

THE TEACHINGS OF CONFUCIUS: A BASIS AND JUSTIFICATION FOR ALTERNATIVE NON-MILITARY CIVILIAN SERVICE

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Over the centuries the teachings of Confucius have been quoted and misquoted to support a wide variety of opinions and social programs ranging from the suppression and sale of women to the concerted suicide of government ministers discontented with the incoming dynasty. Confucius's critics have asserted that his teachings encourage passivity and adherence to rites with repression of individuality and independent thinking.¹

The case is not that simple. A careful review of Confucius's expressions as preserved by Mencius, his student, and the expressions of those who have studied his teachings, suggests that Confucius might have found many of the expressions and opinions attributed to him to be objectionable and inconsistent with his stated opinions. In part, this misunderstanding of Confucius and his position on individuality, and the individual's right to take a stand in opposition to legitimate authority, results from a distortion of two Confucian principles; namely, the principle of legitimacy of virtue, suggesting that the most virtuous man should rule, and the principle of using the past to teach the present.² Certainly, even casual study reveals that Confucius sought political stability, but he did not discourage individuality or independent

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¹ CONFUCIANISM AND HUMAN RIGHTS 1 (William Theodore De Bary & Tu Weiming eds., Columbia University Press 1998). Summing up the voice of Confucius's critics, one Confucian scholar has suggested "[t]he presumption is that Confucianism spells authority and discipline, limiting individual freedom, and strengthening the state." *Id.*

² DUN J. LI, THE AGELESS CHINESE: A HISTORY 35 (Charles Schribner's Sons, 3d ed. 1978). However, a careful study of Confucius's expressions as preserved by his students and followers, particularly Mencius (372 – 289 B.C.E), indicates that these two principles predate Confucius, and that Confucius himself held a very different view of the role of the individual of society and his duty to uphold moral independence even when it required a direct challenge to legitimate governmental authority. *Id.*

action. Thus, while he was in favor of harmony, Confucius did not advocate conformity and blind obedience.

This article takes the central theme that Confucius' teachings support the individual's natural and inherent right and responsibility to exercise his conscience and have such right protected by governmental authority. The paper is divided into four parts. After a brief discussion of Confucius, his family, personal background, and the political conditions in which he lived, the article will discuss the major themes in Confucius' philosophy and addresses some of the more controversial issues as they withstood the test of time.

Part II discusses how Confucius' fundamental teachings on the five relationships, and the individual's relationship to legitimate authority have been used, misused, attacked and distorted over the centuries. Part III investigates three specific applications of Confucius' teachings that demonstrate that the thesis presented in the paper; namely, that Confucius' teachings support the individual's natural and inherent right and responsibility to oppose legitimate governmental authority when the governmental authority is out of harmony with the moral sense of the individual, is well-supported. Finally, Part IV investigates the recent Taiwan legislation and the application of Confucian thought to freedom of conscience and the question of participation in non-military service when the applicant holds strong religious or morally founded objections to service. It concludes with the suggestion that such legislation should be considered in Korea and all other Asian countries with strong Confucian traditions. This discussion is conducted keeping in mind the principle that Confucianism, like the world's other great philosophical legal and religious traditions, is neither static nor monolithic, but is a gradually maturing tradition.³

³ As Asian humanist Irene Bloom points out "the language of Confucius is dynamic and relational; almost invariably he seems to be visualizing a process of development rather than some essential reality." Irene Bloom, *Mencian Confucianism and Human Rights*, in CONFUCIANISM AND HUMAN RIGHTS, *supra* note 1, at 98. Translator and historian Simon Leys suggests that THE ANALECTS are "classic" that is, he means that THE ANALECTS are

PART I

CONFUCIUS – HIS LIFE, TIMES, AND TEACHINGS

A. *Confucius – his life and times*

It would be difficult if not impossible to clearly grasp Confucius's thought without knowing something of the man's personal background and the times in which he lived and taught. The task is made more difficult since he did not write an autobiography and because there are no contemporary biographies of Confucius. Apart from some references in the Song Dynasty (960-1279), there are no literary or artistic works about Confucius' life before the Qing Dynasty (1644-1911).⁴ Much of what is known of Confucius comes from *The Analects*, the text was compiled after his death by faithful students primarily, Mencius.⁵

“open-ended – in the sense that it lends itself to new developments, new commentaries, different interpretations.” THE ANALECTS OF CONFUCIUS xvii (Simon Leys, trans., W.W. Norton & Company 1997). Like any other classic, Leys warns that Confucius can be applied to “countless uses and misuses, understandings and misunderstanding.” *Id.* at xviii. Thus, care must be given in this investigation to search for sufficient context to allow the text to develop without losing the character and integrity of the statement.

⁴ CHUNLI QU, THE LIFE OF CONFUCIUS 644 (Sun Haichen, trans., Foreign Language Press, Beijing 1996). Legal historian Jerry Dennerline noted that even by the fall of the Ming dynasty, in the seventeenth century, it would be almost impossible to define what were the actual teachings of Confucius and what were the thoughts of his students, disciples and the influence of other religious and philosophical schools of thought. JERRY DENNERLINE, THE CHIA-TING LOYALIST: CONFUCIAN LEADERSHIP AND SOCIAL CHANGE IN SEVENTEENTH CENTURY CHINA (1981). The Confucianism of the seventeenth century “was not necessarily bound to a specific dogma, [rather] what made him a Confucianist was his belief in the validity of the teachings in the classical texts.” *Id.* at 153. By this time Confucian thought had been blended with and influenced by Buddhism, Taoism, martial arts, meditation and a wide variety of factions among those who considered themselves to be Confucianist. *Id.* at 152-154.

⁵ THE ANALECTS, literally translated as “sayings discussed” consists of a series of unrelated short statements and dialogues. Ding Wangdao referring to Ban Gu's HISTORY OF HAN, offers the following explanation:

Sayings Discussed (THE ANALECTS) records Confucius's answers to questions raised by students and men of his time, and conversations between his students on the master's sayings. Students took notes separately and, after the master's death, they discussed, collected and compiled his sayings, so the book was called Sayings Discussed (THE ANALECTS).

DING WANGDAO, 100 SAYINGS OF CONFUCIUS xxiii (Ding Wangdao, trans., Shang Wu Xing Shu Guan, Taiwan 1998). Understandably, as a result of the process Ding described, the text is a patchwork with repetitions, contradictions and gaps. There are about 490 sayings covering a wide range of subjects. To read THE ANALECTS requires that the reader focus on what is said as well as what is not mentioned in the text. Even Confucius's student observed that “[t]he Master never talked of: miracles; violence; disorders; spirits.” THE ANALECTS OF CONFUCIUS, *supra* note 3, at 7.21.

Confucius, which is the latinized name given to Kong-Fuzi (551-479 B.C.) by 17th century Western missionaries, was born about one hundred years before Gautama Buddha in the State of Lu, now Shandong, in a rural village.⁶ At that time China was a loose congregation of states or provinces each ruled by its own prince. Strategically situated between three provincial powers, the state of Lu had difficulty maintaining territorial and political integrity and was often in a state of seige with a neighboring power.⁷ Characterized by “incessant turmoil and warfare,” it is not surprising that Confucius lived the last few years of his life in an epoch referred to as the Warring States period (475-221 B.C.E).⁸

According to historian Qu Chulin, Confucius’s father, Kung Shuliang, was a military officer and his mother, Zhengzai, the third daughter of an elderly scholar, was a secondary wife.⁹ Confucius was thought to be a descendant of minor nobility. During his childhood, he moved to the provincial capital at Chu-fu. Although of a noble lineage on his father’s side, D. C. Lau, a translator of *The Analects*, suggests that Confucius was raised modestly. Kung Shuliang died when Confucius was very young, and his young mother entrusted her son’s early training and education to her own father. Lau suggests that of Confucius’s early years “little is known except that he was poor and fond of learning.”¹⁰ Confucius, thus received training in the traditional six subjects to be studied: “rites, music, archery, chariot driving, writing and mathematics.”¹¹

⁶ Qu, *supra* note 4, at 38.

⁷ Li, *supra* note 2, at 72.

⁸ KENNETH LIEBERTHAL, *GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM* 6 (1978).

⁹ See QU, *supra* note 4, at 3-12 wherein Confucius’s parents and their personalities and mannerisms are described in detail.

¹⁰ *Id.*

¹¹ QU, *supra* note 4, at 21. Interestingly, however, while Confucius’s teacher did, in fact, educate him in the traditional six subjects of rites, music, archery, chariot driving, writing, and mathematics, his teacher also expressed some apprehension in that he only felt comfortable and prolific enough to truly teach four of the six subjects. He told Confucius, "I am familiar with only four [subjects], namely rites, music, writing, and mathematics. As for archery and chariot driving, I know very little and have received no military training." *Id.*

Confucius himself later admitted that he “I never learned how to handle troops.”¹² He married at the age of nineteen, and is believed to have had one son and two daughters.¹³

In Confucius’s day, the positions of the ministers of the court for the vassal states were filled by hereditary rather than appointment.¹⁴ Local minor officials were appointed and Confucius was appointed to several such positions during his lifetime. His first appointment came at age seventeen when he was appointed to supervise the grainary of a local noble.¹⁵ Confucius himself explained, “I took positions in the government with the aim of serving the nation.”¹⁶ Confucius served several vassal lords, but was frustrated because he “could never carry his plan of regulating the world by rules of proper conduct.”¹⁷ In spite of some ministerial success, Confucius lost favor with the authorities in 480 B.C and spent his remaining years in dire conditions wandering with his devoted students among the local municipalities and teaching until his death in 478 B.C.

Rather than create a new methodology for government, Confucius drew from the successes of past dynasties in an effort to stabilize contemporary governments. Confucius drew

¹² THE ANALECTS OF CONFUCIUS, *supra* note 3, at 15.1.

¹³ TEH-YI HSIEH, CONFUCIUS SAID IT FIRST 30 CHINA SERVICE BUREAU (NORWOOD, MA:PLIMPTON PRESS 1936).

¹⁴ See QU, *supra* note 4, at 29-30 wherein the hereditary succession of ministers from one powerful family generation to another is illustrated.

¹⁵ Hsieh, *supra* note 16, at 30.

