college have been closely observing and engaged in the progressive legal cause of facilitating our country to restrict and eradicate the death penalty. For example, in 2003, we organized a class of scholars and specialists initiating an intensive discussion

over the important practical issue of abolishing death penalty for non-violent crimes gradually in China, based upon which, we published an English-Chinese bilingual book titled *The Road of the Abolition of the Death Penalty in China*; regarding the Abolition of the Non-violent Crime at the Present Stage in March of 2004, which aroused the society's concern with death penalty and exerted a good international influence in the perspective of protection of human right and progress of rule of law; In May of 2004, we co-organized with the Law School of Xiangtan University the Academic Symposium on Due Process for the Death Penalty and published a book with the title of *Probing into Due Process of Death Penalty: Analects of the Academic Symposium on Due Process For the Death Penalty* in December of 2004; In August and December of 2004, we organized four sessions on special topics of the Series Symposiums of Sino-British Joint Project of Restricting the Scope of Application of the Death Penalty, which comprehensively probed, combining theory with practice, into the issues concerning abrogating the death penalty for economic crimes and property crimes; In March of 2005, we cosponsored with the Culture & Education Section of UK Embassy an Academic Symposium on Sino-British Application Criteria and Restriction of Death Penalty which focused upon the issues concerning application standards of and restriction of death penalty; In the Sino-America and Sino-Korea academic exchanges of criminal legal science which we participated in recent years, the reform of death penalty has become a major subject. Along with the foundation of the College, the issue of death penalty has become one of the major research subjects with our closer concern. No sooner than establishment of the College, we organized Series Forums Concerning Death Penalty Reform, where speeches were chaired and delivered by famous criminal jurists and scholars, for the purpose of being in concert with the Supreme People's Court retrieving the right of reviewing cases with a possible capital sentence of prompt execution and impelling the theoretical researches on reform of the death penalty. In January of 2006, the College published a book named *Investigation and Legislative Perfection on Death Penalty System*, which is a collection of major research fruits and articles concerning the issue of death

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penalty by the full-time and part-time research fellows of the College in recent years, in the purpose of providing reference to our country's judicial practice of restricting and gradually eradicating the death penalty and the corresponding academic researches. Meanwhile, the main members of the College have successively submitted several research & consultation reports concerning reform of the death penalty to the national legislature and the central political and legal departments, such as Propositions of Legislative Reform Concerning Five Common Crimes with Frequent Occurrence; Focusing on Reforming the Application Standard of the Death penalty and Focusing on death penalty in modern China; Summary of Academic Viewpoints on Restriction & Abolition, Application Standard and Reform of the Death Penalty etc. In addition, the College established a center specializing in studies of the death penalty which converge on the corresponding research forces all over the country——The Research Center of Facilitating Reform of the Death Penalty of Beijing Normal University, for the purpose of being in concert with our country's progress of rule of law in gradual restricting and reducing the death penalty and attracting the research forces all over the country to specially study the issue of reform of the death penalty, so as to propose valuable and applicable advices facilitating national reform of the death penalty system. In a word, as a research institute specializing in criminal jurisprudence, we hope that we can make more active contributions in restricting and gradual abrogating the death penalty since which is crucial for the progress of rule of law in nowadays China.

With the preceding considerations and basing upon the previous research activities and academic achievements, hereby we further establish Book Series on Facilitating Reform of Death Penalty as an integrated section of Criminal Jurisprudence Library of BNU. The publications of the Book Series may be either books on special topics or article collections or valuable doctoral dissertations or translations of foreign literatures and codifications. The authorship is mainly entitled to full-time and guest research fellows besides other experts and scholars, domestic and abroad, engaged in criminal jurisprudence. We hope the Book Series on Facilitating Reform of Death

Penalty may deepen the studies on the issue of the death penalty and arouse further concern and attention of the society on the death penalty, so as to provide sufficient theoretical preparation for our country's gradual restriction and abolition of the death penalty and to create a necessary social and cultural atmosphere.

In fact, the practice of the contemporary countries and regions under rule of law has fully revealed that the extent of penal modernization and the popularization of the correspondent basic concepts of criminal law, of which the legal destination and belief of the death penalty is certainly inseparable, are important indicators of the legal civilization and progress of the cause of human rights in a country and a society. We firmly believe that the prudent restriction, gradual reduction and eradication as soon as possible of the death penalty in China will do good to our legal civilization, human rights safeguard and social progress. All colleagues engaging in legal science share the common responsibility in appealing to the whole society to care the death penalty in China and in making joint efforts to facilitate the modernization of legal cause and safeguard human rights in China.

Prof. Zhao Bing-zhi

July of 2006

前 言

在人类的历史上，死刑由来已久，源远流长。《荀子》云：“杀人者死，伤人者刑，此乃百王之所同，不知其所由来者也。”但是，随着历史的发展，人类社会逐渐对死刑呈现出发展变化的态度，形成了死刑存置论和死刑废止论的对立观点。有意思的是，这种分歧不仅在世俗社会中广泛存在，而且在宗教中也是如此。例如，有基督教徒认为，《旧约》中提到要判死刑的行为总共有 19 项，《创世纪》九章 5 至 6 节就提出了“以命偿命”的原则，而十诫之六的“不可杀人”指的仅仅是“谋杀”。但也有基督徒认为，《旧约》刑罚制度的设立是为了平衡、节制复仇心理，并不能当作上帝真正的心意。因为该隐杀了亚伯之后，上帝并没有处决他，而是将他流放，甚至为他加了一个记号——怜悯的记号，好让他不至遭他人“杀害”。因而可以认为，《旧约》律法的精义并不在于赞成死刑，反倒在于强调生命无价。再如，在佛教中，有大师指出，废止死刑在佛教因果法则上是无法成立的。如是因招感如是果，造因不受果是不对的。死刑虽然残忍，但合乎佛教因果报应的原则。佛教首重戒杀，但其中亦有多种层次，上座部的罗汉以慈悲宽恕敌人，也有的因自卫而杀死对方；大乘的菩萨却以杀少救多，杀坏救好而担当起杀人的责任，这也要视其内心起念的不同去衡量。^①但也有人从佛教的基本教义出发认为，“不杀生”是佛教的第一大戒，因而佛教是绝对反对死刑的。甚至裁判死刑、执行死刑的人也都犯了杀生罪。另外，佛教认为人人都有佛性，都可以改造好，而死刑断绝了犯罪人放下屠刀立地成佛的可能性。可见，不仅在世俗社会，即使在宗教中，对于死刑问题也是见仁见智的。

其实，让人们纠缠不清、难以抉择的问题在于：是应该以暴制暴、

^① 星云：《佛光教科书》，台湾佛光出版社 1999 年版，第 365 页。