

Are Individual Rights Necessary?

A Confucian Perspective

Craig K. Ihara

I. WHERE INDIVIDUAL RIGHTS ARE OUT OF PLACE

I would like to begin by considering some familiar contexts in which talk of rights, especially those one person might claim against another, seems quite out of place.

1. On sports teams, say basketball, people have assigned roles appropriate to their various talents. A point guard is, among other things, in charge of running the offense, doing most of the ball handling, setting up plays, and getting the ball to people in scoring position. A center, usually the tallest player on the team, is responsible for dominating the area under the basket, rebounding, blocking shots, and scoring from inside. Suppose that on a specific occasion, the point guard fails to pass the ball to the center who is wide open under the opposing team's basket. What might one say? That the point guard made a mistake, did something wrong or incorrect, did not do what she was supposed to, failed to do her job, messed up, or fouled up. If, for whatever reason, she regularly misses such opportunities, she can be regarded as a poor or bad point guard and is likely to lose her position. Other members of the team can legitimately complain about her incompetence, lack of court sense, or selfishness, although in the name of team spirit they should not be too quick to criticize.

What we have in basketball or any similar game is a practice - to use Alasdair MacIntyre's term' - in which participants have roles and responsibilities, criteria of good and bad performances within the context of the game, and an array of critical responses. In such practices people have

duties in the sense of role responsibilities, but they do not, I maintain, have individual rights.

What supports this claim? First of all it is a straightforward fact that the language of rights is not used within the game of basketball, although it is used outside of the game during professional contract negotiations or in other legal or quasi-legal situations. It would at least be unusual to say when the point guard failed to pass the ball to the center that she had failed to respect the center's rights or infringed or violated the center's right to the ball.

Suppose that we were to attribute rights to the center in this situation, what more would we be saying than we have already, namely that the point guard had failed to do her job, did the wrong thing, et cetera? We would be saying that in this situation the center had something, a right to the ball, which the other players on the team did not have, and that in failing to do what she was supposed to do, the point guard injured the center by denying her what was rightfully hers. The point guard not only did the wrong thing, she wronged the center, violated her rights, and deprived her of her due. Consequently the center is not only more justified than her other teammates in being angry and indignant, but she is also justified in demanding some sort of compensation. I maintain that talking this way about basketball or any sport is odd to say the least, and, if taken seriously, changes the game in a fundamental way. It reconceptualizes the activity in a way that makes basic the individual, and not the team.

Now it is certainly true that players get mad at each other, even if they are on the same team. In the play described, it would not be surprising if the center were even more upset with the point guard than the other players were. After all, because of the point guard's mistake, the center missed an easy opportunity to score and help the team win. But though this is understandable, it does not follow that the center's rights had been violated by the point guard. Indeed if she were to chastise the point guard for what she had done *to her*, as opposed to what she had done to injure the team's chances to win, she would be condemned for lack of team spirit.

Other rather different kinds of examples can be drawn from sports in which the use of rights language is at least unusual and unnecessary. These concern rule infractions, rather than failures to fulfill role responsibilities. As with most sports, basketball has a number of rules about what players can and cannot do in the course of a game. When players violate a rule, they are penalized, and this is not typically articulated or conceptualized in terms of rights violations. For example, traveling (sometimes

called taking steps) is a rule violation resulting in turning the ball over to the opposing team. Many infractions - stepping over the line when shooting a free throw, or substitution violations - are like this; they do not directly involve an opposing player, and it would be difficult to translate or conceptualize them in terms of a violation of rights.

There are other kinds of examples of rule violations in basketball where rights-talk would not be so difficult or awkward but would still be unusual and unnecessary. Consider instances when a player is fouled by a member of the opposite team. In such cases players frequently complain to the referee in words that say in effect, "Did you see what she did (to me)?" There is nothing inappropriate in saying this insofar as the player is pointing out behavior that violates the rules. Anyone, including the fans, can do this. The key question is whether it *must* be conceptualized in terms of a violation of rights.

So for example, a defensive player who holds an opponent in order to prevent her from driving to the basket is committing a foul; we might even say that she is fouling that player, breaking the rules, doing what is not allowed, doing what she shouldn't do, or not playing fairly. But we don't normally say that she is violating the player's rights. It isn't that we couldn't conceptualize it in this way, but there would not be a point in doing so. Clearly, if the defensive player has committed an infraction, there should be a penalty. If no penalty is called, anyone, including the fans, has grounds to protest. But what they will cry is "Foul," or even "She was fouled," not "Her rights were violated." Note that even "She was fouled" need not be conceptualized as a violation of rights. "She was fouled" can be construed as comparable to "She was injured," something that can be perfectly well understood without invoking or even understanding the concept of rights. All that is necessary is the understanding that the offending player did something she should not have done according to the rules. Introducing the notion of rights here takes the focus away from the team and is unnecessary for playing the game.

2. Consider another context - dance. In a ballet people have their parts to play, they each have sequences of movements that they should perform. But even though the dancers in *Swan Lake* each have their individual roles and responsibilities, it is, I maintain, conceptually wrongheaded to think of dancers as having rights against each other within the context of the dance.

For one thing, there are no rules in ballet on which to base individual rights or duties. For another, dancers would not claim that their rights are

violated when others fail to do what they should. If I forget my routine, then I can be said to dance poorly. I might even feel obliged to apologize to my dancing partner, or to the entire group. However, in making a misstep - for example, I fail to help you complete a pirouette - it would be odd to say that I infringed on your rights. I may be frustrating you, making you angry, or letting you down in the sense of disappointing you, and you may have good reason to criticize my performance or insist on a better effort on my part, but such criticism and insistence can be understood quite independently from talking about violating your rights.

Of course you might have a right to expect that I do certain things in the sense that you know what has been choreographed, but your expectations are not based on some obligation I have to you. The right here is epistemic. There is a reasonable basis for your belief, a normal expectation that I will perform in a specific way. In other words, you might be said to have a right, in the sense of a rational justification, to point out my failure to live up to my role. That justification you have in common with anyone else who sees and appreciates my mistake. But this is not a case where doing wrong constitutes a violation of your rights.

3. Consider a third context. Ceremonies and rituals are perhaps more like dance performances than competitive games, but they share some basic features with both. On the one hand, like ballet, they are practices in which people assume roles, and those roles have stipulated responsibilities. As in dance, success depends on a kind of cooperation, a joint effort in which the fulfillment of any one person's objectives largely depends on the efforts of everyone else, and even more importantly the objectives of any individual largely coincide with the common good.

On the other hand, as in competitive games, rituals and ceremonies often have rules, albeit of a different type; so, for example, a state dinner has a certain protocol. More than any other, this context of rituals and ceremonies, along with its role responsibilities and rules of behavior, resembles the Confucian vision of an ideal society.

Now I claim that in these and other contexts talk of individual rights is at least unusual and unnecessary. Later I will also claim that these practices resemble the Confucian social ideal in some fundamental ways. They are all intended to describe contexts in which there need not be any individual rights in the sense of special moral claims to something or other that one person has and that can be infringed by others. Although it has taken some time to get to the issue, I hope that keeping those

examples in mind, and elaborating on some of the differences between them, will provide a contrast that will facilitate our discussion from this point on.

II. THE DEBATE OVER THE IMPORTANCE OF INDIVIDUAL RIGHTS

In recent years, important specialists in Confucian philosophy, such as Tu Wei-Ming, Henry Rosemont, Roger T. Ames, and Chad Hansen,² have all claimed that there is no concept of rights in traditional Confucian thought.³ Although this claim is itself controversial,⁴ and the debate concerning it far from over, I would wager that a majority of Confucian philosophers would concur. I would also speculate that philosophers specializing in other non-Western ways of thought are likely to hold comparable positions about their respective moral traditions.