¹⁶ QU, *supra* note 4, at 54. While Confucius was dedicated to his country and culture, he did have doubts about the current state of society and his ability to affect real change. After stating that he wanted to serve his nation, Confucius then went on to say:

As a keeper of granaries, I tried my best to collect tax and keep accounts clear. As keeper of livestock, I tried my best to have the animals well fed. If the runners were lazy, I exhorted them with patience. If the runners did wrong I punished them according to law. I think I have fulfilled my duties. However, when I look at the world, I see nothing but the decline of the ruling houses, the breakdown and the degeneration of social and moral conduct, and the disintegration of music and rites. Even if I can make the accounts clear, the cattle and sheep plump, my subordinates honest and the runners diligent, I can contribute precious little toward upholding the way of Zhou and strengthening the ruling house of Lu. I might as well try to put out a burning cart-load of firewood with a cup of water.

Id.

from the ancient classics tenets.¹⁸ Confucius traveled with his students to different principalities hoping to find a prince that would apply his methodology of living and governmental management and restore peace to the principality.¹⁹

Since he had been materially poor in his youth, Confucius had concern for the poor and disposed. He did not criticize wealth or physical comforts, nor did he encourage or admire the pursuit of wealth. Confucius noted that “riches and rank are what every man craves; yet if the only way to obtain them goes against his principles, he should desist from such a pursuit.”²⁰ Confucius believed that each individual and each government should strive for the happiness of others. He lived in a time when sons ruled after their fathers, but Confucius believed that anyone, not just those of noble birth, could rule successfully. He thought that education would make the crucial difference between success and failure in a ruler, and he opened the first private school in China. He emphasized education and ritual.²¹ For Confucius, education is not something a man acquires, but is a life long process that impacts and shapes the very being, purpose and existence of the individual. Education, was in Confucius’s mind, the essential tool in the making of the gentleman and the essential identifying characteristic of the gentleman.

¹⁷ *Id.* at 128.

¹⁸ In THE ANALECTS, one of his students observed: “The Master made use of four things in his teaching[s]: literature; life’s realities; loyalty; good faith.” THE ANALECTS OF CONFUCIUS, *supra* note 3, at 7.25.

¹⁹ As Emily Hahn suggests Confucius insisted “upon the relative excellence of the past, in which he believed there had been a golden age of perfection.” HAHN, *supra* note 7 at 31. Confucius himself openly admitted: “I transmit, I invented nothing. I trust and love the past.” THE ANALECTS OF CONFUCIUS, *supra* note 3, 7.1. Or as Lau’s translation reads: Confucius was “devoted to antiquity.” THE ANALECTS OF CONFUCIUS, *supra* note 12, at 7.1. Consistent with that thought is Confucius’s modest explanation for his preoccupation with history: “For my part, I am not endowed with innate knowledge. I am simply a man who loves the past, and who is diligent in investigating it.” THE ANALECTS OF CONFUCIUS, *supra* note 3, at 7.20.

²⁰ THE ANALECTS OF CONFUCIUS, *supra* note 3, at 4.5.

²¹ As Leys explains: Confucius had an “optimistic belief in the all-persuasive power of education: it was assumed that errant behavior came from a fault understanding, a lack of knowledge: if only the delinquent could be taught, and be made to perceive the mistaken nature of his actions, he would naturally amend his ways.” *Id.* at xxix. In one conversation with his followers, he explained that “[a] gentleman is not a pot,” meaning that a man is not trained or educated for a specific task. *Id.* at 2.12. Lau’s older translation of THE ANALECTS renders the expression “vessel” instead of “pot” and explains that the gentleman “is not a specialist, as every vessel is designed for a specific purpose.” THE ANALECTS OF CONFUCIUS, *supra* note 12, at 2.12.

Confucian education was aimed at training people to govern, but his philosophy was radically different than his predecessors or peers because he believed that all government employees should play an active role in government and should show initiative in criticizing imprudent policies even if it meant personal loss. His legacy is more often associated with his emphasis on ritual, but he did not hold to ritual for ritual's sake and he did not urge people to mindlessly follow the crowd.²² Although Confucius is considered a great philosopher and teacher, his primary interest was politics and the business of effective government.

Although he urged his followers to pray devoutly before they enjoyed a meal,²³ Confucius may have been agnostic since he did not write of death and the hereafter. He limited his teachings to opinions about life on earth, explaining to his students: "You do not yet understand life, how can you understand death?"²⁴ Confucius encouraged adherence to "the Way," to the "Golden Mean," or "*Li*" as a means of conduct, encouraging his followers that they should be prepared to stand by it and die for it if conscience required it. This standard encouraged people to take an active role in society. Confucius was concerned with humanity and with the concerns of the people. He was not an isolationist. Rather, he believed that "[i]t is beautiful to live amidst humanity. To chose a dwelling place destitute of humanity is hardly wise."²⁵ Like Jesus, Confucius urged his followers to "love all men."²⁶

For a brief period Confucius worked for the government. However, since he thought of the government as a way for others to silence his teachings, he resigned from his post. This freedom allowed him to travel to various Chinese governments offering his observations about

²² Li suggests that "the ultimate goal of all Confucian scholars (including Confucius) was to secure a position with the government, and in China as in many other agricultural societies, there was no higher prestige than that of becoming one of the king's ministers." Li, *supra* note 2, at 355.

²³ THE ANALECTS OF CONFUCIUS, *supra* note 3, at 10.11.

²⁴ THE ANALECTS OF CONFUCIUS, *supra* note 12, at 11.12.

²⁵ THE ANALECTS OF CONFUCIUS, *supra* note 3, at 4.1.

²⁶ *Id.* at 12.22.

government and rulership. He spent the last five years of his life in his hometown teaching and editing classical literature. Confucius died a natural death in 479 B.C. at the age of 72. It was not until after Confucius's death, however, that his thoughts were elevated to national consciousness when his student, Mencius, published a book called *The Book of Mencius*.

B. Confucius – Traditional views and their impact in Asian society

Eventually Confucius thought permeated every level of Chinese society.²⁷ Confucius's teachings are considered more a philosophy than a religion.²⁸ Yet he has had great influence and his philosophy is often classified with Buddhism and Taoism as China's foremost religious influences. In fact, it is arguable that the greatest influence on Asian culture has been Confucianism.²⁹ A religion to some, an ideology to others, a "cult of ritualized subordination" to its critics,³⁰ Confucianism has governed the general outlook and influenced all levels and features of the Chinese educational, governmental and family systems.³¹

Confucius's aim was to create an orderly society out of the "feudal chaos of his time."³²

One of the most important aspects of Confucius's philosophy toward legitimate authority is the

²⁷ After exploring the history and evolution of Confucian thought concerning individualism, De Bary concluded that Confucianism produced an individual who was not prepared for citizenship in a democratic arrangement, but did produce a moral individual who was committed to adherence to a "higher" law or "the Way" even in the face of opposition or governmental persecution. De Bary refers to Confucianism "as the essence of the Chinese tradition." WILLIAM THEODORE DE BARY, *ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE* 6 (1998).

²⁸ CHINA HANDBOOK 1937-1945 13 (MacMillan Co. ed. 1947). Confucianism is not actually considered a religion because it has no ritual that characterizes it as a religion. It is not possible to derive spiritual comfort from the teaching. It is a philosophy, a system of ethics that direct a more human mode of living. *Id.*

²⁹ *Id.* at 25. The birthday of Confucius was actually made a national holiday in 1934 and later was designated as "Teacher's Day," commemorating the greatest teacher in Chinese history. *Id.*

³⁰ VERA SCHWARCZ, *THE CHINESE ENLIGHTENMENT: INTELLECTUALS AND THE LEGACY OF THE MAY FOURTH MOVEMENT ON 1919* 3 (1986).

³¹ Kenneth Lieberthal focuses on three commonly cited characteristics of Confucianism: (1) that Confucianism is strongly conservative and designed to preserve order; (2) Confucianism valued hierarchy in both political and social spheres and created no sense of equality among citizens; and (3) Confucianism leads to a harmonious society with people following correct conduct without enforcement of law. KENNETH LIEBERTHAL, *GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM* 7 (1995). Similarly, De Bary suggested that there has been a widespread tendency among historians and social critics "to identify Confucianism with autocratic and authoritarian rule in the imperial dynasties." CONFUCIANISM AND HUMAN RIGHTS, *supra* note 1, at 4.

³² OLGA LANG, *CHINESE FAMILY AND SOCIETY* 9 (1946).

fact that Confucius separated political power from ethical power.³³ Confucianism has two parts, both the pursuit of knowledge of the good, or “the Way,” and the second part, the doing of the what is good or acting in harmony with “the Way.”³⁴ Acting in harmony with “the Way,” particularly in times when the scholarly gentleman ruler may not be given to high ideals, may, then bring the individual into a course of conduct that opposed the legitimate or legal political authority. This higher authority, in Confucius own words was not from other men. As Confucius explained “Heaven vested me with moral power.”³⁵

Confucius envisioned a ruler who would not resort to force, but rather a scholarly gentleman who would lead by moral virtue, refined conscience, and fine example. This perfect gentleman ruler would be distinguished “by love of humanity and by piety towards his parents and superiors; he meticulously observed the prescribed rites; he was well-versed in literature and poetry, gentle and urbane.”³⁶ The gentleman was not necessarily a man of nobility, but a man in whom “the practice of virtue [was] secured through education.”³⁷

The higher responsibility of the educated gentleman is sharply highlighted in the Qing criminal code. The code imposed higher punishments on noblemen than commoners for violation, because it was the duty of the educated and scholar class to rule and preside over the affairs of the poor and uneducated. Thus, under traditional Confucian thought the masses and uneducated have no active role in the government.³⁸ Yet, the gentleman ruler was to deal justly

³³ FEI HSIAO-TUNG, CHINA’S GENTRY 39 (1953). Fei suggested that unlike that separation of Church and state that is rooted in the Greek Scriptures conversation with Jesus and the religious leaders of his day in which Jesus responds to a query by saying: ‘Render unto Caesar the things that are Caesar’s and to God the things that are God’s,’ Confucius envisions a separation of political and ethical powers which are on par with each other rather than a divine law that is superior to secular governments. *Id.* at 40.

