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Confucian Perfectionism

A Political Philosophy for Modern Times

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CHAPTER 5

Human Rights as a Fallback Apparatus

Modern Challenges to Confucianism

One of the most complex issues involved in developing a contemporary Confucian ethical and political theory is the question of human rights and individual autonomy. Since the May Fourth Movement (1915–1926), Confucianism has been criticized for failing to recognize the dignity of the individual and the value of individual autonomy as understood in the Western liberal traditions of political thought. Some critics have even contended that Confucianism not only fails to recognize but actively suppresses individual autonomy. The most forceful critic in this regard was Chen Duxiu (1879–1942), who argued powerfully that Confucianism is inappropriate as a model for modern times because its ethics seriously undermines individual autonomy and self-respect. Similarly, contemporary critics claim that Confucianism is incompatible with human rights and civil liberties as it does not respect the autonomy of the individual.¹

In this and the following chapter, I shall discuss how contemporary Confucian-inspired scholars should respond to the question of human rights and individual autonomy. As these concepts are primarily modern and Western, and there is little in traditional Confucianism that we can draw reference from, it is therefore necessary to tackle the relations between Confucian thought and these two concepts through elaboration and emendation. It is my hope that my interpretive analysis will capture the spirit of the tradition and that my emendation will strengthen the philosophical appeal of Confucianism to people in modern times.

The relationship between Confucianism and human rights is a complex one that raises a number of questions: Is Confucianism compatible with the notion of human rights? Is there a place for human rights in an ideal society as understood in Confucianism? Under what conditions would Confucianism accept human rights, if at all? Can Confucianism accept the specific human rights as

¹ For powerful contemporary challenges along similar lines, see Randall P. Peerenboom, "Confucian Harmony and Freedom of Thought: The Right to Think versus Right Thinking," chap. 13 in *Confucianism and Human Rights*, ed. William Theodore de Bary and Tu Weiming (New York: Columbia University Press, 1998); and Ci Jiwei 慈繼偉, "Cong zheng dang yu shan de qu fen kan quan li zai xian dai xi fang he ru jia si xiang zhong de cha yi" 從正當與善的區分看權利在現代西方和儒家思想中的差異 [The Right, the Good, and the Place of Rights in Confucianism], in *Guo ji ru xue yan jiu* 國際儒學研究 [International Confucian Studies], vol. 6 (Beijing: China Social Sciences Press, 1999).

listed in the Universal Declaration of Human Rights? The answers to these questions vary according to each individual's understanding or evaluation of both Confucianism and human rights. For example, some scholars holding an incompatibilist position present Confucianism rather positively and human rights rather negatively, arguing that Confucianism as an ethics of benevolence and harmonious social relationships has no place for rights that are premised on individualism and self-assertiveness; whereas others holding the same incompatibilist position argue that Confucianism preaches an authoritarian form of morality and politics that should be rejected and replaced by a political philosophy of human rights and democracy. The compatibilists, however, argue that while Confucianism may accept the notion of human rights, it may not accept the full-blown conception of human rights as expounded by certain contemporary liberal philosophies of rights or as developed in contemporary international laws. In this chapter I shall develop and defend this moderate compatibilist position.

With regard to the question of compatibility, it is important to detach the idea of human rights from the doctrines or philosophies that have become associated with it in recent centuries. Although Western natural law theories and various liberal schools of thought have contributed much to the development of human rights, today the idea of human rights—minimally defined as rights that human beings have by virtue of their humanity—has gained currency in many different religions and cultures and is supported by people who subscribe to various philosophical and religious traditions of thought. As will be seen later, some of the attacks on human rights made by Confucian-inspired scholars might better be seen as attacks on the kind of rights talk commonly found within certain strands of liberalism. Of course, the extent to which human rights as developed in international laws today can be separated from Western liberalism may be an open question, but it is a mistake simply to assume or assert an equivalence of the two.

The overall argument of this chapter is that while the idea of human rights is compatible with Confucian ethics, the Confucian perfectionist approach understands the value and proper function of human rights in ways that are different from mainstream liberalism. In the next section I discuss and reject several arguments for the incompatibility view. In the third section I adopt a two-track approach to examine the value and function of human rights. In Confucian ideal society people are more or less virtuous and act in the spirit of benevolence; thus the notion of human rights has no practical importance, and human rights are not needed to express human worth. In nonideal situations, however, where people fail to act virtuously and social relationships break down, human rights are important instruments for protecting the legitimate interests of the people. In the fourth section I argue that Confucian perfectionism would resist the development of the type of rights talk that has the effect of impoverishing people's moral vocabularies and encouraging a culture of rights claims and litigation. There are two ways to resist the trend of rights talk—first,

to encourage a perspective that sees both human rights and virtue as important and mutually dependent, and second, to discourage the development of a long list of rights. For several reasons I argue that Confucians should prefer to restrict rights to civil and political rights.

Refuting the Incompatibility View

One of the most common arguments in support of incompatibility holds that the idea of human rights carries certain presuppositions that are either philosophically problematic or fundamentally at odds with Confucianism. This view is well represented in the work of Confucian scholar Henry Rosemont, Jr., who points out that it is "a bedrock presupposition of [Western] moral, social, and political thinking that human beings have rights, solely by virtue of being human." According to him, every human being

has a definite sex, a color, an age, an ethnic background, certain abilities; and we all live in a specific time and a specific place. From these facts some disturbing considerations follow. The first is that if rights are borne by human beings regardless of these differentiations, then those rights must obtain for human beings altogether independently of their culture. But then it becomes extremely difficult to imagine actual bearers of rights, because there are no culturally independent human beings.²