At the same time important figures in Anglo-American moral philosophy, including Ronald Dworkin, Joel Feinberg, Alan Gewirth, Judith Jarvis Thomson, A. I. Meldon, and J. L. Mackie, have forcefully argued in various ways for the fundamental importance of rights, not just for Western ethical theory, but for any philosophically acceptable morality.⁵ To quote Alan Gewirth, "recognition and protection of human rights is a necessary condition of the moral legitimacy of societies."⁶

It seems that if the Confucian specialists are correct and there are no rights in Confucianism, we have a dilemma: either Confucian ethics is morally deficient in a fundamental way or Western advocates of rights have somehow gone wrong. It is this dilemma that I will begin to explore in this chapter by examining the arguments presented by Joel Feinberg in his well-known and influential article, "The Nature and Value of Rights."⁷ I will use Feinberg to illustrate how Anglo-American rights advocates overstate their case, and how, even without the concept of individual rights, Confucian ethics is not vulnerable in the way Feinberg's argument suggests.⁸

III. FEINBERG'S "NOWHERESVILLE" AND ITS IMPLICATIONS

In his article, "The Nature and Value of Rights," Joel Feinberg asks us to imagine a world, "Nowheresville," in which people have no rights in the sense that they cannot make moral claims against each other, but where:

1. People are as virtuous as we can imagine, consistent with what we know of human nature.

2. People have imperfect duties (e.g., charity), which are not to any other specific person or persons.
3. People have a weak sense of desert, that is, they can see that some rewards and punishments are fitting, as when the best contestant wins the prize, but in which people cannot demand what is fitting any more than a servant has grounds to insist on extra pay for especially fine work.
4. In order to have institutions such as property, promises and contracts, bargains and deals, appointments and loans, and marriages and partnerships, Nowheresville has a "sovereign right-monopoly" in which all such practices entail rights, but only those of the sovereign.⁹

According to Feinberg, even though Nowheresville is as morally good a place as we can imagine without rights, there is something missing. Feinberg states:

The most conspicuous difference... between the Nowheresvillians and ourselves has something to do with the activity of claiming.¹⁰

This leads us to the following questions: What does Feinberg mean by "the activity of claiming"? Is it true that without rights we cannot make claims? And if so, why is that important? It seems that those of us who wish to defend Confucian ethics must argue either that claiming is possible in Confucianism even without rights, or that being devoid of claiming is not a fatal flaw in a moral system. I will argue that being able to make individual claims against others is not an essential feature of all philosophically acceptable moral systems, Confucianism in particular.

In order to clarify his position, Feinberg proceeds to distinguish between "claiming that" and "making claims" in the following way:

It is an important fact about rights (or claims), then, that they can be claimed only by those who have them. Anyone can claim, of course, that this umbrella is yours, but only you or your representative can actually claim the umbrella. One important difference then between making legal *claim to* and *claiming that* is that the former is a legal performance with direct legal consequences whereas the latter is often a mere piece of descriptive commentary with no legal force. Legally speaking, making claim to can itself make things happen."

Feinberg implicitly extends his claim about legal claiming to moral claiming, such that making moral claims apparently is a moral performance with direct moral consequences and can itself make things

happen, while claiming that something is or is not the case is morally often a mere piece of descriptive commentary with no moral force.¹²

Feinberg goes on to argue in roughly the following fashion: a society without rights is one in which making claims is impossible. Without the ability to make individual claims, there can be no sense of what is mine, hence (1a) no harm is grounds for complaint, and (1b) every benefit granted to another is supererogatory (not morally required); (2) we lack a sense of human dignity, self-respect, and equality. Since these implications are morally and philosophically unpalatable, we have good reason to reject any society or morality that does not have a concept of individual rights. As Feinberg says:

these are facts about the possession of rights that argue well their supreme moral importance. More than anything else I am going to say, these facts explain what is wrong with Nowheresville.¹³

If the Confucian scholars cited above are correct, it could just as easily be concluded that this lack of individual rights is what is wrong about Confucianism or other non-rights-based traditions.

IV. A REPLY TO FEINBERG

Now let us consider Feinberg's objections in more detail. First of all he says:

Nowheresvillians, even when they are discriminated against invidiously, or left without the things they need, or otherwise badly treated, do not think to leap to their feet and make righteous demands against one another.¹⁴

The example implicitly presents us with a false dilemma: either we have claim rights or we must passively accept all forms of ill-treatment without objection. But a conception of rights is not necessary to recognize or to register complaints against others. Take, for example, the violation of a taboo in some traditional culture. Anyone in that society can and probably would protest taboo violations. That protest would not be grounded on the claim that it violated the rights of the other inhabitants individually, or even collectively. It is far more likely to be condemned on the grounds that it was a violation of some supernatural sanction. In such a case, protesting villagers are not only *claiming that* something is being done and *that* it is a violation of a taboo, they are also *making a claim* that "can make things happen." This is not, of course, making a claim in Feinberg's sense, because it is not a claim made by specific persons whose rights have

been infringed. But such villagers can recognize that there has been a wrongdoing, and they can and do actively protest that behavior.

What is true of the villagers is even true in Nowheresville, where Feinberg stipulates that people will

incur genuine obligations toward one another; but the obligations... will not be owed directly to promisees, creditors, parents, and the like, but rather to God alone, or the members of some elite, or to a single sovereign under god.⁵

But, if this is so, imagine what would happen if someone, A, promises the sovereign not to take things from other people against their will, but in fact ends up doing so. The person who has something taken from her, B, may well recognize that the promiser had not done what she was obligated to the sovereign to do, and could very well claim that the promiser should be forced to return what was taken or be punished or both. What this shows is that even Nowheresville is not the passive place Feinberg takes it to be. Even though it is a place where there are no rights in the sense that people cannot make direct claims against others (e.g., "You have wronged me"), it is still possible to make claims that "will make things happen." Nowheresville may be a world in which there are no claim rights, but it is not a world in which violations of promises and contracts cannot be recognized or must be ignored.

These are but two examples of many in which wrongdoing and effective protests against wrongdoing can be made without individuals having rights against one another. Other examples include role-governed activities - like the examples of basketball, ballet, or ceremonies with which we began. Another example is etiquette, where specific violations of the rules of etiquette are not conceptualized as infringements of rights - eating peas with a knife does not violate the rights of the other diners - but it can still be recognized as improper and can be effectively protested.

In baseball, suppose that a second baseman tags out a base-runner after pushing her off second base. Such an action is forbidden by the rules, and the runner can protest on those grounds. If the umpire agrees, then the runner is allowed to stay on second base. Now suppose a runner maintained that "My rights have been violated." Not only is there no explicit mention of "rights" in the rule book, but it would also be a very odd and uncommon thing to say. But whether or not we think of the runner, or even the team, as having rights, my main point is that we need not conceptualize the violation in terms of rights in order to complain about the behavior. All that is essential for complaint are authoritative rules or roles. The second baseman violated the rules, she did something

that a second baseman is not supposed to do, and that is a sufficient basis conceptually to protest and to seek some official remedy.

Now it might be objected that these examples of games and etiquette are frivolous, and therefore irrelevant. Morality is serious business, and when things of real importance are at issue, like human life, then the language of rights is indispensable.

To such an objection I should like to make three responses. For one, although games and etiquette may indeed be frivolous compared to morality, it is difficult to deny that there are some striking structural similarities between them. Whether these similarities are significant depends in part on one's conception of morality, but I think such comparisons can illuminate the relationships among rules, role responsibilities, and rights and lead us to think of morality from a new perspective. They have the additional advantage of being less controversial and less emotionally charged than other more serious examples.

For another, whatever their more general significance, these examples are offered specifically as responses to Feinberg's claim that in Nowheresville - which is just as frivolous an example as any game - people will not think to protest no matter how badly treated they are. Of course the frivolity of one example does not justify frivolity in another, but these examples, if they provide concrete and familiar contexts in which actions can be recognized as wrong, can be protested, can be corrected without relying on or entailing the concept of rights, and should be accorded as much weight as Feinberg's Nowheresville example.

Finally, more serious examples can be provided. However, it is difficult to present examples that are uncontroversial for at least a couple of reasons. For one, it is difficult to abstract serious examples from our own competitive and individualistic social framework. So for example, a team of scientists, hired perhaps for something like the Manhattan Project, would from a strictly scientific point of view be quite a good example of the kind of cooperative enterprise where I maintain talk of rights is unnecessary. However, it might be objected that a right to intellectual property would not be unnecessary in such a situation. The presupposition behind such an objection is that there is a larger market system within which this activity takes place and with which the scientists are only too concerned. It is also assumed that there is no other impartial mechanism by which monetary or other rewards can be distributed, such that individuals must protect themselves vis-a-vis the claim to certain rights.

Another obstacle to introducing more serious examples is that many people are inclined to conceptualize all important human relationships

in terms of rights. Given this, perhaps the least contentious serious example is that of traditional families, especially Asian families. Such families have always been conceptualized as natural, organic units whose principal purpose is the continuation and promotion of the family, and they are regarded as an entity that extends both backward in time to include familial ancestors and forward to include descendants. In such families, roles and responsibilities are well defined, everyone has a job to do, and at least one of their principal goals in life is to do that job well. A mother who regularly forgets to provide her child food is a bad mother. It isn't necessary to conceptualize her behavior as violating the child's right to food. An older brother who does not care for a younger sibling as directed by his parent is doing the wrong thing, but that should not be equated with violating his sibling's rights.

Examples similar to those given previously can also show what is wrong with the second part of Feinberg's first claim (1b): that people without a conception of rights must regard all benefits they receive as gratuities or acts of supererogation.