³⁴ *Id.* at 40-41.

³⁵ THE ANALECTS OF CONFUCIUS, *supra* note 3, at 7.23.

³⁶ LANG, *supra* note 35, at 9.

³⁷ THE ANALECTS OF CONFUCIUS, *supra* note 3, at xxvii. Confucius’s teachings in loyalty and filial piety upheld the *status quo* and were, therefore, also encouraged by the ruling class. *Id.*

³⁸ As one social commentator and historian claimed, the masses of China became passive and did not participate in local or provincial government. JAMES R. TOWNSEND, POLITICS IN CHINA 40 (1974).

with the subjects and not to be oppressive in rulership in order to be successful. Confucius explained: “mobilize the people only at the right times.”³⁹

Confucius defined the five cornerstones of societal relationships as (1) ruler and subject; (2) father and son; (3) husband and wife; (4) elder brother and younger brother; and (5) friend and friend. Thus, Confucius viewed the people as players in the context of a social network rather than as individuals. Of the five essential relationships, three of the five are familial relationships, thus emphasizing the superiority of the family unit in traditional Chinese society and Confucian thinking.⁴⁰ The traditional family also served quasi-governmental functions. The Confucian family provided a complete social welfare system for the magistrate by demanding filial piety as a characteristic of a good son.⁴¹

The fact that there is a predominance of the importance of the family relationship in the Confucian arrangement has been used to suggest that there is no concept of individuality in the Confucian system. However, this is a narrow view of the discussion.⁴² In order for the relationships to function properly, each individual participant must act as a complete moral individual carrying his or her full share of the responsibility since all relationships require reciprocity. Thus, for example, the responsibility to the minister was not a mindless, mechanical conformist, but the individual citizen’s responsibility to cultivate his conscience and moral

³⁹ THE ANALECTS OF CONFUCIUS, *supra* note 3, at 1.5.

⁴⁰ Sociologist Olga Lang observed, “high respect for family and paternal authority became another specific feature of Chinese civilization.” LANG, *supra* note 35, at 9. Even the Qing criminal code reflects the importance of the family by putting exile and the inability to offer worship at the family estate as one of the most severe punishments available to the magistrate. DERK BODDE & CLARENCE MORRIS, LAW IN IMPERIAL CHINA 85 (1967).

⁴¹ For example, Lang points out “the law exonerated father or grandfather who killed his son or grandson unintentionally when chastising him ‘in a lawful and customary manner.’” LANG, *supra* note 35, at 27.

⁴² Professor De Bary refers to Mencius’ summation of the classic paradigm of human relations:

- Between parent and child there is to be affection
- Between ruler and minister, rightness
- Between husband and wife, [gender] distinctions
- Between older and younger [siblings] an order of precedence
- Between friends, trustworthiness.

CONFUCIANISM AND HUMAN RIGHTS, *supra* note 1, at 17.

independence. At the same time the “mutual obligation of ruler and minister [was] to adhere to right, and to consider the relationship at an end if they cannot agree on what is right [since] undying attaches to principle, not persons.”⁴³

Another feature of Chinese family life supports this interpretation. The status of the woman in early (pre-Qing) Chinese society suggests that Confucius placed value on individuality. Just as Confucianism is neither static nor monolithic, neither is the role of the woman in China been static or monolithic. For example, Confucius supported the traditional thinking of his day that encouraged the “four womanly virtues of morality, proper speech, modest manner and diligent work.”⁴⁴ Many critics suggest that this thinking created and justified generations of female subjection and oppression. However, this position ignores a significant tradition of placing importance on the education of women.

According to Qu, Confucius’ own mother was third daughter of a scholar who was well versed in a wide variety of subjects and was able to supervise Confucius’ education until he went

⁴³ DE BARY, *supra* note 30, at 19. Confucius summed up the matter quite clearly in conversation with Zilu: “Zilu asked how to serve the prince. The master said: ‘[t]ell him the truth even if it offends him.’” THE ANALECTS OF CONFUCIUS, *supra* note 3, at 14.22. According to De Bary, “Confucian ministers were obligated to resign and leave court, according to Mencius, rather than become associated with actions and policies that were not [morally] ‘right’ (yi).” CONFUCIANISM AND HUMAN RIGHTS, *supra* note 1, at 95. As Confucius explained in conversation with Ji Ziran: “A great minister is a minister who serves his lord by following the Way, and who resigns as soon as the two are no longer reconcilable.” THE ANALECTS OF CONFUCIUS, *supra* note 3, at 11.24.

There were several interesting historical examples of heroic Confucian ministers who resisted the despotic Ming rulers. For example, Fang Xiaoru (1357-1402), resisted the Yonglou Emperor. After threats of death by slicing, Fang continued to resist and he and his family to the ninth degree were executed. Ming official Hai Rui (1513-1587) was hailed in the Mao era as a courageous example of one who fought for speaking out against injustice on the part of the ruling class.

Minister Qian Tang resisted Taizu, the founder of the Ming dynasty (1368-1398). Taizu ordered an expungement of the text of Mencius from the civil examinations and remove Mencius tablets from the Confucian temple. According to historian and translator Simon Leys, Taizu “had an abiding hatred for Confucianism” and had his effigy burned in the great temple of Confucius and many of his books burned. SIMON LEYS, CHINESE SHADOWS 206 (1974). Taizu threatened death to any who would oppose his decision to reserve for himself the right to offer ritual sacrifice to Confucius and withdraw the right from the local Confucian officials, as well as delete text of Mencius that he found insulting. Minister Qian is reported to have returned to court bearing a coffin and saying: “It would be an honor to die for Mencius.” CONFUCIANISM AND HUMAN RIGHTS, *supra* note 1, at 20. These examples emphasize De Bary’s position that Confucius and Mencius saw “the ruler/minister relationship as one that “should be governed by mutual respect for what is right [with] proper respect or civility in the decorum that should prevail at court.” *Id.* The relationship was not one of blind submission.

⁴⁴ QU, *supra* note 4, at 28.

to study with her own father.⁴⁵ Confucius' best-known student, Mencius, like Confucius had a scholarly mother who was competent and able to manage their sons' early academic and moral training in the home.⁴⁶ Confucius himself comments favorably on King Wu of the Zhou dynasty (1122-249 BC) who had a woman among his ministers.⁴⁷

Confucian thought is significant in Chinese history not only for its longevity as a dominant influencing factor, but for the fact that Confucius achieved social authority, not through his own wisdom or learning, but "from his profound knowledge of the traditional way."⁴⁸ Confucius dealt with his contemporaries and the human side of life. His teachings offered no view of the hereafter or other metaphysical questions of the day and he makes no references to future rewards or future punishments or to anything of a spiritual nature.⁴⁹ Human relationships were his focus. Thus, Confucius focused on the relationship of man to his community as more important than the rights of the individual.

In this way, Confucius viewed man as a social being, and not an independent agent.⁵⁰ Confucius critics suggest that he upholds stability at any price. Such a characterization is distorted and shows an absence of appreciation of the times in which Confucius lived. However, it is an exaggeration to say that Confucius sought stability as the highest value for the society or as a philosophic principle for good government. Those students and readers who came after him,

⁴⁵ *Id.* at 13. Confucius's mother was described as "not only a kindly mother but also a strict teacher." *Id.*

⁴⁶ THE WORKS OF MENCIUS 16 (James Legge trans., Dover Publications, Inc. 1970).

⁴⁷ THE ANALECTS OF CONFUCIUS, *supra* note 3, at 8.20.

⁴⁸ HSIAO-TUNG, *supra* note 36, at 67.

⁴⁹ HSIEH, *supra* note 16, at 23.

⁵⁰ Historian Dun Li explained a traditional point of view "[t]o the Chinese mind, the collective welfare of a group had priority over the well-being of individuals who composed it, and the enhancement of group welfare would presumably enhance individual well-being as well. Theoretically at least, human relations were more important than human beings." Li, *supra* note 2, at 68. This position, however, is an over simplification and generalization. Unfortunately this misconception lies at the heart of the argument heard at the end of the Qing dynasty and maintained by some today that Confucius's thought gave priority to the needs of the collective community are a protection against the Western culture-bound concepts of individualism and even human rights.

understood and accepted the historical context of his writing, and credited Confucius as being a man of action and one who accepted the need to change.

C. Confucius in the Twentieth Century

Confucius teachings have been used to support reforms to the government as well as used to fight for stabilization of the government. After China's defeat in the Sino-Japanese War (1895-1905), China's weaknesses were fully exposed. Internally reformers tried to shore up the weakened central government. Confucian scholar K'ang Yu-wei led the strategy by convincing the gentry class that reforms were not only compatible with traditional Confucian thought, but that Confucius's teachings, in fact, required reform.⁵¹

This strategy was also used by Wang Mang in the first century and Wang An-shih in the eleventh century. Both used Confucius as a basis for their reform efforts. K'ang's works favorably impressed the new Emperor Kuang-hsu, and in 1898, K'ang and some associates were summoned by the Emperor Kuang Hsu and given government posts with authority to begin reforms. Emperor Kuang, then in his late twenties, had been put on the throne by the Empress Dowger in 1875, while he was still an infant.⁵² The reforms issued in the form of decrees during a period of one hundred days, could have radically changed the Chinese government if they had been implemented. The following reforms came to be know as the "Hundred Days Reforms": (1) elimination of the eight-legged essays and the introduction of test on current affairs in all civil service examinations; (2) the elimination of unnecessary government organs such as the bureau of Royal Butlers (in charge of the emperor's food) and the Bureau of Royal Stables; (3) the establishment of Westernized schools; (4) the organization and training of armed forces

⁵¹Among those who called for reform, K'ang Yu-wei, based his argument on the Spring and Autumn Annals, and other traditional writings to call for reforms to "barriers between nations, class barriers, barriers of race, sex, family, profession, individual disorders, . . . and poverty" in an effort to save the dynasty. JACQUES GUILLERMAZ, *A HISTORY OF THE CHINESE COMMUNIST PARTY 1921-1949* 18 (Anne Destenay trans., 1972).

according to Western methods and the increased use of modern weapons; (5) the establishment of modern banks, the opening of mines, and the construction of railroads; and (6) the establishment of an economic bureau coordinating all industrial and commercial activities across the nation.⁵³

Although certainly not radical in nature, the reforms were not warmly received and the government again fell into the hands of the Empress Dowger. K'ang was denounced as a traitor who had twisted Confucian thinking for his own ends, and was forced to flee to Japan to avoid being beheaded. He remained loyal to the monarchy and founded the Society for the Protection of the Emperor.⁵⁴ Resistance to K'ang's reforms came from the intellectuals who served as government bureaucrats and whose advancement depended on their scholastic performance on the eight-legged essays that K'ang sought to abolish. Thus, Li concludes: "by introducing one educational reform, K'ang made millions of enemies."⁵⁵ After the fall of the Qing dynasty, K'ang returned to China to support Yuan Shih-kai as he attempted to restore the empire in his own name. K'ang died an old man who had "completely reverted to a thoroughly orthodox conservatism."⁵⁶

The May Fourth Movement, a nationalist student movement rather than a mass phenomenon, attacked Confucianism for developing passive people.⁵⁷ Although Mao Tse-Tung

⁵² KENNETH SCOTT LATOURETTE, *CHINA* 120 (1964).