According to Rosemont, the concept of human rights presupposes *acultural* (or *asocial*) human beings, that is, human beings as existing in a cultural and social vacuum, a view not only antithetical to the Confucian conception of personhood but also philosophically untenable. Roger Ames also argues that Confucianism cannot accept human rights because they protect interests that are "independent of and prior to society."³

But such arguments give a mistaken representation of the nature of human rights. Rosemont is right in defining human rights as the rights people have solely by virtue of being human, irrespective of their sex, ethnicity, culture, and historical background. He is mistaken, however, in arguing that this definition of human rights implies that human beings can be thought of as having none of these attributes. This definition of human rights is not a *descriptive* claim about human nature but a *moral* view about the distribution of rights—one's sex, race, or culture is a morally irrelevant consideration insofar as one's entitlement to basic human rights is concerned. Neither are international charters of human rights guilty of the charge that human rights presuppose *acultural* or *asocial*

2 Henry Rosemont, Jr., "Why Take Rights Seriously? A Confucian Critique," chap. 10 in *Human Rights and the World's Religions*, ed. Leroy S. Rounner (Notre Dame: University of Notre Dame Press, 1988).

3 See Roger T. Ames, "Rites as Rights: The Confucian Alternative," in Rounner, *Human Rights and the World's Religions*, 205.

human beings. The International Covenant on Economic, Social and Cultural Rights protects people's interests in a meaningful social and cultural life. The freedoms of expression and of religion laid down in the International Covenant on Civil and Political Rights, which are taken by Rosemont and others as individualistic rights, are in my opinion designed to protect people's *social* interests: freedom of expression protects an individual's interest in communicating with others, especially in the public sphere; freedom of religion protects one's interest in joining religious associations. These rights are based on the fact that human beings are social and cultural animals. We must not confuse the basis of individual rights with the content of those rights. Although it is the *individual's* interest, not *society's* interest, that justifies a human right, the content of the individual's interest may be *social*.⁴

Rosemont goes on to argue that even if the concept of human rights does not presuppose acultural or asocial beings, it is

closely related to our view of human beings as freely choosing autonomous individuals, a view which is at least as old as Descartes and which is reaffirmed in the 1948 United Nations Declaration of Human Rights. But this concept is overwhelmingly drawn from the culture of the Western industrial democracies and is concerned to propose a particular moral and political perspective, an ideal, appropriate to that culture.⁵

In his view, other cultures or moral perspectives do not affirm this idea of a free, autonomous self. In early Confucianism, according to Rosemont, "There can be no *me* in isolation, to be considered abstractly: I am the totality of roles I live in relation to specific others. I do not *play* or *perform* these roles; I *am* these roles. When they have all been specified I have been defined uniquely, fully, and altogether, with no remainder with which to piece together a free, autonomous self."⁶ In a similar vein, Ames argues that "There is much in the Confucian tradition that might be a resource for rethinking our notion of *autonomous individuality*, especially that aspect of the individual which, given its priority over society and environment, effectively renders context a means to individual ends."⁷

This argument is problematic in both its understanding of the Universal Declaration of Human Rights (UDHR) and the Confucian conception of personhood.⁸ For example, the UDHR makes no direct mention of the concept of freely choosing autonomous individuals, and none of the major ideas in the

document can be easily construed as promoting a liberal-individualistic ideal of autonomy. Neither is individual freedom defined as an absolute value or as license to do whatever one pleases. The first article in the UDHR stipulates that "All human beings are born free and equal in dignity and rights" but continues, "They are endowed with *reason* and *conscience* and should act towards one another in a spirit of *brotherhood*" (italics added). The last article also states that "everyone has duties to the community in which alone the free and full development of his personality is possible," and that the exercise of one's rights and freedoms must meet "the just requirements of morality, public order and the general welfare in a democratic society." In addition, the UDHR does not define the basis of civil rights other than associating it with "the dignity and worth of the human person." There is no autonomy-based justification of these rights. Moreover, in the West, freedom of expression is often justified on the grounds that it contributes to the pursuit of truth, arts, democracy, the monitoring of government, and so forth—grounds not directly related to personal autonomy as such. Similarly, the right not to be subjected to torture, arbitrary arrest, detention, or exile, the right to fair hearing, and the right to be presumed innocent until proven guilty are typically justified on the basis of our interests in a minimal notion of freedom, physical security, and fair treatment rather than any robust liberal idea of autonomy.

It is also problematic to describe the early Confucian conception of personhood as purely role-based. Rosemont says, "I am the totality of roles I live in relation to specific others. I do not *play* or *perform* these roles; I *am* these roles." If by this Rosemont means that Confucian individuals have no internal capacity to step back from social conventions to reflect on, affirm, or reject their social roles and associated norms, then this is an incorrect interpretation of Confucian thought. There is no shortage of discussion in the classical texts as to whether people should accept or continue to play their roles and how they should do so: whether a ruler should give up his throne, a gentleman join the government, a son/minister follow his father's/ruler's instruction, and so forth. All this presupposes that Confucian individuals have the capacity to reflect critically on their roles.⁹

To be sure, Confucianism does place significant ethical constraints on human actions, and many of these are based on social roles. But it would be a mistake to think that Confucianism sees all duties, or rights, as arising solely from social roles, as Rosemont's description of the Confucian conception of personhood seems to imply. Although Confucianism places great emphasis on particular social roles, it is not a purely role-based ethics. The Confucian ethics of benevolence is ultimately based on a common humanity rather than differ-

4 For more discussion on this point and the relationship between individual rights and common goods, see Joseph Chan, "Raz on Liberal Rights and Common Goods," *Oxford Journal of Legal Studies* 15, no. 1 (1995): 15–31.