In many societies, including China, it is thought that the ruler must perform certain ceremonies during the spring of the year to ensure a good harvest. This performance is not regarded as an act of supererogation on the part of the ruler, but as an essential part of the responsibilities of that position. Failure would bring about censure. Performance, even superlative performance deserving praise, would not be regarded as supererogatory. But in neither case are rights attributed to the people, even though they are the ones that stand to gain or lose the most.

A squeeze play in baseball is an analogous example. By laying down a good bunt, the batter enables the runner to fulfill her role and her objectives. The runner depends on and benefits from the batter's performance. But, although praise would be appropriate, gratitude on the part of the runner would not. Like the ruler, what the batter did was not supererogatory but her responsibility as a batter. It is something the batter was obligated to do, but not for the sake of the runner. This contradicts Feinberg's view that, without claim rights, benefits would have to be regarded as supererogatory.¹⁶

Finally, consider the following case in the context of Nowheresville. Suppose the sovereign commands all spouses to take care of each other such that husbands have an obligation to the sovereign to care for their wives, and wives have an obligation to the sovereign to care for their husbands. Now by hypothesis husbands in Nowheresville do not have claim rights against their wives, and vice versa. And yet neither would

have to regard dutiful spousal behavior as exceptional or to regard it as above and beyond the call of duty, any more than a baseball player would regard with gratitude the dependable play of a teammate.

V. INDIVIDUAL RIGHTS AND A CONFUCIAN VIEW
OF HUMAN VALUE

Given the examples provided previously, perhaps Feinberg might concede that people in Nowheresville, even though they do not have individual claim rights, can protest misbehavior and can accept certain benefits without regarding them as gratuities. But he might maintain that neither the protests nor the acceptances are based on the appropriate reason, namely the moral status of the people who stand to be harmed or benefited. In other words, their responses are not grounded on the fact that they are human beings deserving respect and dignity for their own sake. This in effect brings us to Feinberg's second argument about the value of rights. To quote him at length:

Having rights, of course, makes claiming possible; but it is claiming that gives rights their special moral significance. This feature of rights is connected in a way with the customary rhetoric about what it is to be a human being. Having rights enables us to "stand up like men," to look others in the eye, and to feel in some fundamental way the equal of anyone. To think of oneself as the holder of rights is not to be unduly but properly proud, to have that minimal-self respect that is necessary to be worthy of the love and esteem of others. Indeed, respect for persons... may simply be respect for their rights, so that there cannot be the one without the other; and what is called "human dignity" may simply be the recognizable capacity to assert claims. To respect a person then, or to think of him as possessed of human dignity, simply is to think of him as a potential maker of claims... these are the facts about the possession of rights that argue well their supreme moral importance. More than anything else I am going to say, these facts explain what is wrong with Nowheresville.¹⁷

In this passage Feinberg actually suggests two, importantly different, positions. Early on he says, "claiming *enables* us 'to stand up like men'" [italics mine] et cetera. In other words, he says that making claims is either itself *sufficient* to "stand up like men" or at least part of a sufficient condition for doing so. This view does not necessarily entail a criticism of Confucianism or other moral systems that do not posit rights because it leaves open the possibility that there are other ways that are sufficient to recognize dignity and equality between human beings.

However, further on in the passage he strongly suggests that thinking of others as having rights, conceived as the capacity to make claims,

is at least a *necessary* condition, and may even be equivalent to respect for persons, or human dignity. Although at one point Feinberg qualifies this with a "may," this position is fundamental to his defense of rights. Without it rights are not "supremely important," but potentially eliminable, and Nowheresville is not necessarily the defective society that he says it is.

But if rights are a necessary condition for equality, self-respect, respect for persons, and human dignity, then Feinberg is posing an extremely strong challenge not only to Nowheresville but to any moral philosophy, such as Confucianism, which does not recognize or place central importance on rights.¹⁸

Where should a response to Feinberg's second claim begin? First of all, it is important to emphasize what I have been assuming all along, that he is not simply extolling the virtues of rights understood as claims, but the notion of *individual* rights and claims. In other words, it is conceptually possible to have the concepts of rights and claims without attributing them to individuals. Instead rights might only be attributed to groups such as families, as was the case in Tokugawa Japan. And yet if this were so we would have to rethink what Feinberg says. Would he still say that people could have a sense of equality, dignity, self-respect, and the rest?

On the one hand, if he did, people would not have these things because they individually had rights, but rather because they each belonged to a group that had such rights. But then being able to make claims as individuals would not be essential to feelings of self-worth and respect for others. Given that Feinberg's examples are always examples of individuals and their rights, it is extremely unlikely that he could or would adopt this alternative.

On the other hand, suppose group rights were not sufficient for feelings of self-worth and human dignity. If so, then it would not simply be rights that are necessary but *individuals having those rights*. Indeed, I maintain that this is precisely what is presupposed in Feinberg's argument. His analysis, and much of the philosophical literature about rights, purports to be arguing for the value of rights, when it is actually arguing for the value of the rights of individuals.

Second, if Feinberg is correct, then he must hold that for every system of morality either it must have the concept of rights, or it is not possible for people within it "to have a feeling of equality, minimal-self respect, the love and esteem for others, respect for persons, or human dignity." But these claims seem either false or true only by definition.

Take Feinberg's assertion that thinking of oneself as a holder of rights is essential for "the minimal-self respect necessary to be worthy of the love and esteem of others." If "self-respect" is understood straightforwardly as a psychological concept, the obvious fact is that a person's minimal-self respect is primarily a function of the love and regard of those important to her, especially during childhood. But it is implausible to suppose that love, especially familial love, is based on "thinking of oneself as a holder of rights" or "thinking of one's child as a potential maker of claims." In addition, the regard of others depends on what is valued in the culture in question, which may or may not include having the capacity to make claims against others. So it seems quite possible that one might be valued by others and have self-respect but not have any conception of oneself as the individual bearer of rights.

Now Feinberg can maintain that people in such a society don't really respect themselves because they don't see themselves as rights-bearers. However, not only does this seem question begging, but given what he says - "minimal-self respect is necessary to be worthy of the love and esteem of others" - it also entails that no one in these societies is "worthy of the love and respect of others," a view that Feinberg would surely not want to maintain.

Consider from a Confucian perspective another claim that Feinberg makes, namely, that being able to make claims is necessary for human equality, human dignity, and respect for persons: the Confucian world is a part of a universe well-ordered by Heaven (*Tian*). Everything has what we would call an essential nature, a characteristic role to play in this universe, and when everyone and everything does its part, all goes smoothly, harmoniously, as it should. It is an orderly conception of the world, much more like Western views prior to the scientific revolution than our views today.

In the Confucian view, human beings are part of the natural order. The natural state, even for human beings, ought to be one of harmony, not discord. Life in a harmonious society is the one human beings are both best suited for and toward which they are most naturally inclined. The Confucian conception of human equality lies in the belief that all human beings are born with a capacity for moral feelings such as compassion, respect, and propriety, and for human relationships based on them.¹⁹ The basic tenet in orthodox Confucian thought is that "All people are by nature good," where this means that everyone is born with the four feelings that are the beginnings of the four virtues (*Mencius* 2A:6). According to Confucianism, it is because of this, and not because people

are rights-bearers or are potential makers of claims, that human beings have a moral status deserving respect.

Herbert Fingarette has another related way of describing human equality and value in Confucianism.²⁰ In his book, *Confucius: The Secular as Sacred*, Fingarette likens the Confucian conception of human life to a sacred ceremony. Human beings are like "holy vessels" because they have a role in that ceremony.²¹ It is important to see, as Fingarette takes pains to point out, that human beings have an intrinsic value, not because they are individual rights-bearers, but because they are constitutive parts of an intrinsically valuable whole. Human beings have value, not because they are individuals, but because they are interrelated.

To use another image of Confucianism, one very close to Fingarette's notion of a sacred ceremony, life is like a sacred dance in which we all have parts to play, and in which it is only through the successful performance of the dance that we can individually and collectively attain fulfillment. Human beings deserve respect because they are participants in the sacred dance of life as beings who have roles, such as those of child or parent, and capacities to relate to one another in characteristically human ways. In this picture people deserve respect and have dignity in two distinguishable ways: (1) externally, from the point of view of an observer, because they are integral parts of an intrinsically valuable whole, the sacred dance, and (2) internally, from the point of view of other participants, because, analogous to the way that family members deserve respect from each other, we are all part of the same family. In this model, equality derives from our common membership and from our equal potential to achieve excellence within our own particular circumstances. Although it is possible to conceptualize a dance, like ballet, in terms of mutual rights and duties that dancers have to one another, it is an odd way of thinking about what they are doing. Furthermore it is unnecessary. Far from being central, rights seem at best peripheral to, and at worst, at odds with the objectives of the dance.