⁵³ LI, *supra* note 2, at 425.

⁵⁴ GUILLERMAZ, *supra* note 54, at 19.

⁵⁵ LI, *supra* note 2, at 426.

⁵⁶ GUILLERMAZ, *supra* note 54, at 19.

⁵⁷ In tracing the history and events of the May Fourth Movement, historian Vera Schwarcz explained that:

In modern China, . . . the origins of spiritual lethargy were traced back to Confucianism, or more precisely to those elements of the Confucian tradition that comprised the *lijiao*, the cult of ritualized subordination. This cult had been perpetuated through the institution of the examination system and represented an adaptation of the ethic of filial piety to the needs of the imperial bureaucratic state. Using the most intimate emotions that prevail within the family, the cult of subordination was comprised of 'three ropes and five bonds' (*sangang wuchang*) – all of which required that inferiors submit themselves to their superiors, whereas the 'five bonds'

had a traditional Confucian upbringing, it is no surprise that Mao wanted an end to the wide spread teachings of Confucius for several reasons. For example, Confucius taught that there was a link between heaven and earth. He considered the emperor to be the link between heaven and earth. Thus, any unjustified resistance to the emperor would bring the adverse judgment of the Heavens (*tian*). On the other hand, if the Emperor was not morally correct in his behavior, then the Heavens would indicate their displeasure by natural disaster and calamity.⁵⁸

Second, Mao's political and social policies toward the traditional family arrangement required parents to set aside Confucian emphasis or filial piety and encouraged children to denounce their parents as "reactionaries" and as "bourgeois," when their parents failed to advocate party values. Instead of the five human relations stressed by Confucius, the Communist Party inculcated the "five loves—love for the motherland, for people, for work, and for knowledge, and respect for public property."⁵⁹ Youths were encouraged to select their own marriage partners. Women were encouraged to prepare for the learned professions and their wages in industry were equal to their male counterparts. Mao's economic programs also had a direct impact on Chinese family life. Collectivization and programs such as the Great Leap Forward moved families living in the countryside toward communal living based on work groups rather than the traditional extended family through kinship. Under Mao, the state "assumed a central role in establishing the economic, cultural, and even demographic parameters that decide the size and the composition of urban households."⁶⁰ For example, in 1955, Mao established a

elaborated further the sentiments that ought to prevail between prince and minister, father and son, older brother and younger brother, husband and wife, friend and friend.

SCHWARCZ, *supra* note 33, at 3.

⁵⁸ LIEBERTHAL, *supra* note 9, at 8.

⁵⁹ LATOURETTE, *supra* note 55, at 17.

⁶⁰ DEBORAH DAVIS & STEVAN HARRELL, CHINESE FAMILIES IN THE POST-MAO ERA 50 (1993).

system of national household registrations in an effort to control migration from rural to urban centers and to administer food rationing.

Third, “Mao scorned the Confucian ideal of harmony as an absolute social value.”⁶¹ Confucius taught that a hierarchiarical political structure could maintain social and political stability in times of turmoil. Confucius encouraged each individual to keep his place in the society and to follow the responsibilities imposed by their relationships to others in the society. For Mao and others this position was in direct conflict with the Communist insistence on struggle and more specifically, class struggle. Mao’s famous quotation from his letter to the Central committee suggested that struggle could never be an impersonal matter, but that it was “highly personal, direct, violent, and public.”⁶² Mao wrote in his famous observations on the peasant revolts in Hunan: “a revolution is not the same as inviting people to dinner or writing an essay, or painting a picture, or doing fancy needle work; it cannot be anything so refined, so calm and gentle, or so mild, kind, courteous, restrained, and magnanimous. A revolution is an uprising, an act of violence whereby one class overthrows another.”⁶³ In addition to violent class struggle, Mao believed in struggle sessions, which were often violent in nature and that “China could move forward only on the basis of violence and that the revolution needed a vanguard and a hard leading edge.”⁶⁴ Such a strategy had no place in the harmonious society of educated gentlemen rulers of Confucius.

During Mao’s day, Confucius had both critics and supporters. In 1957, 1961 and 1962 the National Party authorized meetings of scholars and politicians to evaluate how Confucius’ teachings should be viewed by the Communist Party. Professors Kuan Feng and Tu Yu-shih

⁶¹ LIEBERTHAL, *supra* note 9, at 68.

⁶² *Id.* at 69.

⁶³ CHINESE COMMUNISM 23 (Dan Jacobs & Hans H. Baerwald eds., 1963).

⁶⁴ LIEBERTHAL, *supra* note 9, at 69.

vigorously opposed Confucius' teachings, and gave the following reasons: "Basically speaking, the political philosophy of Confucius should be viewed as an attempt, on the part of the slave owners, to harmonize or smooth out the contradictions between different classes. Confucius was hoping that by reforms the old institution of the West Chou dynasty could be restored. In terms of political action, he was more than a conservative or reactionary. He always stood on the side of the slave owning nobility."⁶⁵

Historian Li reports that this radical opinion was a minority view, and that Professor Feng Yu-lan's expressions were the majority opinion. Professor Feng suggested "[t]he philosophical view of Confucius marks the liberation of man's thought from the yoke of supernatural power. It teaches us the adoption of a positive attitude toward reality of life. The love advocated by Confucius is expressed in universal terms, transcending class differences."⁶⁶ Not until after Mao's death was Confucius gradually rehabilitated. Evidence of the rehabilitation was seen in the 1980 Hangzhou conference of philosophers, which openly included topics related to Confucianism were openly debated. Rehabilitation was complete when in 1984 the Beijing headquartered China Confucius Foundation restored the temple in Qufu, Confucius' birthplace.⁶⁷

⁶⁵ LI, *supra* note 2, at 561.

⁶⁶ *Id.* at 562. The famous Marxist historian Professor Fan Wen-lan had similar expressions. "What is the attitude we should adopt toward Confucian teachings, rich as they certainly are? The most beneficial attitude, as has been pointed out by Mao Tse-tung, is to differentiate the dregs from the essence, and we should reject the dregs in order to preserve the essence. Confucius has left behind a beautiful heritage which all of us Chinese must value highly." *Id.*

⁶⁷ CONFUCIANISM AND HUMAN RIGHTS, *supra* note 1, at xi. "The China Confucius Foundation was formally established in 1984. Headquartered in Beijing, they opened a branch at the Qufu temple." *Id.*

Part II

CONFUCIUS' VIEW OF OPPOSITION TO LEGITIMATE AUTHORITY

What did Confucius actually say and teach about opposition to legitimate authority?

Many have the impression that Confucius advocated harmony and peaceful relations above all else. True, *The Analects* do suggest that a gentleman who values virtue would be “willing to give his life for his sovereign,”⁶⁸ however, this position can not be read in a vacuum and this expression does not mean that the subject owed blind, unquestioning allegiance to the king. Rather, the simple allegiance based on relationship, Confucius taught his followers that the relationship had an element of reciprocity.⁶⁹ When courtesy and loyalty were present there would be grounds for mutual exchange and government would be in accord with the Way.⁷⁰

The notion that man is governed by a “higher law” put in place by a divine Creator or nature exists in all cultures. Confucius recognized a “higher law” and explained: “Heaven vested me with moral power.”⁷¹ With this moral power manifesting itself in the form of conscience, Confucius recognized a higher law and urged his followers to maintain a conscience without reproach by acting “without grief and without fear.”⁷² Following the acceptance of a “higher

⁶⁸ THE ANALECTS OF CONFUCIUS, *supra* note 3, at 1.7.

⁶⁹ THE ANALECTS explain: “Duke Ding asked: ‘How should a ruler treat his minister? How should a minister serve his ruler?’ Confucius replied: ‘A ruler should treat his minister with courtesy, a minister should serve his ruler with loyalty.’” *Id.* at 3.19.

⁷⁰ Lau’s translation gives additional emphasis to the importance of the ruler showing courtesy to his ministers and following the Way. Lau’s translation of the same comment reads: “Duke Ting asked, ‘What is the way the ruler should employ the services of his subjects? What is the way a subject should serve his ruler?’ Confucius answered, ‘The ruler should employ the services of his subjects in accordance with the rites. A subject should serve his ruler by doing his best.’” THE ANALECTS OF CONFUCIUS, *supra* note 12, at 3.19. Lau’s substitution of “subjects” for “ministers” gives a different view that will be addressed in another section of this discussion. However, at this point, it is not the issue and we may ask: what if the ruler did not accord his ministers the requisite courtesy and did not follow the Way? Did Confucius teach that loyalty was still owed to such a minister?

⁷¹ THE ANALECTS OF CONFUCIUS, *supra* note 3, at 7.23.

⁷² *Id.* at 12.4.

law” is that understanding the government, regardless of the form of government, should not require its citizens to violate the higher law.

Confucius preferred rites over laws. The rites were a series of ceremonies or social conventions. Historian Qu offers this description of the rites: “the five rites include the auspicious rite for sacrifice, the inauspicious rite for funerals, the rite for welcoming quests, the military rite for regulating the troops, and the festival rite for initiation to adulthood and weddings.”⁷³ Rites were more than simple rituals, but were to be social conduct motivated from the heart, the performance of which should move the participants and onlookers to reverence and to high moral conduct and thinking.