5 Rosemont, "Why Take Rights Seriously?" 167–68.

6 Ibid., 177.

7 Ames, "Rites as Rights," 212.

8 See "The Universal Declaration of Human Rights," United Nations, <http://www.un.org/en/documents/udhr/>.

9 An instructive discussion of this point can be found in Kwong-loi Shun, "Conception of the Person in Early Confucian Thought," chap. 8 in *Confucian Ethics: A Comparative Study of Self, Autonomy, and Community*, ed. Kwong-loi Shun and David B. Wong (Cambridge: Cambridge University Press, 2004).

entiated social roles—it carries ethical implications beyond these roles. The Confucian view is that human persons are first and foremost moral agents capable of realizing ren, which means, among other things, a certain ability or disposition to care for and sympathize with others. Although the sites for the realization of ren are commonly found in personal relationships, such as those between father and son or husband and wife, there are *nonrelational* occasions where moral actions are also required by ren. That is to say, not all moral duties in Confucianism arise from social institutions or relationships.

Take for example Confucius's golden rule, "Do not impose on others what you yourself do not desire" (*Analects* 15.24)—a moral precept applicable to everyone irrespective of social role or status. Mencius also says, "A gentleman retains his heart by means of benevolence [ren] and the rites [li]. The benevolent man loves others, and the courteous man respects others" (*Mencius* 4B.28). In this passage the "others" are unspecified. This notion of loving all others can also be found in book 7 of *Mencius*, where Mencius says, "A benevolent man loves everyone, but he devotes himself to the close association with good and wise men" (7A.46). A more telling example of a non-role-based or nonrelational morality is Mencius's discussion of a child on the verge of falling into a well (2A.6). For Mencius, a man with ren would be moved by compassion to save the child, not because he is acquainted with the child's parents, nor because he wants to win the praise of his fellow villagers or friends, but simply because of his concern for the suffering of another human being. Mencius's point is that no man is devoid of ren in the sense of "sensitivity to the suffering of others." These "others" are not confined to those personally known but may also include all people within the Four Seas—namely, everywhere in the world.

Some might argue that the example of the child about to fall shows only that we are moved to save a child in danger only if we see the child, that is, that there is some kind of "interaction" or relationship between the child and the one who saves him or her. However, in my opinion this stretches the notion of relationship too far—a personal relationship does not begin instantaneously upon first eye contact. Moreover, even if the sight of a child in danger arouses feelings of benevolence or empathy and moves me to action, my compassion for complete strangers could be similarly triggered by the audiovisual images of their suffering I encounter in the media. Benevolence may also compel us to respond to this awareness. Although it is true that Confucian ethics favors a graded concern for others and emphasizes that we should care for our family and friends above strangers, Confucians also believe that benevolence is not confined to those personally known but can reach all people within the Four Seas. Later Confucians even talk about the benevolent heart being able to encompass nature and Heaven. Confucian ethical concern for human suffering is potentially unlimited in scope. Benevolence motivates and commands us to respond to our awareness that there are people in need, even if they are strangers and live far away from us.

Nothing I have said thus far shows that Confucianism recognizes that human individuals have rights irrespective of their roles. Rather, it shows that the argument for the charge that Confucianism is *unable to accommodate* universal human rights is unsound, for it is based on a *false* premise, namely, that Confucianism subscribes to a purely role-based view of morality.¹⁰

Contemporary Confucian scholar Kwong-loi Shun also disagrees with the purely role-based interpretation of Confucian ethics but seems hesitant to endorse the compatibility of human rights and Confucianism for a slightly different reason. He agrees that "Confucian thinkers regard human beings as autonomous in having the capacity to reflect on, assess and shape their lives without being determined by external influences." But "the exercise of this capacity," according to his interpretation of Confucian ethics, is "intimately linked to the social order" rather than to the fact that individuals have separate interests to protect or ends to pursue. In particular, he believes that the fact that any claim individuals can make on others in such an order is "based on an understanding of the social dimensions of human life rather than on a conception of human beings as individuals who need protection in the pursuit of their individual ends." Shun says that the basis for making a legitimate claim on others "is not a view of human beings as individuals whose interests require protection either because of competing interests among people or because their freedom to choose their own ends needs to be preserved."¹¹ In other words, if, according to Confucianism, people should not make claims on the basis of their individual interests or ends, then the fact that human rights do allow people to make claims on such a basis would not be welcome by Confucian ethics.

What should we make of this view? I believe it is fair to say that Confucianism does not give importance to the idea of individuals freely choosing their own ends, whatever these ends may be. The emphasis is on acting rightly rather than freely, and to act rightly is to act in accordance with one's best understanding of the requirements of Confucian morality. Nevertheless, Confucianism never denounces or belittles individual interests that are understood as the legitimate needs and desires of individuals as human beings (not just as parents, sons and daughters, or officials). One discourse in Confucianism that does denounce "interests" refers to the self-interests (often selfish interests) of rulers, not those of the people; rulers should care for the basic interests of their people above their own interests. As Xunzi says, lordship is established for the people, not for the ruler (*Xunzi* 27.68). For Confucianism, one of the most important functions of a ruler is to "benefit" (*li*) the people. As the classical texts clearly show, the ruler's task is to protect the interests of the people in terms of subsistence and pursuit of material goods, fair treatment in the allocation of rewards and punishments, and proper familial and social relationships. Shun claims

¹⁰ Roger Ames has further developed his view of Confucianism as a kind of "role ethics" in *Confucian Role Ethics: A Vocabulary* (Hong Kong: Chinese University Press, 2011), which I am not able to discuss here.