This admittedly sketchy picture should help to show that even though Confucianism makes no mention of rights, it has a significant and interesting conception of human equality and human worth. Respect for persons and proper pride might plausibly be thought to arise out of these human capacities and their exercise, even though they are not grounded on being potential makers of claims.

Is this Confucian conception of human worth a satisfactory alternative to Feinberg's rights-based conception? If the question is "Can a Confucian conception of human beings provide an interesting and not implausible

basis for people to have feelings of self-respect, human dignity, human worth, proper pride, equality, and respect for others?" then the answer seems clearly affirmative.

If the question is "Can a Confucian conception of human being give rise to precisely *the very same* conceptions as those based on the notion of being an individual rights-bearer?" the answer is much more doubtful. But even if it cannot, this in itself is not sufficient to condemn the Confucian view unless we already agree that the rights-based conceptions are the only ones acceptable and that persons must be conceived as individual rights-bearers. Taking this view requires that we accept something like the view that persons are essentially individuals whose humanity is defined by rationality and autonomy, the honoring of which requires acknowledging the demands that one individual can make against others.

But putting the focus on the individual, her rationality and autonomy, and the demands that she can make is a peculiarly Western concern. Traditional societies, like those based on Confucianism, and even pre-Enlightenment Western societies, clearly understand being human in other terms. Feinberg could simply assert that such views are mistaken, and that the rights view is correct, but doing so seems presumptuous.

Throughout, Feinberg argues that we can have no concept of human dignity without the concept of rights. To a large measure this depends on what is meant by "human dignity." In one plausible interpretation, human dignity can be understood as the recognition that human beings have an intrinsic value qua human beings, which is of a different order than the value of mere objects. Understood this way, Confucian and other traditional cultures without the concept of rights have a conception of human dignity insofar as they have their own conception of human value, which is, to use Kant's terminology, beyond mere price.

However, if human dignity must be analyzed in terms of the individual and her rights, or in terms of human autonomy and rationality, then Confucian and other traditions may indeed not have a conception of human dignity, but may be none the worse for that. In other words, if Feinberg is arguing that we cannot have the correct conception of human dignity unless it is grounded on a conception of persons as rights-bearers, then, if this is to be more than a trivial analytic claim, he must first define more clearly the conditions an acceptable conception of dignity must meet and provide more arguments to the effect that only this conception will do.

As we can see, the question of whether the Confucian conception of human worth might be a satisfactory alternative to a rights-based conception of persons is a very difficult one, because any answer would seem to beg the question by presupposing some evaluative perspective. From the point of view of a Confucian, the answer is, obviously, affirmative. From the point of view of someone in the individual rights tradition, probably not. A third alternative, working for some transcultural agreement, is probably a long way off. If so, the only reasonable course may be not to reject any moral system that recognizes human worth, even if that worth is grounded on a different conception of human beings and not on individual rights.

To summarize this criticism of Feinberg's second claim: I have not argued that being a rights holder cannot be *a way* of establishing and maintaining a sense of human worth in our diverse and fragmented modern world.²² What I think is false, and what I have argued against, is the view that conceiving of oneself and others as having rights is the *only way* to have a sense of human equality, dignity, self-respect, and the rest. What I have suggested is that other moral theories might plausibly be thought to support a sense of human dignity and do not rely on the conception of individual rights to do so.

VI. THE VALUE OF INDIVIDUAL RIGHTS

In this concluding section I would like to pursue a line of speculation about what the value of individual rights might in fact be. To do this, again consider the sport of basketball. In basketball, talk of rules is important, but talk of individual rights is unusual and unnecessary. It is not, however, impossible. I grant that we could introduce rights into basketball. Why don't we do this, and under what circumstances might we want to do so?

One suggestion is that we don't need to initiate talk of rights when the players, coaches, fans, or referees can be relied on to do their best to identify and rectify rule or role violations. Conferring any kind of privileged position on the one who most directly suffers the consequences of the rule or role breaking (e.g., a player who is fouled while taking a shot) is unnecessary because it is unlikely to increase the fairness of the game. The shooter is not likely to be objective or reliable.

What are we trying to protect in this situation? Rules are designed both to constitute the game and to improve it by making it more competitive, and thereby more exciting and enjoyable. Essential to achieving these

objectives is the maintenance of fair competition, including, especially, the fair application of the rules.

Perhaps this gives us a clue to rights talk and its importance. If one important aspect of morality is to manage competition, especially a competition between individuals, then it becomes very important to protect the competitors from unfair treatment. On the one hand, if one can assume a basic cooperativeness and honesty or, as in basketball, some reliable and impartial authority or mechanism, then conceptualizing the game in terms of individual rights, and conferring special abilities to make claims on individuals, may be less important or altogether unnecessary. On the other hand, if one cannot, then investing individuals with the ability to have and to press their own claims may be vitally important.

Perhaps another image, other than the one of competition, might be useful. Consider a company or a family where a cooperative whole is constituted through the fulfillment of role responsibilities. When a group is a kind of community working toward a common goal, talk of rights is neither necessary nor appropriate. In fact, it can be deleterious. Respect, equality, and dignity are all understood in terms of being a contributing member of the community. There will still be rules and boundaries, not because individuals in the community have rights, but because roles have to be defined for the community to work effectively and to progress. On the other hand, when a community breaks down, when there is no common goal, and when the desire for individual advancement or other forms of competition dominate, then each person will want and need individual safeguards or rights.

Now it is sometimes claimed, especially in the case of dysfunctional families, that family members had rights all along, but that when families are working well those rights are all being recognized and therefore do not need to be mentioned. Although this is one way of conceptualizing the situation, it is just as easy, and perhaps simpler and significantly less fraught with metaphysical assumptions, to maintain that rights within a family, say children's rights, are social constructs created for the purpose of adjudicating the differences that exist in dysfunctional families. It is not that children have always had rights, but that they come to do so in societies where many families are seriously dysfunctional. It is sometimes useful to regard children as having rights once families no longer perform the job of caring for children as they should. What is basic is how children should be treated. Whether establishing

rights will further that end depends on how well the families are operating.

What I have maintained is that it is possible for people to ensure rule/role compliance and to have a sense of human dignity and worth without having the concept of individual rights. In my view, individual rights are valuable when having them can improve on other impartial mechanisms geared to ensure rule/role observance, or to adjudicate conflict, or to protect persons against those, including the state, who refuse to fulfill their responsibilities. In any team game, such as basketball, if players were less biased and better situated than referees to identify rule violations against them, it might make sense to give their complaints special weight by letting them identify infractions that could then be adjudicated by some other procedure. If referees were known to have less than impartial attitudes toward teams or players, individual rights might be a way of correcting that bias. If families degenerate to a point where one cannot count on parental affection, then instituting talk of children's rights may be an unhappy necessity.

One problem with our increasingly diverse and complex society may be that we are so fragmented that we apparently can no longer count on interests other than self-interests, and we cannot rely on informal protections such as community pressure to protect those interests. Attribution of rights, that is, giving individuals special status within the institution, is one way to ensure that individual interests will be taken into account and that rule violations will be identified and pursued in a vigorous manner. If this is correct, we can see why the notion of a right can be such a useful one in certain contemporary contexts. Rights can give unique weight to the claims of individuals; and in the case of human rights it gives the individual an importance that extends beyond specific sociopolitical structures.

In my analysis, whether it makes sense to promote the idea of individual rights depends on whether giving special weight to individual claims is called for by a specific set of circumstances. It should not be promoted if moral systems that do not invoke the notion of individual rights can serve as well or better.

Given our culturally diverse modern world, it is not difficult to see why many claim that traditional moral systems such as Confucianism are impractical. But even if they are correct, not being practical in the modern world is far from being morally unacceptable in the way Feinberg and others charge.²³

Notes

An NEH Summer Seminar and its director, Prof. Thomas E. Hill, contributed significantly to the development of this chapter, as did the comments of many individuals present at readings of earlier drafts at the UCLA Law and Philosophy Reading Group, Moral and Political Philosophers of Orange County, the Pacific Division of the APA, and the Second Annual East Meets West Conference in Long Beach, California, as well as at University of Redlands, Chapman University, and my own campus, University of California, Fullerton. In particular I am indebted to the work of Henry Rosemont for many of the fundamental ideas presented here, and especially to Seung-hwan Lee for stimulating my thoughts on these issues. I have also received significant feedback and support from Kwong-loi Shun, David B. Wong, Paul Kjellberg, Carl F. Cranor, and anonymous reviewers for Cambridge University Press.