That the rites to Confucius were more than formalities performed for appearance sake is emphasized in his conversation with Yan Hui. “Yan Hui said: ‘May I ask which steps to follow?’ The Master said: Observe the rites in this way: don’t look at anything improper; don’t listen to anything improper; don’t say anything improper; don’t do anything improper.”⁷⁴ This thought is again given emphasis when Confucius suggests that a person “who does not understand the rites is incapable of taking his stand,”⁷⁵ that is he is morally incomplete.⁷⁶

Participation in the rites was worshipful and involved the person’s concentration, attitude and

⁷³ QU, *supra* note 4, at 22. Along with learning these five rites, a learned person in Confucius time was also expected to master "six types of music, five techniques of archery, five techniques of chariot driving, six types of handwriting, and nine methods of mathematics." *Id.* The six types of music learned during Confucius's time were related to different historical periods. "The music of the sage ruler Huangdi [was] called Yunmen, the music of Yao [was] called Xianchi, the music of Shun [was] called Dashoa, the music of Yu [was] called Daxia, the music of Tang [was] called Dahuo, and the music of King Wu [was] called Dawu." *Id.* The five techniques of archery were "Baishi, Shenlian, Shanzhu, Xiangchi, and Jingyi." *Id.* The five techniques of chariot driving were known as "Mingheluan, Zushuiqu, Guojunbiao, Wujiaoqu, and Zuqinzuo." *Id.* The six types of handwriting referred to the six "proper" ways to form words. They were "self-explanatory characters, pictographic characters, pictophonic characters, associative compounds, mutually explanatory characters, and phonetic loan characters." *Id.* "The nine techniques of mathematics refer[red] to the nine ways to calculate numbers, including Fangtian, Sumi, Chafen, Shaoguang, Shangong, Junshu, Fangcheng, Yinbuzu, and Panyao." *Id.*

⁷⁴ *Id.* at 12.1.

⁷⁵ *Id.* at 20.3.

⁷⁶ Interestingly, journalist and historian Emily Hahn, points out that the dispute about the rites that drew the Catholic church into confrontation with the Chinese government and eventually got the Jesuits expelled from Peking

heart. As Confucius explained: “Sacrifice implies presence. One should sacrifice to the gods as if they were present. The Master said: ‘If I do not sacrifice with my whole heart, I might as well not sacrifice.’”⁷⁷ The rites were not a product of Confucius’ day. Rather, they had been passed down from prior generations. Although the rites have an appearance of worship, Confucius’ deep interest in the rites reflects his conviction that he has a divine direction to spread his message of reform.⁷⁸ For Confucius, the rites are largely political in nature as he highlights in this conversation: “The Master said: ‘If one can govern the country by observing ritual and showing deference, there is not more to be said. If one cannot govern the country by observing the ritual and showing deference, what’s the use of ritual?’”⁷⁹ Thus, for Confucius the rituals or rites are a governmental tool for governing a people.

In Confucius day there were two predominant schools of legal thought. The Legalist school of thought viewed people as inherently in need of strict and exact laws to bring about social order and to control illegal or immoral activity. Like Niccolo Machiavelli, the author of *The Prince* who rejected Platonic and early Christian views of “goodness” in men, the Legalist school of thought had a low opinion of man and observed: “Man tends to self-interest as water tends downwards.”⁸⁰ With this view of mankind, strong controls in society were essential.⁸¹ The Legalist approach sought severe and uniform application of law. Its goal was a strong central state with strong and shrewd rulers managing a powerful centralized administrative

when the upper-class Chinese opposed the Roman Catholic Church’s position that the rites were of a pagan origin and inconsistent with Catholicism. HAHN, *supra* note 7, at 30.

⁷⁷ THE ANALECTS OF CONFUCIUS, *supra* note 3, at 3.12.

⁷⁸ *Id.* at 18.6.

⁷⁹ *Id.* at 4.13.

⁸⁰ STEVEN GOLDSTEIN, *Politics Introduction: The Chinese: Adapting the Past, Building the Future* 138 (1986).

⁸¹ As John King Fairbank explained, “[t]he early use of law by the Legalist school of the third century BC was as a tool of absolutism to aid in administration unification.” JOHN KING FAIRBANK, *THE UNITED STATES & CHINA* 117 (Harvard University Press 1983).

government.⁸² To the Legalists, law was a tool or instrument of state power, something to be imposed on the general population, not the ruling class. Law was for the benefit of the general population without the need for ratification by any consensual process.⁸³

Similar to the Western notions of natural law, Confucianism supports the belief that there is a natural order underlying all human and non-human life. This normative standard is translated into Mandarin as *li*. *Li* is associated with moral force rather than with the sanctions of governmental agencies of physical force. *Li* is not law in the sense that *li* can not codified. Rather *li* is a normative standard transmitted in more subtle methods of example rather than code.⁸⁴ Confucius believed that the moral restraint of rituals would curb not only the individual ordinary citizen, but would also “curb the excesses of autocratic power.”⁸⁵ Thus, in Confucius’ view, the ultimate asset of the government is the trust of the people in their rulers and the mutuality of reciprocity of the king to the subjects.

Confucianism presents the idea that social order is best maintained by a benevolent and moral leader who would gently lead the population by his good example. When this gentleman ruler sees a need to correct others, the gentleman ruler would apply penalty with a view toward reformation rather than punishment. Yet *li* has its limitations.⁸⁶ When the sanction of force is required to maintain public order *fa* is used. *Fa* acknowledges the human reality that some people and some situations would not be effectively ordered by moral force. *Fa* “represents the

⁸² GOLDSTEIN, *supra* note 83, at 135.

⁸³ CONFUCIANISM AND HUMAN RIGHTS, *supra* note 1, at 93.

⁸⁴ Confucian scholar Julia Ching presented a view in which “Confucian society was governed by forms of decorum (*li*), a term rooted in ancient religion and originally presuming a distinction between nobility and commoners. *Li* may be described as customary, uncoded law, internalized by individuals, and governing gentlemen in their personal behavior and social lives, in their behavior toward the spirits as well as the rest of the world.” CONFUCIANISM AND HUMAN RIGHTS, *supra* note 30, at 74.

⁸⁵ CONFUCIANISM AND HUMAN RIGHTS, *supra* note 1, at 15.

⁸⁶ As Benjamin Schwartz observed: “it is important to remember that *li* is not a body of rules designed to take care of every circumstance.” ON ATTITUDES TOWARD LAW IN CHINA in *Government under Law and the Individual* 29 (Milton Katz ed, 1957).

sanction of force” and becomes the precursor for the elaborate criminal code, which reached its height in the late Qing dynasty.⁸⁷ Even though Confucius favored *li* over *fa*, in reality the two systems were intertwined because “it is still Confucian-educated officials who administered legal procedures.”⁸⁸

The Confucian *li* encourages a system of informal mediations based on Confucian principles of human compassion and morality rather than rules of law to resolve disputes between individuals.⁸⁹ For Confucius, law enforcement is unnecessary if, following the leadership of the exemplary model leader, everyone practiced self-discipline in accordance with the rites.⁹⁰ Confucius’s thought and understanding of “the Way” is not inconsistent with Western principles acknowledging a “higher” law to which each man is responsible and where “[n]o agreement can bind, or even authorize, a man to violate natural law.”⁹¹ Thus, Confucius saw politics and ethics as closely connected issues.⁹² Although he was interested in politics and government, he was nonpartisan and sought a neutral ground by following “the Way” rather than supporting a particular personality or prince. This knowledge of the political climate in an area did not lead Confucius to become involved in political intrigue since he saw political maneuvers as part of the corrupting system of legal structure that would undermine good government.

To Confucius, the government was for the sake of man, not for governing rulers. Government was put in place and legitimate when “[h]eaven speaks as the people speaks.”⁹³ For

⁸⁷ *Id.* at 30. Interestingly, *fa* not *li* is the Chinese character used to translate the English word “law.”

⁸⁸ CONFUCIANISM AND HUMAN RIGHTS, *supra* note 1, at 17.

⁸⁹ PHILIP HUANG, CIVIL JUSTICE IN CHINA 12 (Stanford University Press, Stanford, CA 1996). Under traditional Confucian thought, “society was supposed to be so harmonious and moral that there ought to be few, and ideally no, civil lawsuits.” *Id.* at 200.

⁹⁰ CONFUCIANISM AND HUMAN RIGHTS, *supra* note 1, at 100.

⁹¹ EMMERICH DE Vattel, THE LAWS OF NATIONS 4 (Charles G. Fenwick trans., 1916).

⁹² Confucius wrote, “[g]overnment is synonymous with righteousness. If the king is righteous, how could anyone dare be crooked?” HSIEH, *supra* note 16, at 74.

⁹³ CONFUCIANISM AND HUMAN RIGHTS, *supra* note 1, at 95.

Confucius, the ultimate authority was “the Way.”⁹⁴ So rather than consider identification of the ultimate authority or “higher” law, the discussion is more fruitfully directed to identification of characteristics that indicate legitimate authority.

According to Confucius, superior virtue or moral law was answerable to a higher “law” which “constituted a moral constraint on the exercise of power.”⁹⁵ Higher law was manifest when a exemplary model, acting as sovereign, was supported by ready ministers who were obedient to him, when self-control and moral restraint were exercised, and were ready to “resign and leave court . . . rather than become associated with actions and policies that were not ‘right’ (yi).⁹⁶ When members of the ruling house failed to heed the righteous minister and oust the despotic Emperor, conditions would deteriorate until “the people speaking for Heaven” resorted to violence for relief from the oppressive government.”⁹⁷

Confucius believed that justice and social order could only be secured by deference to governmental authority. When there was good working authority, then submission to the Emperor and the higher order for the common good, was justified. However, when there was natural disaster coupled with lack of virtue in the rulership, the population assumed that the existing rulership had lost the Mandate of Heaven and that the “legitimacy” of the dynasty had been removed and already passed to another individual or family.⁹⁸ Acceptance of governmental

⁹⁴ As De Bary explained, “no historical figure or dynasty could claim full to embody the Way and thereby assert absolute authority to speak for it.” DE BARY, *supra* note 30, at 99.