¹¹ Shun, "Conception of the Person," 194–95.

that "the focus of Confucian thinkers when viewing the legitimate claims that an individual has on others is less on how the claims serve to protect that individual, but more on how they are part of a social setup that is to the communal good." This claim seems to be overstated, for he also notes, rightly in my view, that it is not true that Confucian thought "downplays individual interest and subordinates it to the public good"; rather, "there is no genuine conflict between individual interest and the public good."¹²

One reason for the absence of genuine conflict between individual interests and the public good is that the public or communal good is partially constituted by individual needs and entitlements. As I shall show in chapter 7, peace and harmony are based on the recognition of each individual's due, or the fair treatment of individuals. Mencius and Xunzi take the fair treatment of individuals as a moral imperative that trumps political goals such as the gaining of an empire. Mencius says that it is wrong to "kill one innocent man" or "take what one is not entitled to" in order to gain an empire, for doing so is contrary to righteousness (yi) and benevolence (ren) (*Mencius* 2A.2, 7A.33). Xunzi is of the same view, namely, that a gentleman (ru) "would not commit a single act contrary to the requirements of justice nor execute a single blameless man, even though he might thereby obtain the empire. Such a lord acts with justice [yi] and faithfulness [xin] toward the people" (*Xunzi* 8.2).

In light of this understanding, we may conclude not only that Confucian thought would not oppose the idea that basic individual interests constitute the common good, but that it would take these interests as the basis of a legitimate social and political order. Confucianism would not reject human rights on the grounds that they protect fundamental individual interests and would in fact support the civil rights laid out in the UDHR, such as the right not to be tortured or subjected to arbitrary arrest and the right to a fair hearing, precisely because they protect the fundamental individual interests of physical security and fairness. As the UDHR's notion of human rights does not presuppose the notion of freely choosing autonomous individuals without regard for community responsibilities or social relationships, and as Confucian ethics see no opposition between the individual good and the common good (i.e., social order and harmony can only be pursued by affirming and protecting people's interests in terms of security, material goods, social relationships and fair treatment), then it follows that, with regard to these issues at least, there is no incompatibility between Confucianism and the concept of human rights.

Human Rights in Ideal and Nonideal Situations

While there is no strict incompatibility between Confucianism and the idea of human rights, the tensions between the two lie in the more subtle issues of how Confucians understand the value and proper function of human rights, as well

as which of the many rights laid out in international human rights treaties they accept as fundamental. There are two common approaches to understanding the value and function of fundamental human rights: one is an instrumental approach that takes human rights as an important device for protecting people's fundamental interests; the other does not deny the instrumental value of human rights but insists that they also have an important noninstrumental value, in the sense that they are necessary expressions of human dignity or worth. In this section I shall argue that Confucianism can accept the first approach but not the second.

Joel Feinberg has made an influential argument for the expressive value of human rights.¹³ He asks us to imagine "Nowheresville," a world in which "the virtues of moral sensibility" and "the sense of duty" flourish, and which is filled with "as much benevolence, compassion, sympathy, and pity as it will conveniently hold without strain." What is lacking in this world is individual right—people have no right to make claims against each other. In Feinberg's view, having a right enables the right-holder to make certain claims against others, to make a complaint and demand for compensation if he or she is wronged, and so forth. In Nowheresville, however, if people are treated inappropriately, they can make no claims against others, which results in a lack of self-respect and human dignity—for having the capacity to assert rights claims is a necessary condition for self-respect and human dignity. Feinberg writes:

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 (this is an intriguing idea) 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.¹⁴

Feinberg does not, however, give any argument for the claim that human dignity "may simply be the recognizable capacity to assert claims." In any case, Confucians would resist any view that links human dignity solely with rights and the capacity to make claims against others. The concept of human dignity is broad and vague and allows for various conceptions. If one minimally defines the concept as the inner moral worth of a human being that entitles him or her to a certain moral status and respect that no other living things or material objects possess,¹⁵ then clearly different cultural or philosophical perspectives

¹³ Joel Feinberg, "The Nature and Value of Rights," *Journal of Value Inquiry* 4, no. 4 (1970): 243–60.

¹⁴ *Ibid.*, 252.

¹⁵ See Rhoda E. Howard, "Dignity, Community, and Human Rights," chap. 4 in *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*, ed. Abdullahi Ahmed An-Na'im (Phil-

¹² *Ibid.*, 195.

will have different views of the source of inner moral worth and hence different conceptions of human dignity. According to Mencius and Xunzi, the source of inner moral worth that makes human beings *gui* (translated as noble, honorable, or valuable) is the human capacity for benevolence and righteousness (*ren yi*). Mencius says, "Every man has in him that which is exalted [*gui*]," namely, his "benevolence and righteousness [*ren yi*]" even if "the fact simply never dawned on him" (*Mencius* 6A.17). For Xunzi, among all living things, only humans possess "a sense of duty [*yi*],"¹⁶ and for this reason they are "the noblest [*gui*] beings in the world" (*Xunzi* 9.16a). This inner worth of human beings allows Mencius to say that in politics "people are of supreme importance" (*Mencius* 7B.14), and that innocent life should never be sacrificed merely to gain political power (2A.2). As we see, Confucians regard human beings as having an inner moral worth that gives them a special status, and they believe that the source of this worth lies in each person's potential capacity for benevolence and righteousness, rather than in the possession of rights.¹⁷

Even if human rights are not needed to express the dignity of an individual, it does not follow that human rights do not or should not exist. Nevertheless, human rights do not have any practical importance in an ideal Confucian society, and it seems inappropriate to invoke the notion of rights in such a context. In the ideal Confucian society, people are more or less virtuous and act in the spirit of benevolence—a graded notion of care or love for one's family and friends and for all strangers as brothers within the Four Seas. People in virtuous relationships should not need to think of themselves as individuals possessing rights that they can evoke to make claims against their partners; they should think of themselves as participating in a relationship of reciprocal commitment or mutual caring. To introduce considerations of rights is inappropriate in such relationships, as it might motivate us to see the interests of others as limitations on our own interests rather than as separate interests that we might wish to promote.¹⁸