1. Alasdair MacIntyre, *After Virtue* (Notre Dame, IN: University of Notre Dame Press, 1981), pp. 175ff.
2. See Tu Wei-Ming, "Li as Process of Humanization" and "The Confucian Perception of Adulthood," in *Humanity and Self-Cultivation: Essays in Confucian Thought* (Berkeley, CA: Asian Humanities Press, 1979), pp. 27, 54 (n. 23) and Henry Rosemont, Jr., "Why Take Rights Seriously? A Confucian Critique" in Leroy S. Rouner ed., *Human Rights and the World's Religions* (Notre Dame, IN: University of Notre Dame Press, 1988), pp. 167-182; Roger T. Ames, "Rites as Rights: The Confucian Alternative" in Leroy S. Rouner ed., *Human Rights and the World's Religions* (Notre Dame, IN: University of Notre Dame Press, 1988), pp. 199-216; Chad Hansen, "Punishment and Dignity in China" in Donald Munro ed., *Individualism and Holism* (Ann Arbor: University of Michigan Center for Chinese Studies, 1985), p. 360.
3. The claim is not simply that there is no concept of *human* rights in Confucianism, but there is no concept of rights at all.
4. Seung-hwan Lee, "Was There a Concept of Rights in Confucian Virtue-Based Morality?" *The Journal of Chinese Philosophy*, vol. 19 (1992), pp. 241-61.
5. Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977); Alan Gewirth, *Reason and Morality* (Chicago: University of Chicago Press, 1978) Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990); J. L. Mackie, *Ethics: Inventing Right and Wrong* (New York: Penguin Books, 1977); A. I. Meldon, *Rights and Persons* (Berkeley: University of California Press, 1980); Joel Feinberg, "The Nature and Value of Rights," *The Journal of Value Inquiry*, vol. 4 (1970), pp. 243-7.
6. Alan Gewirth, "Why Rights Are Indispensable," *Mind*, vol. 95 (1986), p. 343.
7. Feinberg, op. cit., pp. 243-7.
8. Although Feinberg and others use the term "rights" simpliciter, I maintain that their arguments are normally about the rights of individuals. More on this later.
9. Feinberg, op. cit., pp. 243-7.
10. *Ibid.*, p. 249. This emphasis on claiming reflects Feinberg's specific conception of rights. He specifically distinguishes his notion of claim rights from

other Hohfeldian conceptions of rights such as liberties, immunities, and powers: "claim rights are distinguished from the mere liberties, immunities, and powers, also sometimes called 'rights,' (and) with which they are easily confused" (p. 249). For purposes of this chapter, I adopt Feinberg's conception of rights understood as valid claims.

11. *Ibid.*, p. 251.
12. Obviously what Feinberg says about legal claiming is much more clear and forceful than those extrapolated to moral claiming.
13. Feinberg, *op. cit.*, pp. 252-3.
14. *Ibid.*, p. 249.
15. *Ibid.*, p. 247.
16. I assume it is implausible that the runner has a right against the batter to lay down a bunt. At most the runner might be said to have a right *to expect* the batter to try and lay down the bunt, but such a right is epistemological, not a claim right. That is to say, it is a right based on having information that makes it reasonable to believe the batter will try to bunt (e.g., a bunt sign the runner sees the coach give the batter). It is not based on promises or commitments of any kind by the batter to the runner.
17. Feinberg, *op. cit.*, p. 252.
18. It strikes me that even those, like Seung-hwan Lee, who argue that there is a concept of rights in Confucianism agree that those rights have been seriously deemphasized. If so, and if the Western authors cited at the beginning are correct, then Confucian ethics is seriously defective for never giving rights and claiming their proper role.
19. For a discussion of the Confucian conception of human equality, see Donald Munro, *The Concept of Man in Early China* (Stanford, CA: Stanford University Press, 1967).
20. Herbert Fingarette, *Confucius: The Secular as Sacred* (New York: Harper Torchbooks, 1972).
- 8i. *Ibid.*, pp. 71-9.
22. There is also a case to be made, though I have only suggested it in this essay, that excessive individualism can undermine self-respect by, for example, depriving human beings of a social context within which actions have meaning. (I owe this point to Paul Rjellberg.)
23. Admittedly this analysis of rights argues for the importance of rights, but only under certain specific social conditions. This is in contrast with Feinberg and others who seem to argue for its importance without qualification. However, the view I present is not simply a utilitarian or even consequentialist conception of rights, since, as presented, it is compatible with a Rawlsian constructivism. In it, compatible with Rawls, rights can be understood as part of a reasonable solution to certain choice situations partly determined by specific social circumstances such as the lack of any shared conception of the good, and need not be conceptualized as an essential part of any morally acceptable system.

Rights and Community in Confucianism

David B. Wong

I. INTRODUCTION

There is an interesting turn toward Confucianism in much U.S. scholarship on Chinese philosophy. Heiner Roetz, in a recent book on Confucian ethics, detects certain frequently recurring themes in this scholarship. Quoting and paraphrasing from authors such as Herbert Fingarette, Henry Rosemont, David Hall, and Roger Ames, Roetz summarizes the themes in the following way:¹

China can teach us to recognize that the mentality of self, autonomy, and freedom has run its course. Together with the Chinese, we should recall our "communal rituals, customs, and traditions"² and "inherited forms of life."³ We should abandon the "myth of objective knowledge," and adopt a "thinking that avoids the disjunction of normative and spontaneous thought."⁴ Confucius especially presents us with a model which for our world is perhaps "more relevant, more timely, more urgent" than it has been even in China herself.⁵

Roetz criticizes the line of thought he finds in these authors for its apparent paradoxicality: the criticism of negative developments within Western society presupposes general normative criteria, yet the allegedly better model - Confucianism - is deployed to argue for a "contextualism which is no longer interested in questions of right and wrong, or relativity and objectivity."⁶ Furthermore, Roetz argues that context and tradition sanctified foot-binding in China, widow burning in India, and slavery in the United States. Roetz asks, "How can we criticize the unspeakable injustice inflicted upon man in the name of traditions and contexts if we leave the final say to both and abandon any ethical reserve?"⁷ Roetz goes on to argue for an interpretation of Confucianism that finds within

it important universalistic ethical themes relating to Habermasian and Kohlbergian conceptions of moral development.

Now I am not certain that the authors Roetz mentions would agree that they hold the particular combination of views he attributes to them.⁸ But on the other hand, it is not unusual to find this combination of views in Westerners who react favorably to Confucianism - both the view that Confucianism reveals something important that one's own tradition has neglected or underemphasized and the view that it is wrongheaded to search for some transcendent truth about which tradition is objectively superior to others. I suspect that many of us who do comparative ethics get caught in the tension between these two views. In this essay I want to explain a way to live with both. I stake out a position between the new contextualist and postmodernist approaches to Confucianism, on the one hand, and the universalist approach that can find insight or injustice in Confucianism.

I want to focus on the question of whether moralities ought to recognize individual rights and in particular the rights to speech and dissent. The common view, one to which I have contributed in the past, is that rights do not find a congenial home in Confucianism because of its emphasis on community. In this essay I want to take a more complex position. I still maintain that there is a significant difference between typical rights-centered moralities and the community-centered morality of Confucianism. I will argue for a pluralism that accepts both rights-centered and Confucian moralities, and in that respect I am with the contextualists and postmodernists. On the other hand, I also will argue that there are universal constraints on morality rooted in the human condition and human nature, and that these constraints push Confucianism and rights-centered moralities closer together through the recognition of the interdependence of rights and community. To lay the groundwork for this argument, let me re-introduce the ways in which I have distinguished Confucianism from rights-centered moralities.

II. COMMUNITY-CENTERED AND RIGHTS-CENTERED MORALITIES

In previous work, I have characterized Confucianism as a virtue-centered morality with the core value of a common good at its center. This common good consists in a shared life as defined by a network of roles specifying the contribution of each member to the sustenance of that life. This

communally oriented morality contrasts with a rights-centered morality, which gives no comparable emphasis to a common good. Rather it emphasizes what each individual, qua individual, is entitled to claim from other members. Rights-centered moralities spring from a recognition of the moral worth of individuals independently of their roles in community.

It now seems necessary to qualify my original distinction in several ways. First, I need to distinguish at least in theory between virtue-centered and community-centered moralities. I originally identified the two types because they have been historically linked through the concept of a virtue as a quality needed by members to contribute to the common good of community. However, it now seems to me at least theoretically possible that virtues can become uncoupled from a common good and be deemed desirable qualities on some basis other than their necessity for a shared life.⁹ Having said this, let me stipulate that my focus shall be on community-centered moralities in which the concept of virtue *is* associated with the qualities necessary for sustaining the common good of a shared life.