⁹⁵ *Id.* at 95. According to the ideals of the ancients, the Babylonians, the Assyrians, Egyptians, and the Hebrews, the king as well as the priest derived his authority from the gods and it was the duty of the king, his court, and the priests to see that the divine laws of social and economic justice were enforced. The king was often the religious, as well as the political, head of the nation. The prophet, therefore, was in a serious dilemma when he believed that the king was disobedient to the laws of God. C.C. McCown, *Conscience and the State*, 32 CAL. L. REV. 22, 2-30 (1944).

⁹⁶ CONFUCIANISM AND HUMAN RIGHTS, *supra* note 1, at 95.

⁹⁷ DE BARY, *supra* note 30, at 95.

⁹⁸ Social critic, Fei Hsiao-tung, quoting Tung Chung-shu (179? – 104? B.C.E.), summarized the concept of the relationship between the heavens and governmental authorities:

rulership for the common good was conditioned on the heavenly authorities keeping the Mandate of Heaven with a particular ruler. Submission to governmental authority as an unqualified and absolute, was never considered a Confucian or a Chinese concept. That Confucius did approve of resistance to legitimate authority can be seen in three examples; namely, (1) conscientious objectors in Asian nations today, (2) Confucian comments on filial piety and the relationship of the family to the State; (3) civil disobedience in the Chinese-American community.

Part III

THREE SITUATIONS AND ARGUMENTS IN FAVOR OF THE THESIS

A. The citizen's refusal to serve in the armed forces

The life of ordinary subjects in Confucius' day was not one of ease and comfort. It is no wonder that Confucius observed, repeating an expression of his time, "[i]t is difficult to be a prince, it is not easy to be a subject."⁹⁹ The civilian population, largely made up of agricultural workers, was primarily viewed as a source of tax revenue and conscription. When Confucius suggested that subjects should act like subjects and let the princes act like princes, he was encouraging a maintenance of this social order and reinforcing his belief that the matter of government did not rest with the common people. Nevertheless, this position did not mean that young men who for moral reasons opposed military service should be compelled to serve in the

Your servant, in reading the Spring and Autumn Annals, has come to see that, in this work done by previous generations, there is presented a relation between Heaven and Man. I realize that awfulness of this relation. When a nation loses its tao, Heaven will first warn the people by famines and disasters. If the emperor does not look back upon himself, then Heaven will warn him by portents. If he still does not change his way, then he will court real disaster. This shows the benevolence of Heaven, which wishes to stop disturbances in the world.

HSIAO-TUNG, *supra* note 36, at 51.

⁹⁹ THE ANALECTS OF CONFUCIUS, *supra* note 3, at 13.15.

army. This argument is consistent with the traditional view of the soldier.¹⁰⁰ The life of a soldier was not held up as a goal to the Confucian gentleman or to the common people of the day. Thus, it is understandable that Confucius did not encourage mandatory conscription or suggest that the government had the right to compel military service on those who had a moral objection to participation in military service.

Although Confucius's father was a military officer, Confucius had very little to say about the role of the soldier or the function of the military. There is no direct support in Confucius' work that one can refer to and conclude that conscientious objections or anything that could be construed as civil disobedience would be advocated by Confucius. Living in socially and politically tumultuous times, he argued a "return to the ancient Way, [because] Confucius felt, men must play their proper assigned roles in a fixed society of authority."¹⁰¹ His works are directed toward a particular section of the Chinese population, namely, the male he describes as the "gentlemen." "His ideal was a *chiün-tzu*, literally 'ruler's son' or 'aristocrat,' a term which at his hand changed its meaning from 'a noble' to 'a man of nobility.' The term is perhaps best translated as 'gentlemen' in the sense of a 'cultivated man' or 'superior man.'"¹⁰² Yet Confucius was not considering nobility as a matter of wealth and hereditary title. Instead, he suggested that the standards of "a man of nobility" should be attainable through education and personal diligence.¹⁰³ Appealing to the moral power in everyone, Confucius also spoke generally about

¹⁰⁰ Historian Dick Wilson, referring to Chu The, who came from a "poor peasant family," noted that his "old-fashioned parents . . . despised the life of a soldier." DICK WILSON, *THE LONG MARCH 1935-36* (1935). A similar observation was made by Kenneth Scott Latourette when he suggested that, "[s]ome occupations and groups were held in disdain – among them were soldiers, beggars, actors, prostitutes, eunuchs, underlings to officials, and slaves who were a minority and were chiefly servants in well-to-do households." LATOURETTE, *supra* note 55 at 87.

¹⁰¹ EDWIN O. REISCHAUER & JOHN K. FAIRBANK, *EAST ASIA: THE GREAT TRADITION* 70 (1960).

¹⁰² *Id.* at 71.

¹⁰³ Religious theorist Laurence Thompson commented on Confucius's definition of a "gentleman" and noted that Confucius's view significantly changed China's view of the potential of the individual. Thompson wrote that, "before Master K'ung [Confucius], in China as in old Europe, a 'gentleman' was a man of noble blood; after Master K'ung, a gentleman was a man who possessed the character a gentleman should possess, regardless of his blood. This emphasis upon character, upon moral excellence, was a great contribution of Master K'ung to Chinese society."

the “rights” of common people when he suggested that it was the course of wisdom to “secure the rights of the people.”¹⁰⁴ Although these rights are never defined in the human rights or legalistic framework associated with the present day use of the expression, this term does give the opinion that the subject of his day were not just sources for tax revenues and military strength.

Confucius did say that “a man who respects his parents and his elders would hardly be inclined to defy his superiors,”¹⁰⁵ but his view of integrity and moral virtue carried with it the understanding that under some circumstances, a genuine gentleman, educated in the rites and with developed moral integrity, was morally compelled to take a stand for his convictions, even if he stood alone and in opposition to the community standard. These positions are consistent and did not necessarily require the gentleman to move to military action or to rebellion, but rather, as in the case of Confucius himself, to act as reformer.¹⁰⁶

Confucius said nothing directly about military service as it applied to the general population, but there were many things about which he either made no comment or had only brief and general comments. In fact his faithful followers observed: “the Master never talked of: miracles, violence; disorders; spirits.”¹⁰⁷ He offered little comment on “fasting, war, illness.”¹⁰⁸ Other topics such as “profit, or fate or humanity” *The Analects* says “The Master seldom spoke of.”¹⁰⁹ Confucius himself explained the reason why there was an absence of comment on

LAURENCE THOMPSON, CHINESE RELIGION: AN INTRODUCTION 12 (Wadsworth Publishing Company, New York 1996).

¹⁰⁴ THE ANALECTS OF CONFUCIUS, *supra* note 3, at 6.22.

¹⁰⁵ *Id.* at 1.2.

¹⁰⁶ *Id.* at 18.6.

¹⁰⁷ *Id.* at 7.21.

¹⁰⁸ *Id.* at 7.13.

¹⁰⁹ *Id.* at 9.1.

subjects related to the military as “I never learned how to handle troops.”¹¹⁰ Yet, his comments do create a clear pattern that supports the notion that man must at times follow his conscience and that such bold action may bring severe consequences, which the “superior man” must be willing to accept in order to act with integrity and personal honor.

Confucius did have something to say concerning the government and its relationship to its populace on the question of force. He did not view building military force as an admirable priority for government.¹¹¹ Emphasizing the importance that government should inspire trust and confidence in the governed, Confucius is credited with the belief that “the people need to be taught by good men for seven years before they can take arms.”¹¹² These unrelated thoughts when connected suggest that Confucius foresaw that, under certain circumstances, the decision of government to enter into a military conflict would not be supported by the common man.

Other principles credited to Confucius support the notion that the individual, in some situations, must stand for his conscience regardless of the law, the tide of public opinion or the political expediency of the day. For “the Master said: ‘A gentleman seeks harmony, but not conformity. A vulgar man seeks conformity, but not harmony.’”¹¹³ Confucius himself sought involvement in government service, but was frustrated by the confinements of the civil

¹¹⁰ *Id.* at 15.1.

¹¹¹ In *THE ANALECTS*, there are several interchanges with Confucius on the subject. “Zigong asked about government. The master said: ‘Sufficient food, sufficient weapons, and the trust of the people.’ Zigong said: ‘If you had to do without one of these three, which would you give up?’—‘Weapons.’—‘If you had to do without one of the remaining two, which would you give up?’—‘food; after all, everyone has to die eventually. But without the trust of the people, no government can stand.’” *Id.* at 12.7.

In another exchange about the role of force in government, Confucius makes a similar expression. “Zilu asked about government. The Master said: ‘Guide them. Encourage them.’ Zilu asked him to develop these precepts. The Master said: ‘Untiringly.’” *Id.* at 13.1. Confucius believed that effective government must be concerned with moral leadership rather than military force because “the Master said: ‘He is straight: things work out by themselves, without having to issue orders. He is not straight: he had to multiply order, which are not being followed anyway.’” *Id.* at 13.6.

¹¹² *Id.* at 13.29.

¹¹³ *Id.* at 13.23.

service.¹¹⁴ It appears that a virtuous private life supported stable government, and government was not undermined when an individual chose not to participate in political matters. Following the same line of reasoning, arguably Confucius could foresee that public service and public welfare could be supported in various ways apart from military service.

Speaking specifically of the draft-age men Confucius did not encourage soldiering as a virtuous alternative: “The Master said: ‘At home, a young man must respect his parents; abroad, he must respect his elders. He should talk little, but with good faith; love all people, but associate with the virtuous. Having done this, if he still had energy to spare, let him study literature.’¹¹⁵ With this advice, it is clear that there is no invitation or exceptional value attached to a career in the military. In fact, his further counsel makes it almost impossible to envision how a young man can conscientiously seek a career in military service when “the Master said: ‘While your parents are alive, do not travel afar. If you have to travel, you must leave an address.’”¹¹⁶ This is consistent with the proverb of the day that said: “good sons do not make soldiers, just as good iron is not made into nails.”¹¹⁷

Finally, Confucius also made statements concerning his view of relations among mankind. In *The Analects* Zigong asked: ‘Is there any single word that could guide one’s entire life? The Master said: ‘Should it not be *reciprocity*? What you do not wish for yourself, do not

¹¹⁴ THE ANALECTS describe an exchange between Confucius and one of his followers:

Someone said to Confucius: “Master, why don’t you join the government?” The Master said: “In the Documents [also referred to as The Book of History] it is said: ‘Only cultivate filial piety and be kind to your brothers, and you will be contributing to the body politic.’ This is also a form of political action; one need not necessarily join the government.”