For Confucians, human virtue and virtuous relationships are not dependent on rights. This point has important implications for certain strands of contem-

porary rights talk prevalent in some Western countries, where some liberals have adopted an inflated view of rights and argue that even the most valuable forms of mutual caring and love can flourish only in a relationship based on rights. Simon Caney, for example, argues that "benevolence as a virtue is more desirable if based on knowledge of one's rights and entitlements. It has a greater degree of intentionality."¹⁹ John Tomasi gives the following example to support Caney's general point:

Imagine a marriage relation in which one spouse is utterly deferential to the other. Consider a "deferential wife" whose most every act toward her husband would be perceived by others as being beyond her reasonable duty, as being—apparently, at least—supererogatory (we could as easily imagine a "husband"). However uncomfortable, she nonetheless always wears clothes she knows he prefers; however much they annoy her, she always invites guests he enjoys; however ill suited for her schedule, she always rises and retires when he does. . . . It seems clear that the deferential wife . . . does not act in a way properly called "virtuous" . . . She does not recognize that she is most often in a good position to act otherwise; she has forgotten—and likely would prefer not to be reminded—that she even has rights.²⁰

One may agree with Tomasi that, in this example, the wife lacks self-respect or self-worth. The basis of self-respect, however, need not lie in the fact that she has rights, but in the belief that she is worthy of care and concern and that her well-being matters. Therefore she has a legitimate basis, namely, the ideal of mutual caring and love, to complain about her husband—the husband is not treating her with care and is not recognizing her needs and aspirations.²¹ The wife need not think in terms of rights in order to assess the relationship. In fact, once she begins to think in these terms, she starts to distance herself from the persons on whom she may press her claims. What she ought to do, according to the Confucian view, is to remind her husband of the ideal of mutual love and caring.

For Confucians, therefore, rights do not play an important role in virtuous relationships, where the focus is on mutual caring and love. But what if the relationship turns sour? Do we need rights to repair it in this instance? Probably not, since it would still be best to repair the relationship by refreshing both

adelphia: University of Pennsylvania Press, 1992), 83; and Doron Shultziner, "Human Dignity: Functions and Meanings," chap. 7 in *Perspectives on Human Dignity: A Conversation*, ed. Jeff Malpas and Norelle Lickiss (Dordrecht: Springer, 2007), 81.

16 As I discussed in chapter 2, note 22, Xunzi's notion of a "sense of duty" might contradict his general view that human nature is bad or evil. One possible way to get around this apparent contradiction is that even though human beings have no innate sense of duty or morality, they can somehow acquire it through socialization and learning, although it is not clear how this can be possible. In any case, Xunzi might argue that the fact that human beings can acquire a sense of duty or morality is what separates them from animals and gives them an exalted status in the world.

17 For another critique of Feinberg's view from a Confucian perspective, see Craig K. Ihara, "Are Individual Rights Necessary? A Confucian Perspective," chap. 1 in Shun and Wong, *Confucian Ethics*.

18 Hugh LaFollette, *Personal Relationships: Love, Identity, and Morality* (Oxford: Blackwell, 1996), 146.

19 Simon Caney, "Sandel's Critique of the Primacy of Justice: A Liberal Rejoinder," *British Journal of Political Science* 21, no. 4 (1991): 517.

20 John Tomasi, "Individual Rights and Community Virtues," *Ethics* 101, no. 3 (1991): 533. See also Joel Feinberg, *Harm to Self*, vol. 3 of *The Moral Limits of the Criminal Law* (New York: Oxford University Press, 1986), 238.

21 Some might say that the husband violates the norm of reciprocity, which is one form of fairness. But reciprocity, as I understand it, is a minimum notion embedded in many kinds of ethics. One can say that the ideal of mutual caring and love, and Confucius's notion of *shu*—not to impose on others what we ourselves do not desire, and establish and enlarge others insofar as one seeks to establish and enlarge oneself—embody some notion of reciprocity. In any case, reciprocity as a form of "fairness" is still very different from the notion of a right.

partners' commitment to the ideal of mutual caring, rather than by introducing or invoking rights.²² However, if the relationship breaks down to a point of no return, rights may be relevant and useful in protecting the interests of both parties. Consider again the example of the breakdown of a marriage: if a husband's love for his wife has died and in many ways he has harmed her interests, it would be highly desirable and even necessary for the wife to have formal and legal rights (marriage rights as well as human rights) to fall back on in order to protect her interests.²³

Thus in nonideal situations rights can play an important role even in familial relationships, and I think Confucianism would endorse rights in this sense. No ethics of benevolence and care would seek to diminish the needs of individuals. After all, when we care for a person, what are we supposed to care for if not that person's needs and interests? There is no reason why Confucianism would prohibit an assertion of rights that is necessary to protect important individual interests. And if familial relationships require rights as a fallback position, this should be reason enough to support the greater community with an apparatus of rights. In the workplace, market, government, court, and other less personal social spheres, people's motivations to act virtuously toward each other may not be as strong as within the context of the family. In nonideal situations rights are important instruments with which the vulnerable can protect themselves against exploitation and harm.