Second, I now want to emphasize that my conception of a rights-centered morality includes a conception of the characteristic ground for the recognition of individual rights, as well as a generic conception of rights. We may think of the individual's moral rights as that to which the individual is legitimately entitled to claim against others as her moral entitlement. But a rights-centered morality typically assumes as a basis for such entitlements that the individual has substantial domain of morally legitimate personal interests that may conflict with the goal of promoting public or collective goods. Rights constitute constraints or limits on the extent that individual personal interests may be sacrificed for the sake of public or collective goods. Let me call this kind of ground for the recognition of rights "the autonomy ground." I do not want to claim that this is the only ground for rights recognized in the modern Western democratic tradition, but I do think it is probably the most recognized ground in that tradition and that it is the predominant ground in terms of its widespread acceptance and the degree of importance attached to it.

Third, I want to identify another possible ground for the recognition of rights that may exist alongside the autonomy ground. Rights may be recognized on the basis of their necessity for promoting the common good. Community-centered moralities, I shall argue, can and should recognize this sort of "communal ground" for rights. Rights-centered and community-centered moralities, then, need not differ because one

recognizes rights while the other does not. They must differ in the sort of basis they offer for the recognition of rights.

III. THE COMMUNAL GROUND FOR RIGHTS

Seung-hwan Lee has argued¹⁰ that the Confucian virtues do involve rights, if rights are conceived as enabling persons to make justified claims against others whose duty it is to fulfill them. This is in effect what I want to call the "generic" conception of rights, and Lee goes on to point out that in Mencius in particular there is a conception of rights in this sense. The Mencian virtue of righteousness (*yi*) involves "dutifulness in discharging of one's obligation, rightfulness in respecting other's due, and righteousness in recognizing the limit of one's own desert."¹¹ In the case of rites and propriety (*li*), Lee points out that the rules governing duties between people standing in the cardinal relationships, such as father and son, can be conceived as rules specifying correlative rights and duties.

But Lee warns us not to equate the rights found in Confucianism with the type of "individualistic" rights found in Western traditions. And one major reason for his warning is that "the Confucian ideal of a communitarian society in which good of the community always precedes individual good tends to devalue individualistic assertion of one's rights against the common good."¹² This is connected, Lee argues, with the Confucian conception of the human being as a relational being. In terms of my framework, Lee is according a communal ground to the generic conception of rights, not an autonomy ground.

So conceived, Confucian rights do not seem to offer much aid and comfort to those Chinese intellectuals and reformers who see a need for rights of dissent, of free speech, and of the democratic election of leaders in a multiparty political system. Lee seems to conclude as much, arguing that Chinese society needs a dose of Western individualism in order to counter an "excessive emphasis on the collectivist conception of the common good," in the name of which "people's assertions of basic rights and freedom have been neglected."¹³ However, I think the turn to an autonomy ground for rights may be premature. We need to see what rights a communal ground can yield.

Roetz, for example, calls for a "nonregressive appropriation of tradition" that "combines the interpretation and adaptation" of the Confucian heritage with "the modern demands for democracy and change."¹⁴ He points to themes in the Confucian canon that seem especially relevant to

rights to dissent and freedom of speech. Consider the following passage from the *Zidao* (*The Way of the Son*), chapter 29 of the *Xunzi*.

Zigong said, "If a son follows the order of the father, this is already filial piety. And if a subject follows the order of the ruler, this is already loyalty. But what is the answer of my teacher?"

Confucius said, "What a mean man you are! You do not know that in antiquity, if there were four frank ministers in a state with ten thousand war-chariots, its territory was never diminished. If there were three frank ministers in a state with a thousand war-chariots, that state was never endangered. And if there were two frank subordinates in a clan with one hundred war-chariots, its ancestral temple was never destroyed. If a father has a frank son, he will not do anything that contradicts propriety. If a scholar has a frank friend, he will not do anything unjust. *How, then, could a son be filial if he follows the order of his father? And how could a subject be loyal if he follows the order of the ruler? One can only speak official piety and loyalty after one has examined the reasons why they follow the order.*"⁵

The implication of this passage is that one has a duty to speak frankly when the violation of propriety and justice is in question, even if it is the ruler who is about to violate them. The basis for such a duty to speak is the sort of communal ground I have been describing. It is in the interests of having a community that realizes propriety and justice that a minister or a son speaks out. It might be thought that the duty to speak frankly implies as a necessary correlate the right to speak. After all, if one has a duty to speak, should one be allowed to speak and in fact be protected from interference through force and coercion?

It is important to recognize the ways in which Xunzi's argument has a more limited scope than we might assume. For one thing, Xunzi would not have thought the duty to frank speech applied to *daughters* in relation to their fathers, nor is it clear that he meant the duty to frankly speak to one's king to apply to everyone in the empire below the rank of minister. Xunzi's duty does not correspond to a modern, liberal democratic right to free speech held by all citizens. Furthermore, it is at least logically possible that the duty to speak as Xunzi conceived was not even associated with any *right* to speak. As I indicated previously, one could begin to make an argument for a right to speak only if relevant others have a duty to let one speak. But the fact that a minister or a son may have a duty to speak frankly does not necessarily imply that a king or a father has a general duty to let him.¹⁶ Indeed, if one keeps in mind Xunzi's abiding and deep concern for political and moral order and the way that order is under constant threat from an anarchic and self-serving human nature, one could imagine him holding that the king or father may have a duty to

punish **the minister or son for** speaking out if it threatens the political and moral **order within the** kingdom or the family. This duty to punish may hold **even if the** minister or son has spoken truly and appropriately.

There is another ground for blocking the inference of a *general* right to speak from Xunzi's argument. This argument is consistent with the possibility that a minister or son has a general prima facie duty to follow orders from his king or father *without* questioning them in frank speech. Xunzi may have been saying that such a duty can be overridden, say, if it is needed to correct some especially grave error in these orders. On this interpretation, the duty to speak would be one that arises on specific and relatively infrequent occasions. Under these assumptions, there could not be a general right to speech corresponding to the duty to speak, since such a duty would arise only under specific and infrequent circumstances.¹⁷

So I do not mean to suggest that one finds in the Chinese classical tradition anything like a full-blown argument for a right to free speech. What I do mean to suggest is that we do have the *germ* of an argument in the idea that the common good is sustained by recognition of a duty to speak. The full-blown argument requires further substantial claims that are broadly empirical and that are, I shall argue, consistent with a communal ground for the right. Some of the issues involve criticism of traditional hierarchies that accord more powers and privileges to ministers and sons than to other subordinates and daughters. I have made such arguments elsewhere so I will not do so here. I do want to address here the issues of whether one can have a duty to speak without others having a duty to let one speak and whether there really is a good argument for a general prima facie duty to obey the orders of political authorities without frank questioning. I intend to dispute that the common good is actually promoted by failing to recognize a duty to let others speak or by limiting the duty to dissent to especially grave and infrequent occasions.

Let me start with an argument Allen Buchanan gives in the context of the contemporary Western debate between communitarian and rights-centered theorists. As a theorist who bases rights on the autonomy ground, Buchanan addresses communitarians on their own ground when he writes that

individual rights can play a valuable role even in societies in which there is unanimous agreement as to what the common good is and a universal commitment to pursuing it. For even in such a society there could be serious, indeed violent, disagreements either about how the common good is to be specified concretely and in detail or about the proper means and strategies for achieving it. Individual

rights, especially rights of political participation, freedom of expression, and association can serve to contain and channel such disagreements and to preserve community in spite of their presence.¹⁸

It seems to me pretty plausible that the sort of disagreements Buchanan mentions are a regular and constant feature of human societies, and that therefore the "need to protect and allow for the peaceful transformations of communities"¹⁹ requires regular and institutionalized channels for dissent, not simply the occasional recognition of a duty to frank speech in specific and infrequent circumstances. Such regularized channels of dissent would require the recognition of duties to let others speak and more positively to protect them in speech from threat and coercion by others. It is to allow those who would speak to publicly hold others to this duty to allow and to protect their speech, something that is involved in being able to claim something as one's right. Once we have such duties, I think we are pretty close to something like a modern democratic right to speak.

Indeed, a communal grounding for a right to speech could be made within a contextualist and postmodernist interpretation of Confucianism, provided that such an interpretation still leaves room for criticism of the tradition. Hall and Ames, well known for their postmodernist interpretation of Confucius and for their vigorous defense of him, nevertheless observe that "The most serious failings of Confucius's philosophy are due to the provincialism and parochialism that seem inevitably to result from the institutionalization of his thinking." This parochialism, they charge, retards "cross-cultural communication" and fosters abuses that cross the "fine line that keeps social order beginning at home separate from nepotism, personal loyalties from special privilege, deference to excellence from elitism, appropriate respect from graft," and, finally, "appropriate deference to the tradition and a cultural dogmatism that has too frequently been in the interests of particular groups."²⁰ In the spirit of such criticism, one could argue that an appropriate remedy for these failings is recognition and vigorous protection of rights to free speech and dissent.