Id. at 2.21.

¹¹⁵ *Id.* at 1.6.

¹¹⁶ *Id.* at 4.19.

¹¹⁷ SUYIN HAN, CHINA IN 2001 149 (1967).

do to others.”¹¹⁸ Thus, if a student of Confucius were to object to involvement in armed conflict or any other feature of military service, it would seem that this conviction is clearly connected to Confucius’ expressions and traditional Asian thought.

B. *The son’s obligation to be filial*

Many of Confucius’ critics felt that he had left an absolute, non-negotiable rule requiring blind obedience. More than one critic has suggested that Confucius’ teaching on filial piety helped produce generations of passive and oppressed sons and daughters caught under the absolute control of the fathers and grandfather’s whim.¹¹⁹

An understanding of *The Analects* rules out the simple conclusion that the dutiful son was just a puppet to his father’s wishes. The father, a gentleman himself, pursuing the Way and a path of moral rectitude certainly had trained his own son according to the Way. Thus, a moral father would delight and certainly not be caused worry to see his own son taking a moral stand

¹¹⁸ THE ANALECTS OF CONFUCIUS, *supra* note 3, at 15.24. Such words certainly resemble the “Golden Rule” or Jesus Christ’s summation of the Jewish traditional law when he stated in the Sermon on the Mount “[s]o whatever you wish that men would do to you, do so to them; for this is the law and the prophets.” *Matthew* 7:12. Not only do the thoughts resemble the “Golden Rule,” but philosopher Teh-yi Hsieh suggested, “Confucius had a single word which expressed his Golden Rule in its essence, and gave a poetic value that no one can convey to the people of the West. This word which has been written into English as ‘Shu’ means, ‘My heart’s desire is to meet your heart’s desire,’ or ‘I wish to do to you even as I would be done by.’” HsIEH, *supra* note 16, at 24-25.

¹¹⁹ In the popular novel of the 1930s, *THE FAMILY*, Chinese novelist Ba Jing portrayed the Gao family as a near-perfect Confucian family with four generations living together. However, the patriarch’s power to select marriage mates for the three sons of the family becomes the issue that undermines the family arrangement when the second son refuses to marry by arrangement. Juehui, the youngest son, frequently refers to the loneliness and alienation he feels living in his four generation household where he finds no real emotional or intellectual support and only feels the intense pressure to obey and to conform to the will of his elders in order to show that he has the proper filial piety. He laments: “I’m so lonely! Our home is like a desert, a narrow cage. I want activity, I want life. In our family, I can’t even find anyone I can talk to.” BA JING, *THE FAMILY reprinted in THE SELECTED WORKS OF BA JING*, 79 (1988).

According to *THE ANALECTS*, “Lord Meng Yi asked about filial piety. The Master said: ‘Never disobey.’” *THE ANALECTS OF CONFUCIUS*, *supra* note 3, at 2.5. Yet, Confucius response to Lord Meng Yi goes further and gives the reader a fuller view of Confucius’s intent. It reads:

As Fan Chi was driving him in his chariot, the Master told him: “Meng Yi asked me about filial piety and I replied: ‘Never disobey.’” Fan Chi said: “What does that mean?” The Master said: “When your parents are alive, serve them according to the ritual. When they die, bury them according to the ritual, make sacrifices to them according to the ritual.”

Id. Thus, the reading in context, gives a softened view of the earlier use of the absolute “never.”

that might not be popular with the majority and might bring unfavorable consequences to himself and to his family. The moral father, himself in pursuit of the Way, would expect his son to show moral rectitude even if it meant taking a course that put him in opposition to himself or the King: “The Master said: ‘In affairs of the world, a gentleman has no *parti pris*: he takes the side of justice.’”¹²⁰ At another location, Confucius offered this expression for the gentleman to follow: “The Master said: ‘Set your heart upon the Way, rely upon moral power; follow goodness; enjoy the arts.’”¹²¹ Confucius was not looking for rules of moral conduct but rather set broad principles, which individuals would have to interpret according to the surrounding circumstances rather than simply the relationship. Principles not rules guided the thinking and conduct of Confucius’s gentleman. In fact, Confucius deplored dogmatism.¹²²

Confucius required more than simple obedience from the son.¹²³ He recognized the importance of choices and living according to the individual’s needs and calling. He did not look for absolute obedience in his followers.¹²⁴ Indeed, Confucius valued independent action and looked down on mindless obedience. Even in his own life experience, Confucius suggests that filial piety is not a matter of blind obedience.¹²⁵ For Confucius, there was reciprocity in the

¹²⁰ *Id.* at 4.10. Or as Lau rendered the expression, “[t]he gentleman and the gentleman’s son] is on the side of what is moral.” *THE ANALECTS OF CONFUCIUS*, *supra* note 7, at 4.10.

¹²¹ *THE ANALECTS OF CONFUCIUS*, *supra* note 3, at 7.6.

¹²² *Id.* at 9.4.

¹²³ Although his father and mother were both dead when he noted that individuality was important, Confucius said, “I’d rather follow my inclinations [than pursue wealth].” *Id.* at 7.12.

¹²⁴ One particular comment from Confucius confirms this observation when speaking of a student named Yan Hui: “Yan Hui is of no help to me: whatever I say pleases him.” *Id.* at 11.4.

¹²⁵ When Confucius’s wife died he was sixty-six years old; “Confucius’s son began mourning her as his father had mourned his mother, but a year had passed when the young man heard the old one mutter, ‘Ah, it had gone too far!’ Upon which, says the story, the son dried his tears and when back into the world.” HAHN, *supra* note 7, at 32.

In a historical novel, *CINNABAR*, spanning the Qing dynasty to the end of the Cultural Revolution, Robert B. Oxnam, the author and President of the Asia Society, presented a rather tense conversation between a traditional scholar/father living at the end of the Qing dynasty and his son whose interests are supportive of the liberal movements of his generation. The father asks his son to read from *THE ANALECTS* and then draws him into a discussion about filial piety. He gives his son time to contemplate the following passage, “When a son follows his father’s instructions during his lifetime, one can say that he has a strong sense of duty. But when a son follows his father’s way after his death, for the full three years of mourning, only then can one say that he is truly filial.” ROBERT B. OXNAM, *CINNABAR*, 58 (1990) (quoting *THE ANALECTS OF CONFUCIUS* 4.5). The father asks for his

father-son relationship.¹²⁶ Respect must be earned by a course of high moral conduct; it is not merely given as a result of any relationship.¹²⁷ Confucius made several comments on filial piety. One statement alone, however, does not give the full extent of his thoughts on the subject and no singular statement can be taken as a summary of all of his related comments.¹²⁸ So no one comment from Confucius can be understood as a universal rule or the summary of all of his thoughts on one subject.¹²⁹ Confucius adds another dimension to the father-son relationship

son's interpretation of the reference. The young man responds: "I think it means what it says. Filiality is measured by adherence to a father's will after his death. Not before." *Id.* at 59. His father asks in return: "Is that to be taken literally or figuratively?" *Id.* The young man answers: "Figuratively, I think. Otherwise it would be difficult to fulfill Confucius's other admonitions . . . about changing your costume to suit the seasons. Changing your approaches as circumstances alter." *Id.*

The son's interpretation is closer to Wejen Chang's argument in his article *Confucian Theories of Norms and Human Rights* in which he observes: "[w]hen Confucius said a father should behave as a father and a son should behave as a son, he obviously implied that the relationship was reciprocal and conditional – only when a father behaves as a correct father can a son be expected to behave as a correct son." CONFUCIANISM AND HUMAN RIGHTS, *supra* note 1, at 120.

¹²⁶ Confucius explains in his conversation to Ziyou, his disciple, otherwise known as Yan Yan. THE ANALECTS OF CONFUCIUS, *supra* note 3, at 114. "Ziyou asked about filial piety. The Master said: 'Nowadays people think they are dutiful sons when they feed their parents. Yet they also feed their dogs and horses. Unless there is respect, where is the difference?'" *Id.* at 2.7.

¹²⁷ Another aspect of filial piety is raised in conversation with Zixia: "Zixia asked about filial piety. The master said: 'It is the attitude that matters. If young people merely offer their services when there is work to do, or let their elders drink and eat when there is wine and food, how could this ever pass as filial piety?'" *Id.* at 2.8.

¹²⁸ Leys makes an interesting comment Confucius's pedagogy in his commentary: "[Confucius] does not teach in abstract notions, he always adjust his teachings to the concrete needs and specific personality of the person whom he is addressing." *Id.* at 115.

¹²⁹ An excellent example of Confucius's approach to teaching is found in THE ANALECTS. "Zilu asked: Should I practice at once what I have just learned? The Master said 'Your father and your elder brother are still alive; how could you practice at once what you have just learned?' Ran Qiu asked: 'Should I practice at once what I have just learned? The Master said: 'Practice it at once.' Gongxi Chi said: 'When Zilu asked if he should practice at once what he had just learned, you told him to consult first with his father and elder brother. When Ran Qiu asked if he should practice at once what he had just learned, you told him to practice at once. I am confused; may I ask you to explain?' The Master said: 'Ran Qiu is slow, therefore I push him; Zilu has energy for two, therefore I hold him back.'" *Id.* at 11.22. In reading THE ANALECTS, Confucius's flexible pedagogical style can not be overlooked and in some cases accounts for apparent contradictions.