Early Confucian thinkers reacted in a similar way to problems of moral wrongdoing in nonideal situations. When things go wrong and people misbehave in a nonideal society, Confucians first appeal to each other's sense of benevolence and righteousness and reaffirm the norms and rituals that they are expected to follow, hoping that those who go astray will return to the path of benevolence and righteousness. If conflicts or inappropriate conduct persist, the parties involved are brought before those who enjoy an exalted status and command respect from all parties (typically village elders) for mediation, in the hope of reconciling conflict and restoring social harmony.²⁴ If mediation does not work, Confucians allow the issue to be litigated in court, although they prefer to avoid this where possible. Confucius says, "In hearing litigation, I am no different from any other man. But if you insist on a difference, it is, perhaps, that I try to get the parties not to resort to litigation in the first place" (*Analects* 12.13). But Confucius does not say that litigation should be avoided absolutely or at all costs. When people no longer act according to virtues or rituals—when

they harm others, for example—there is a need to fall back on some institutional apparatus to protect the legitimate interests of those involved. More important, Confucius does not say that we should always yield to others at all times, particularly when we are unjustly harmed.²⁵ There is a passage that may correct this popular misunderstanding of Confucius: "Someone said, 'Repay an injury with a good turn. What do you think of this saying?' The Master said, 'What, then, do you repay a good turn with? Repay an injury with straightness, but repay a good turn with a good turn'" (*Analects* 14.34). When we are wronged, injured, or harmed by others, Confucius says that it would be appropriate to react by recourse to "straightness," which might be interpreted today as including such measures as seeking justice and compensation through litigation.

The Confucian preference for mediation, reconciliation, and compromise, therefore, does not imply that human beings do not have rights or that they should never use them to protect themselves when harmed. Nevertheless, the Confucian favoring of nonlegal methods of conflict resolution is worth mentioning in the contemporary discourse of human rights. As Randall Peerenboom writes,

Although far from perfect, traditional methods [of conflict resolution] such as mediation offer many advantages. Both parties save face, fully participate in the proceeding, and shape the ultimate solution. The process, usually faster and cheaper than more formal methods, allows for a more particularized justice and for the restoration of social harmony, with both sides feeling they have received their due.²⁶

In fact, the Confucian concern for nonlitigation can be understood as an objection not to human rights as such but to the abuse of rights. However, in order not to abuse rights, we need a theory of virtues to guide right-holders in the exercise of their rights. Confucianism, being a rich theory of virtues, therefore complements a theory of human rights in this regard.²⁷

Confucians today, therefore, would approach the value and function of human rights in the same way that early Confucian thinkers approached litigation. Human rights are not necessary to the expression of human dignity, nor are they constitutive of virtues or virtuous relationships. In a nonideal situation, however, they can serve as an important fallback apparatus to protect one's

22 LaFollette, *Personal Relationships*, 146.

23 The notion of rights as a fallback apparatus is taken from Jeremy Waldron, "When Justice Replaces Affection: The Need for Rights," chap. 15 in *Liberal Rights: Collected Papers 1981-1991* (Cambridge: Cambridge University Press, 1993), 374.

24 For a detailed discussion of the Confucian practice of mediation in traditional and modern China, see Albert H. Y. Chen, "Mediation, Litigation, and Justice: Confucian Reflections in a Modern Liberal Society," chap. 11 in *Confucianism for the Modern World*, ed. Daniel A. Bell and Hahm Chaibong (Cambridge: Cambridge University Press, 2003).

25 And so, on the level of states, defensive wars can be morally legitimate, according to Mencius. For a detailed account of Mencius's view, see Bell, *Beyond Liberal Democracy*, 23-51.

26 Randall P. Peerenboom, "What's Wrong with Chinese Rights? Toward a Theory of Rights with Chinese Characteristics," *Harvard Human Rights Journal* 6 (1993): 55.

27 For more discussion, see Michael J. Meyer, "When Not to Claim Your Rights: The Abuse and the Virtuous Use of Rights," *Journal of Political Philosophy* 5, no. 2 (1997): 149-62; Jeremy Waldron, ed., *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man* (London: Methuen, 1987); and Seung-hwan Lee, "Liberal Rights or/and Confucian Virtues?" *Philosophy East and West* 46, no. 3 (1996): 367-79.

basic interests and needs. In a modern society, human rights function both as a normative principle and a legal instrument, but what ultimately gives human rights their significance and impact is the latter. As a legal instrument, they protect powerless individuals from harm by governments, corporations or social groups. Human rights laws are no ordinary laws; they are higher laws that trump ordinary laws or policies made by governments. Human rights laws cannot be effective without the rule of law and an independent court system with powers of judicial review. But when human rights laws are not yet in place or effective, human rights serve as a powerful normative principle to critique the status quo and demand change, with the ultimate aim of turning human rights aspirations into effective positive laws.²⁸

Rights Talk and the List of Rights

There is still one important issue to address before Confucians can fully accept human rights as a fallback apparatus. In the Confucian view, the need for claim-rights emerges only when virtues fail, rituals break down, and mediation becomes ineffective. But such rights, if frequently evoked, can create a snowball effect that causes further social strain and encourages divisive ways of thinking and adversarial tactics. The more readily people can access the rules and procedures of human rights, the more likely they are to use them in the first instance. In this scenario, rights would be brought from the background to the foreground, becoming the first resort rather than the last.²⁹

Let us look carefully at this problem. The first point to note is that a culture of litigation and adversarial actions may develop even without the introduction of a human rights apparatus. When the level of general trust is low in a society and ordinary social norms and mechanisms are too weak to guide behavior, litigation might become the only effective way to protect one's interests in cases of conflict, whether or not human rights laws exist. To prevent a culture of litigation from developing, we should try to rebuild social capital, revitalize social norms and mechanisms, and above all make sure that the law is enforced in a fair and effective manner.

Second, whether the human rights apparatus will encourage rights talk and litigious behavior or not, and how likely this is, depends on a number of factors, namely, how human rights are perceived, how wide-ranging the scope of these rights is, and whether there are alternative mechanisms in place to resolve con-

28 Of course, the human rights legal apparatus goes much further than the traditional Chinese penal and administrative law system in the following structural aspects (not to mention the difference in content): the distinction between higher and ordinary laws, the concept of a limited government, judicial review, and perhaps a democratic political system. I argued in chapters 2–4 that Confucianism today should accept these institutions.