The argument thus far weighs in favor of recognizing various duties to allow and to protect dissenting speech. Implicit in this argument is an assumption worth making explicit: dissenting speech will not be heard often enough to serve the common good if it is not allowed and protected from interference. This assumption may appear trivially true, but if so, it is so only to us. As I indicated earlier, Xunzi probably recognized a

duty to frank speech while denying a duty to allow it. He was theoretically consistent, but in practice, I want to argue, inconsistent.

The recognition that speech and dissent must be publicly recognized and protected in order for it to serve its function in promoting the common good is a lesson that some Chinese thinkers learned from Chinese history. Andrew Nathan has identified a succession of Chinese intellectuals in the early part of the twentieth century who argued for democratic rights on the ground that China's problems in modernizing stemmed from the "systematic overconcentration of power" and its abuse. At the same time, Nathan points out that these intellectuals very rarely put forward a line of reasoning central to the Western democratic tradition: "that the individual's interests are separate from the group's, that certain of them are so basic as to have the status of 'rights,' and that democracy is first of all a system that protects these rights."²¹ Implicit in this characterization of Chinese democratic thought, I claim, is a communal grounding for rights of speech and dissent.

To give another example of this sort of grounding in the Chinese tradition, seven eminent intellectuals led by the historian Xu Liangying recently protested a series of arrests of dissidents by connecting human rights with modernization:

To talk about modernization without mentioning human rights is like climbing a tree to catch a fish. Two hundred and five years ago, the French Declaration of the Rights of Man stated clearly that being ignorant, neglectful and disdainful of human rights is the sole cause of the general public's misfortunes and corruption in government. China's history and reality have verified that longstanding truth.⁸²

If one could make the case for substantial rights to free speech and dissent in this way, as I believe one can, what are the implications for the debate between universalism and postmodernist contextualism? It suggests to me that there are human tendencies that span very different cultures, tendencies that render community-centered moralities subject to certain kinds of liabilities. These liabilities need not be judged in Western terms, and not specifically in terms of a moral perspective that places a premium on the value of individual autonomy. Rather, the liabilities are failures to realize the ideal of the common good itself. If, as Buchanan suggests, communitarian traditions frequently give rise to serious and even violent disagreements over questions as to how concretely to realize a common good, democratic rights may be necessary to ensure the peaceful resolution of such disagreements. If, as Hall and Ames suggest, and as many generations of Chinese intellectuals and reformers have

concluded, centralized authority unchecked by dissenting voices from below tends toward abuse of power, nepotism, and isolation and ignorance of what those below really do need, democratic rights may be part of the required remedy, if not the entire remedy.

Having roughly outlined the case for the possibility of communally grounded democratic rights, let me note that a communal grounding is different from a utilitarian grounding for rights, though both groundings are consequentialist in character. A utilitarian grounding of rights would make the case for their utility, where the sum total of utility is a function of the welfare of individuals. For most utilitarians, anyway, the character of the relations between individuals does not in itself necessarily count as part of the total good to be promoted.²³ But it is precisely the character of the relations between individuals that is the primary focus of community-centered moralities. Underlying this focus is a normative and descriptive conception of the person as constituted by her relationships to others and whose good is constituted by relationships that fulfill a moral ideal of appropriate respect and mutual concern. A community-centered morality must, of course, concern itself with some of the same goods with which utilitarianism is concerned. Both Mencius and Xunzi, for example, knew full well that their moral ideals of community could not begin to be fulfilled without a minimal level of material security for the people. And that has remained a preoccupation for Confucians up to the present. But a community-centered morality locates the importance of individual welfare within the larger context of a common good. In fact, the individual's good and the common good are inextricably linked.

IV. THE DIFFERENT OUTCOMES OF THE COMMUNITY AND AUTONOMY GROUNDS

Having noted the possibility of providing a communal ground for rights, however, we must note what such a ground does not provide. The scope of rights grounded in community will not be the same as the scope of rights grounded in autonomy. As Buchanan notes, if one were to justify individual rights only by reference to the moral requirement of autonomy, one might justify a "rather broad, virtually unrestricted right to freedom of expression." If, however, we allow the value of community "independent weight as a factor in determining the scope of the right of freedom of expression, we might find that only a more restricted right of freedom of expression can be justified." Therefore, concludes Buchanan, "In the justification of individual rights, the traditional liberal and the

I rights-minded] communitarian may travel the same path for some time, but eventually the path may fork and they may be forced to part company."²⁴

Indeed, it might be that the rights-minded communitarian and the traditional liberal will part sooner rather than later, and quite dramatically, depending on what the communitarian perceives as necessary for the common good. Nathan's historical study of Chinese conceptions of democracy reveals the fragility of rights when seen solely as instrumental to collective goods such as prosperity and modernization. Time and again, rights championed as necessary for the common good have been suspended or curtailed because of fear of chaos and national weakness.

Such an observation will lead to the conclusion that a significant difference between community-centered and rights-centered moralities remains, even if both kinds of moralities are constrained by the need for rights to dissenting speech. On the one hand, human nature and the human condition place common constraints on what could count as an adequate morality. Human beings in power tend often enough to abuse that power or to confuse the personal interests served by their exercise of power with the ethical interests of their communities, and therefore need to be checked through the protected use of dissenting speech. Even if a morality provides no autonomy ground for rights to dissenting speech, it must provide for some version of those rights. However, significant moral differences are consistent with such common constraints. Not only do the two types of morality endorse democratic rights for different reasons, the scope of the rights endorsed and their relative immunity to being overridden by other considerations may differ significantly.

V. WORRIES ABOUT THE COMMUNAL GROUND FOR RIGHTS

However, a worry arises from reflection on the ways in which communally grounded rights within the Chinese tradition have easily given way to fear of chaos and national weakness. The concept of communally grounded rights may be too weak an instrument for combating the liabilities of community-centered traditions. Especially instructive in this regard is Nathan's account of the way that the Communist Party, from Mao onward, moved toward the idea of free speech and dissent, only to withdraw support for it when it threatened to undermine the equation between the interests of the party and those of the people.²⁵

This worry may remind us of the familiar charge against consequentialist groundings of rights: that they provide an uncertain and inconstant grounding for them.²⁶ In one sense, of course, the community-centered moralist must admit this charge. As noted previously, rights with a communal grounding will never be as wide in scope or as secure from being overridden by other moral considerations as they would be with an autonomy grounding. From the perspective of the community-centered moralist, this is how it should be. But such a moralist still has reason to worry because she may wonder whether *the common good* is harmed when rights to speech and dissent are as insecure as they have been in the Chinese tradition.

The recognition of rights by itself will be ineffectual when the decision to override them for the sake of the common good is in the hands of a class that is motivated to identify its interests, and not necessarily morally legitimate ones, with the common good. But to say that the real problem may be an overcentralization of power is not to say what should take its place. The facile answer is to propose a transplanting of Western democratic machinery and to suppose that will take care of the problem. A real solution to the insecure grounding of rights within communal traditions, I suggest, must look to the character of civil society and not solely to democratic machinery.

William de Bary has recently identified two reasons for the failure of Confucianism to be more influential than it has been in its native country: first, an inability to realize its ideal of education for all people which would infuse a unified national consciousness, and second, a failure to mobilize the people as a politically active body, capable of supporting its initiatives and proposed reforms. The second failure, suggests de Bary, was linked to the lack of an infrastructure of politically effective associations that could serve as channels of communication and influence between the family and local forms of community on the one hand, and the ruling elite on the other.²⁷ A major concern of some democratic theorists in this country is the possible disappearance or eroding authority of precisely such an intermediate infrastructure. These theorists see Tocqueville as prescient about the dangers of an atomistic individualism that leaves citizens isolated, pursuing their purely private interests, and quite ineffective in making their voices heard in the political sphere because their voices are single. Now I am uncertain as to whether our intermediate institutions have gotten weaker or fewer, as these theorists worry, or whether these institutions have always been as sporadically effective as they seem to be

now. In either case, I believe there is justifiable concern. The common element of concern in both scenarios is that there is not enough community (whether it is less community than in the past or not) to support effective democracy.

VI. THE INTERDEPENDENCE OF RIGHTS AND COMMUNITY

A common problem for both the Chinese and American democratic traditions, I suggest, is that they have not possessed enough community, at least enough community at levels above the family and local community. The problem for the American tradition goes beyond alienation from the political process for average citizens. Consider Tocqueville's definition of individualism as a "calm and considered feeling which disposes each citizen to isolate himself from the mass of his fellows and withdraw into the circle of family and friends," such that "with this little society formed to his taste he gladly leaves the greater society to look after itself." Such people, Tocqueville observed, form "the habit of thinking of themselves in isolation and imagine that their whole destiny is in their hands." They come to "forget their ancestors" and also their descendants, as well as isolating themselves from their contemporaries. "Each man is forever thrown back on himself alone, and there is danger that he may be shut up in the solitude of his own heart."²⁸

Tocqueville's warning about isolation from our contemporaries and our descendants is reflected in the persistent and large inequalities of income and wealth in this country and in a shamefully high proportion of our children who are growing up in poverty; most importantly, it is reflected in the national inability or unwillingness to address these problems. And this brings me to the other side of the coin: if community-centered moralities should move closer to rights-centered moralities, at least in recognizing some of the most fundamental democratic rights, so too must rights-centered moralities recognize the indispensability of community for the realization of democratic values of self-governance and social justice. That is why I suggested at the beginning of this essay that rights and community are interdependent.