29 For this argument, see Justin Tiwald, "Confucianism and Human Rights," chap. 22 in *Handbook of Human Rights*, ed. Thomas Cushman (Abingdon, UK: Routledge, 2012).

flikt or prevent abuse of power. A culture of rights talk and litigious behavior is more likely to develop in a society if human rights are given an exalted status and human rights protection covers a wide range of aspects of people's lives. In recent decades the number of international human rights treaties and laws has significantly increased, expanding from the "first generation" of civil and political rights, to social and economic rights, to minority and group rights, and environmental rights. New bodies and mechanisms have been created to monitor compliance and implementation. These developments have encouraged rights movements and rights talk in international and national contexts. Many philosophers have challenged the long list of human rights that has been enumerated, questioning the coherence of the so-called new generations of rights. What is worrying is that in public and academic discourse, rights talk seems to have eclipsed traditional moral vocabularies such as justice, the common good, virtue, and duties and rights have become the main moral currency to tackle social problems. James Griffin, for example, has argued that "the fairly recent appearance of group rights is part of a widespread modern movement to make the discourse of rights do most of the important work in ethics, which it neither was designed to do nor . . . should now be made to do."³⁰ Coupled with the exalted status of human rights, this rights talk trend could have the effect of impoverishing people's moral vocabularies and encouraging a culture of rights claims and litigation.

In my view, Confucianism should resist such a development. We have already examined the fact that Confucians see human rights as an instrumental fallback apparatus rather than an abstract ideal that expresses human dignity. To avoid the problems above, Confucians should emphasize the importance of educating people in the value of virtue—and right-holders should possess virtues to guide them in the exercise of their rights. I also believe that Confucians would prefer a short list of human rights consisting of (1) those rights whose violation (often by governments) poses serious setbacks to social order and individual interests, and (2) those rights that can most easily be implemented and protected by law. The first generation of rights—civil rights and political rights—appears to fit these two criteria more so than social, economic, or other types of rights. Confucians certainly do not belittle the social and economic interests of people. Although these interests may arguably be more basic than certain civil liberties such as freedom of speech and association, unlike civil rights, they are hard to protect through litigation and need to be secured through politics and policies.³¹ What governments need to do is to make and enforce sound policies and institutions to promote economic growth and a fair distribution of resources. Appealing to the language of rights in these matters

30 James Griffin, *On Human Rights* (New York: Oxford University Press, 2008), 256.

31 I do not want to claim that there cannot be any economic and cultural rights that can be effectively implemented by law—this is a difficult empirical question and needs to be discussed case by case.

can risk turning a complicated balancing of competing values—such as social justice, basic needs, equal opportunity, efficiency, and general utility—into simplistic legalistic reasoning. More important, the introduction of civil and political rights can help prevent violations of social and economic rights, for the latter are often a result of government corruption, maladministration, and mismanagement of economic policies. Amartya Sen has famously argued that famines are almost always associated with authoritarian political rule and that democracy plays an important instrumental role in their prevention: “Famines are easy to prevent if there is a serious effort to do so, and a democratic government, facing elections and criticisms from opposition parties and independent newspapers, cannot help but make such an effort.” He continues: “The positive role of political and civil rights applies to the prevention of economic and social disasters in general.”³²

The nature of traditional Confucianism also makes civil and political rights a priority. As I argued in chapter 2, a long-standing feature of traditional Confucian thought (and Chinese political tradition) was the ruler's unchecked supreme status and authority. Although in theory people enjoyed supreme importance, in reality they were not protected by legal institutions or empowered to protect themselves through political participation. The introduction of a human rights apparatus in the civil and political sphere would therefore help to redress the heavy imbalance of power between the ruling and the ruled. Relatively easy access to the legal apparatus to assert one's civil and political rights and legally challenge rights-violating laws and policies is actually something to be welcomed rather than deterred, for it provides powerless individuals with a powerful means to defend themselves.³³

32 Amartya K. Sen, “Democracy as a Universal Value,” *Journal of Democracy* 10, no. 3 (1999): 8. This point goes some way to resist a common argument made by some Asian governments in the so-called Asian Values debate, which holds that civil and political liberties need to be sacrificed in order to meet more basic material needs. For a detailed discussion of the trade-off argument and other points of contention in the debate, see Bell, “Human Rights and ‘Values in Asia’: Reflections on East-West Dialogues,” chap. 3 in *Beyond Liberal Democracy*. Bell, however, points out that while “the general claim that civil and political rights must be sacrificed in the name of economic development may not stand up to social scientific scrutiny, East Asian governments also present narrower justifications for curbing particular rights in particular contexts for particular economic or political purposes. These actions are said to be taken as a short-term measure to secure a more important right or more of that same right in the long term.” *Ibid.*, 56–57.

33 It should be noted that there are two kinds of civil freedom: one kind concerns political matters such as political speech, public demonstration, and association, while the other has more to do with cultural and moral matters such as pornography, assisted suicide, and homosexuality. Elsewhere I have argued that Confucians would favor a more liberal approach to the first sort of freedom and a more conservative one to the second, which is another issue often discussed in the “Asian Values” debate. For a detailed discussion of the issue about human rights and cultural and ideological differences, see Joseph Chan, “Hong Kong, Singapore and ‘Asian Values’: An Alternative View,” *Journal of Democracy* 8, no. 2 (1997): 35–48; Joseph Chan, “Thick and Thin Accounts of Human Rights: Lessons from the Asian Values Debate,” chap. 3 in *Human Rights and Asian Values: Contesting National Identities and Cultural Representations in Asia*, ed. Michael Jacobsen and Ole

Rich cultural and ethical resources already exist within a Confucian society to deal with the sort of concerns raised by social and economic rights. As we shall see in chapters 7 and 8, a long-standing feature of Confucian thought is the emphasis on the government's responsibility to cater for people's material needs. A large part of the Confucian ideal of benevolent rule requires the setting up of social and economic policies to distribute land and economic opportunities for the ruled. Mencius's influential idea of a well-field system articulates what we may call today the sufficiency principle of social justice, which holds that the government has a responsibility to provide for each household a certain amount of land to own and plow so that members of that household can live a decent material life and have spare time to learn and practice virtues when dealing with family members and neighbors. It is interesting to note that Mencius, like Sen, attributes poverty and famines to political factors rather than natural ones. Mencius is keenly aware of the seriousness of poverty and inequality of wealth in his times. He refers to situations in which some people have food “so plentiful as to be thrown to dogs and pigs,” while others “drop dead from starvation by the wayside” (*Mencius* 1A.3). He also says, “Nowadays, the means laid down for the people are sufficient neither for the care of parents nor for the support of wife and children. In good years life is always hard, while in bad years there is no way of escaping death” (1A.7). The cause of such situations, according to Mencius, lies with “despotic rulers and corrupt officials” (3A.3). He goes so far as to claim that if people die of starvation under a particular ruler, then that ruler has not only failed in his obligations as ruler but has also behaved no differently than if he had killed them (1A.3; see also 1A.4).

Conclusion

In this chapter I have argued that there is no incompatibility between Confucianism and the notion of human rights. In the Confucian ideal society there is no need for human rights, and they are not necessary for human dignity or constitutive of human virtues. In nonideal situations, where virtuous relationships break down and mediation fails to reconcile conflict, human rights can serve as a fallback apparatus for the protection of fundamental individual interests. But human rights should not be exalted to eclipse other moral vocabularies such as duty and virtue, or exercised without regard for the interests of other people. To avoid the rise of rights talk, Confucians prefer to restrict rights to civil and political rights—not because social and economic needs are less important but because civil and political interests are more easily protected by litigation. The promotion of economic rights, on the other hand, requires sound economic institutions and policies that cannot easily be ensured through the

Bruun, vol. 6 in Nordic Institute of Asian Studies: Democracy in Asia Series (Surrey: Curzon Press, 2000). In chapter 6 I discuss the basis and limits of liberties related to cultural and moral issues.

legal language of human rights. In addition, there are three reasons for giving civil and political rights priority over social and economic rights in a Confucian-inspired society. First, the adoption of civil and political rights redresses a strong tendency within Confucianism to overpower political leaders. Second, there are rich conceptual and ethical resources in a Confucian-inspired society to protect and promote people's material needs and social relationships (i.e., the concerns of social and economic rights). Third, similarly to contemporary thinkers, early Confucian thinkers such as Mencius recognized that the chief causes of severe poverty and famine are political corruption and despotism, which require sound political solutions. Today, political corruption and despotism are prevented by a robust set of civil and political rights and legal apparatus that protect not only people's physical security and freedom but also their fundamental material needs and interests.

CHAPTER 6

Individual Autonomy and Civil Liberties

Individual Autonomy: Moral and Personal

May Fourth intellectual Chen Duxiu argued that Confucian ethics is incompatible with modernity. Modern life, he said, is based on recognition of the individual, or the independence of individual personality and property. The spheres of modern society—the family, economy, and politics—are organized by the principle of respect for individual autonomy, whereas Confucianism preaches the opposite: the son is not independent of the father, the wife is submissive to the husband, and the people are subjects to the rulers.¹ But is it true that Confucianism does not recognize individual autonomy? Some contemporary Chinese scholars have argued that although Confucianism may not incorporate the liberal notion of individual autonomy, it nevertheless contains a concept of moral autonomy that can support civil liberties.² This argument is important. If sound, it can be useful in revising the dark and pessimistic picture of Confucianism painted by the May Fourth thinkers. In this chapter I seek to critically examine the Confucian conception of moral autonomy and explore its implications regarding civil liberties.

The concept of moral autonomy is, unfortunately, vague and ambiguous, and many of the arguments that make use of it do not help remove its vagueness or ambiguity. The question of whether Confucian ethics has a conception of moral autonomy often invites two replies. The first argues that as the term "moral autonomy" was coined and popularized by Kant, it should also be de-

1 See Chen Duxiu 陳獨秀, *De sai er xian sheng yu she hui zhu yi: Chen Duxiu wen xuan* 德賽二先生與社會主義：陳獨秀文選 [Mr. Democracy and Mr. Science and Socialism: Selected Writings of Chen Duxiu], ed. Wu Xiaoming 吳曉明 (Shanghai: Shanghai Yuandong 上海遠東, 1994), esp. "Dong xi min zu gen ben si xiang de cha yi" 東西民族根本思想的差異 [Fundamental Differences in Thinking between East and West], 25–29, and "Kongzi zhi dao yu xian dai sheng huo" 孔子之道與現代生活 [The Way of Confucius and Modern Life], 56–62. For an analysis of Chen Duxiu's view, see Lin Yü-sheng, *The Crisis of Chinese Consciousness: Radical Antitraditionalism in the May Fourth Era* (Madison: University of Wisconsin Press, 1979), esp. chap. 4.

2 This line of argument can be found in the works of Mou Zongsan 牟宗三 [Mou Tsung-san] and Tang Junyi 唐君毅 [Tang Chun-i]. See also Lin Yü-sheng, "The Evolution of the Pre-Confucian Meaning of *jen* 仁 and the Confucian Concept of Moral Autonomy," *Monumenta Serica: Journal of Oriental Studies* 31 (1974–75): 172–204; and his "Reflections on the 'Creative Transformation of Chinese Tradition' in Chinese Thought in a Global Context: A Dialogue between Chinese and Western Philosophical Approaches," ed. Karl-Heinz Pohl (Leiden: Brill, 1999), 73–114, which appeals to the Confucian concept of moral autonomy in arguing that Confucianism can accept human rights.