The lesson, to return to the issue of universalism versus postmodern contextualism with which I began, is that adequate moral traditions need both community and rights. Rights-centered traditions require a range of viable communities to nurture effective moral agency (a requirement of which Confucianism is well aware) and to make for the effective use of democratic machinery. They require viable communities to foster the

sense of common project and fellowship that in turn promotes real and effective concern for meaningful equality among all citizens. Community-centered traditions need rights for the moral renewal of community and their peaceful transformation through the many disagreements it will experience over the common good. These necessities are grounded in our human nature. This is the sense in which I side with the universalists. However, this does not mean that rights and community must have precisely the same content across traditions, nor does it mean that they have to be given the same emphasis and the same rationale. This is the sense in which I side with the postmodernists.

VII. A FURTHER COMPLICATION

Rights-centered theorists have resisted appeals for community because they resist the ideal of a shared vision of a common good. I believe that they are right to do so if this ideal involves the impossible ideal of unanimity of belief about what the common good is, but I also believe that it is an error to reject community as a necessary moral ideal. The sort of community needed by both kinds of tradition must accommodate considerably more diversity of views on the common good than is commonly recognized by the more simplistic forms of communitarianism. Such forms typically envision their ideal communities as centered on some shared and unambiguous conception of the common good. Yet if we look at actual communities, even those with strong traditions of belief in a common good, we find continual disagreement and conflict over the common good. In part, this is the result of the complex nature of the common good. It is not one good, but an array of goods. These goods can be mutually supporting but also in tension with one another.

We can see this clearly in the Confucian tradition. If filial piety and brotherly respect are the root of *ren* or comprehensive moral virtue,²⁹ it also may conflict with other aspects of moral virtue, such as our concern for others outside the family. If loyalty to family nurtures a respect for authority not based on coercion, and if this respect is absolutely necessary for the cultivation of public virtue,³⁰ it may also encourage a partiality for one's own that is damaging to public virtue. Confucian ethics, as Hall and Ames have observed, is liable to continuous disagreement as to when the line between a rightful loyalty to family has crossed the line into nepotism and special privilege. And lest we take this as an occasion for condescending condemnation of Confucianism, let us recall that from different parts of the political spectrum in this country there has arisen

a regret for the passing of the big city political machines. Back then, "taking care of one's own" was at least taking care of *someone well*, and the average person on the street could feel capable of real influence on political decision making.

My point then is not to condemn Confucianism for this difficulty but to take it as indicative of the tensions between the goods that make up the complex whole called the common good. Or to take another issue that very much bears on present-day China: the provision of material security for all may be necessary for the moral flourishing of Chinese society, as Mencius and Xunzi rightly observed, but at the same time the necessary means for development and modernization in the future can have enormously destructive effects on the moral quality of a society in the present. I have in mind the extremely coercive one-child policy and the growing gap that modernization and a measure of capitalism have produced between an impoverished countryside and some relatively affluent classes in cities.

Because the common good is a complex whole including a plurality of goods and within which these different goods may come into conflict, there always will be some disagreement over which goods are included and the most reasonable way to deal with conflicts between the goods that are included. The vision of a society united around a shared and unambiguous vision of a common good is dangerously simplistic and, moreover, ignores bases for community other than such a shared conception of the common good. Actual communities are based not only on some degree of agreement in moral belief but also on a shared history, often of struggle and internal conflict, ties of affection or loyalty, or on a limited set of common goals that may be educational, artistic, political, or economic in nature.

Given the inevitability of serious disagreement within all kinds of moral traditions that have any degree of complexity, a particular sort of ethical value becomes especially important for the stability and integrity of these traditions and societies. Let me call this value "accommodation."³¹ To have this value involves commitment to supporting noncoercive and constructive relations with others even though they have ethical beliefs that conflict with one's own. Why is this value important? From the standpoint of the integrity and stability of a society, this value is important given the regularity of occurrence of serious ethical disagreement. If such disagreement always threatened to become the source of schism, no society could survive for very long without brutal repression.

To conclude, both rights-centered and community-centered traditions need a conception of community that is not based on an unattainable ideal of a shared vision of the common good. This new conception must accept significant diversity and disagreement and must maintain community in spite of that disagreement - not only through the recognition of rights but also through acceptance of the value of accommodation. To accept this value is to seek to find creative ways for conflicting sides within a community to stay within a community and yet not yield entirely to the other. If democratic virtues are needed here, it is not so much the ability to insist on one's rights, but the creative ability to negotiate, to give and to take, to create solutions that fully satisfy neither side in a conflict but that allow both sides to "save face."

This value has a basis in the Confucian tradition. Consider Antonio Cua's interpretation of the Confucian virtue of *ren*. This virtue, he says, involves an attitude toward human conflicts as subjects of "arbitration" rather than "adjudication." Arbitration is an attempted resolution of disputes oriented toward the reconciliation of the contending parties. The arbitrator is "concerned with repairing the rupture of human relationship rather than with deciding the rights or wrongs of the parties" [which is adjudication] and accordingly attempts to shape "the expectations of the contending parties along the line of mutual concern, to get them to appreciate one another as interacting members in a community."³² Now I think Cua's interpretation underemphasizes real themes of "adjudication" to be found in Confucius, Mencius, and Xunzi,³³ but it does capture a theme of accommodation and reconciliation in Confucianism³⁴ that could have received greater emphasis than it did in the tradition as it actually evolved.

Unfortunately, the way in which Confucianism became institutionalized resulted in a deemphasis of this theme and in a corresponding greater emphasis on agreement in conception of the common good. For example, Nathan identifies a crucial assumption running throughout the advocacy of democratic rights by Chinese intellectuals. The assumption is that such rights would tap the energies of the people, check abuses of the ruling elite, further development, and produce harmony in the sense of *all sharing the same ideals*,³⁵ It is this last element of the assumption that is fatal.

Nathan unfortunately tends to draw the wrong lesson from his observation. He equates this aversion to disagreement with the assumption that the legitimate personal interests of the individual must ultimately

harmonize with the common good.³⁶ This is a natural assumption for a Westerner to make: to deemphasize the legitimacy of disagreement and conflict is to deemphasize the legitimacy of conflicts between individuals and their communities. But conflict and disagreement can come from differences over conceptions of the common good. And because the common good of a complex society will include the goods of different communities contained within that society, there will be conflict between the goods and the communities. Mozi had a better insight into the source of disagreement and conflict in community-centered traditions: he recognized that much conflict can arise from people's *social* identities, from their identifications with family that lead to conflict with other families, from their identifications with their states that lead to conflict with other states.³⁷

I believe there is sufficient plasticity in human nature so that people in community-centered traditions have to a greater degree relational identities. I believe that a life lived in accordance with such an identity can have great satisfactions. It of course can have deep frustrations, as do lives lived in accordance with identities that are much less relational in nature. The problem with Confucianism has not lain in its claim that a life shared and lived in relation with others is a morally flourishing life. The problem has lain in its assumption that the different aspects of a person's social identity, which correspond to the different goods that go into the common good, can all somehow be subsumed and ordered under some grand harmonizing principle. Here, perhaps, we might have wished not only that institutionalized Confucianism had taken rights more seriously, but also for a greater synthesis of Confucianism and Daoism, and more specifically, Zhuangzi's appreciation for difference and the multiplicity of perspectives.³⁸

Notes

1. Heiner Roetz, *Confucian Ethics of the Axial Age: A Reconstruction under the Aspect of the Breakthrough toward Postconventional Thinking* (Albany: State University of New York Press, 1993), p. 2.
2. Roetz here refers to Henry Rosemont, Jr., "Kierkegaard and Confucius: On Finding the Way," *Philosophy East and West*, vol. 36 (1986), pp. 208-9.
3. The reference here is to Herbert Fingarette, *Confucius: The Secular as Sacred* (New York: Harper, 1972), p. 69.
4. The reference here is to David Hall and Roger Ames, *Thinking Through Confucius* (Albany: State University of New York Press, 1987), pp. 73, 43.
5. Fingarette, *op. cit.*, p. 72.
6. Roetz, *op. cit.*, p. 2.