Wejen Chang also suggested that Confucius's students and scholars who followed the Confucian tradition did not accept Confucius's comment on filial piety as a requirement for absolute and blind obedience. He points out the Mencius felt that a son showed filial piety when a son brought "honor to one's parents." CONFUCIANISM AND HUMAN RIGHTS, *supra* note 1, at 121. Similarly Chang suggested that Xuzi (c. 298-235 B.C) viewed blind, unconditional obedience as the works of a "petty person" and outlined three specific examples in which a filial son would not obey his father; namely, "if obedience will put them in danger or bring disgrace upon them or make oneself appear bestial." *Id.*

Similar expression is found in THE ANALECTS concerning the responsibility of the minister to the ruler, in Confucius said, "A righteous man, a man attached to humanity, does not seek life at the expense of his humanity; there are instances where he will give his life in order to fulfill his humanity." THE ANALECTS OF CONFUCIUS, *supra* note 3, at 15.9.

obligation when he was approached in conversation by the Governor of She. “The Governor of She declared to Confucius: ‘Among my people, there is a man of unbending integrity: when his father stole a sheep, he denounced him.’ Confucius said: ‘Among my people, men of integrity do things differently: a father covers up for his son, a son covers up for his father – and there is integrity in what they do.’”¹³⁰ Here Confucius raises an interesting issue concerning the importance of family, government and loyalty. It also requires harmony. In this conversation, the Governor of She draws Confucius into a discussion in which he prioritizes loyalties.

Confucianism places loyalty to family above loyalty to the State in the form of observance of legalities. Such decisions are not for the rule-keeper or the dogmatic, but must be guided by strong, well-understood principles and a moral conscience trained by higher law. Was this position a result of Confucius’ recognition of the fact that governments come and go, and family is always family? Or was he acknowledging the great moral harm that could arise when family members lose their humanity and prefer legalism over family-oriented rehabilitation? Confucius was not advocating lawlessness. In fact, he saw the family arrangement as an environment in which moral training could effectively take place. “The Master said: ‘Can you spare those whom you love? Can loyalty refrain from admonishing?’”¹³¹

Other references in *The Analects* suggest that Confucius was not suggesting that the sons and daughters of the household should be nothing more than passive mindless servants to their father’s every wish. For example, a gentleman would not raise his son to obey whatever his father mindlessly commands, and then expect him to carry out larger responsibilities like serving his prince. On the topic of interaction with the prince, Confucius explained: “[Duke Ding asked:] ‘Is there one single maxim that could ruin a country?’ Confucius replied: ‘Mere

¹³⁰ *Id.* at 13.18.

¹³¹ *Id.* at 14.7.

words could not achieve this. There is this saying, however: ‘The only pleasure of being a prince is never having to suffer contradiction.’ If you are right and no one contradicts you, that’s fine; but if you are wrong and no one contradicts you – is this not almost a case of ‘one single maxim that could ruin a country?’”¹³² Clearly, Confucius did not advocate blind obedience to the father just as he did not advocate blind obedience to the government.

C. The citizen’s participation in acts of civil disobedience

Confucius explained that “[n]ot to act when justice commands...is cowardice.”¹³³ Lau’s translation paints the same expression even more vividly when he writes: “Faced with what is right, to leave it undone shows a lack of courage.”¹³⁴ Thus, it seems clear that Confucius envisioned situations in which the gentleman with education would have to act even when others did not. It may be that he would have to act alone, and he would in twentieth century parlance, have to follow his conscience, or do what he felt was right in his heart. Under these unspecified circumstances, he may have to act alone or in concert with others, but it is clear that the moral man would have to act, even if the act brought him into conflict with legitimate authority. While some of Confucius critics suggests that he overvalued conformity, he clearly stated to the contrary: “A gentleman seeks harmony, but not conformity.”¹³⁵ Thus, the gentleman should have no fear in standing alone if he feels that his conscience, consistent with the Way, required action or speech. In fact, bold action was the identifier of the gentleman under any

¹³² *Id.* at 13.15. Vicki Baum in the historical novel SHANGHAI ‘37 depicting the events surrounding the Japanese invasion of Shanghai in 1937, suggests that Confucius did not give the father’s absolute rule over their sons and that the Chinese traditions as they reached the twentieth century never gave the Chinese people that impression. In fact, she asserts quite the opposite when she wrote: “If the father’s commands are bad, the son must resist, and the minister must likewise refuse obedience to him who is over him.” VICKI BAUM, SHANGHI ‘37 240 (Basil Creighton trans., 1943).

¹³³ THE ANALECTS OF CONFUCIUS, *supra* note 3, at 2.24.

¹³⁴ THE ANALECTS OF CONFUCIUS, *supra* note 12, at 2.24.

¹³⁵ THE ANALECTS OF CONFUCIUS, *supra* note 3, at 13.23.

circumstances: “The Master said: ‘When the Way prevails in the state, speak boldly and act boldly. When the state has lost the Way, act boldly and speak softly.’”¹³⁶

An interesting example of civil disobedience in the Chinese community occurred in the United States following the enactment of the Geary Act of 1892. The Geary Act required all Chinese laborers living in the United States to register with the collector of internal revenue. Failure to register would subject the Chinese laborer to arrest and deportation. In 1892 there were approximately 85,000 Chinese laborers living in America. Ellen D. Katz, *The Six Companies and the Geary Act: A Case Study in Nineteenth-Century Civil Disobedience and Civil Rights Litigation*, 8 WESTERN LEGAL HISTORY 227, 268 (1995). The Chinese Benevolent Association, also known as the Six Companies called for support from the Chinese community and urged the targeted workers to refuse to register and to risk deportation. In September 1892, the Six Companies under the leadership of its President, Chu Ti-chu, told John Quinn, the collector of internal revenue in San Francisco that the Chinese community would not comply with the Geary Act because the act “violated every principle of justice and equity and fair dealings between friendly powers.” *Id.* at 271.

The Six Companies hoped that non-registration together with political, diplomatic pressures, and legal action would prompt either judicial invalidation or legislative appeal. The constitutionality of the Geary Act is challenged in court and eventually reaches the Supreme Court of the United States in *Fong Yu Ting v. United States*, 148 U.S. 698 (1893), which upheld the constitutionality of the Geary Act. Private citizens also showed their support for the Geary Act through violent attacks in Chinese workers such as the incident at Rock Spring, Wyoming in which white miners murdered twenty-eight Chinese workers. *Id.* at 249.

¹³⁶ *Id.* at 14.3.

Congress responded with passage of the McCreary Amendment Act of 1893, that extended the registration requirement for six months. Despite these clear legal and political setbacks, the resistance lead by the Six Companies succeeded because the Cleveland administration decided not to enforce the mass deportations of Chinese workers. The movement in resistance to the Geary Act that imposed the requirement for all Chinese laborers to register with the government or risk deportation is properly characterized as “a massive campaign of civil disobedience,” because it was public, nonviolent, political and contrary to law. Katz, *supra*, at 228.

According to Confucian scholar Sumner B. Twiss, ‘the highest Confucian ideal’ is the “unity of Man and Heaven which . . . extends Confucianism humanism and its sense of moral responsibility to a planetary or even universal scale.”¹³⁷ Twiss claims that Confucianism like every other “cultural moral tradition” is universal and creates a duty to act when morality, whether “virtue-based or rights-based” is violated by the government.¹³⁸ Therefore, the action of the individual is used to call attention to the need of the government to conform to the higher law. By taking the moral stand even when it violates civil law, the conscientious objector provides a service to the government. His actions are similar to the Confucian minister who corrected the Emperor at the risk of personal loss. This morally driven conduct provides a valuable service to the community and protects the stability of the government by calling attention to moral issues.

¹³⁷ Sumner B. Twiss, *Discussing Confucianism and Human Rights*, in CONFUCIANISM AND HUMAN RIGHTS 43 (William Theodore De Bary & Tu Weiming eds., 1998).

¹³⁸ *Id.* at 44.

Part IV

ASIA AND THE QUESTION OF ALTERNATIVE CIVILIAN SERVICE

Jehovah's Witnesses have been active in Asia for many decades.¹³⁹ They represent a religious organization that has consistently applied their beliefs regardless of the governmental arrangement under which they live. With their religious beliefs firmly based on the Bible, Jehovah's Witnesses are known to be peaceful, non-violent and cooperative, and at the same time, they refuse induction into any nation's armed forces. These interpretations of scripture are not unique to Jehovah's Witnesses.¹⁴⁰

Looking carefully at both the Hebrew and Greek Scriptures as well as the example of the first century Christians, individual witnesses have universally concluded that participation in the military would violate Bible principles.¹⁴¹ Although service in the military is clearly forbidden according to the beliefs of Jehovah's Witnesses, *The Watchtower* magazine, published by Jehovah's Witnesses, recently discussed the possibility of Witnesses performing alternative nonmilitary civilian service.¹⁴²

In light of the possibility of alternative civilian service for religious dissenters, Taiwan has recently become the first Asian country to adopt a program providing its draft age citizens

¹³⁹ Jehovah's Witnesses are active in over 233 lands and nations, and were recently described by sociologists Rodney Stark and Laurence Iannaccone as "the most rapidly growing religious movement in the western world." Rodney Stark and Laurence R. Iannaccone, *Why the Jehovah's Witnesses Grow So Rapidly: A Theoretical Application*, 12 J. CONTEMP. REL. 133, (1997).

¹⁴⁰ Karen Musalo, *Swords into Ploughshares: Why the United States Should Provide Refuge to Young Men Who Refuse to Bear Arms for Reasons of Conscience*, 26 SAN DIEGO L. REV. 865, 849-865 (1989).

¹⁴¹ Although the Witnesses take seriously the Apostle Paul's counsel: "Let every soul be in subjection to the superior authorities" *Romans* 13:1, they understand that Jesus emphasized that their first obligation is to keep in mind their relative submission to governmental authorities when he said: "[p]ay back . . . Caesar's things to Caesar, but God's things to God." *Matthew* 22:21.

¹⁴² "What though, if the State requires a Christian for a period of time to perform civilian service that is part of national service under a civilian administration? Here again, Christians must make their own decision based on an informed conscience." THE WATCHTOWER, May 1, 1996, at 16.

the option of completing their constitutional obligation to perform military service in a civilian service program. The newly enacted Statute for Implementation of Alternative Services ("SIAS"), and the amendments to the Military Service Law ("MSL") and the Law of Enforcement of the Military Service Law ("LEMSL") were promulgated by President Li on 2 February 2000.¹⁴³ The amendments to the MSL and the LEMS� became effective on 4 February

¹⁴³ This is a summary of the key points of the SAIS:

The Ministry of the Interior ("MOI") will be responsible for implementing the SIAS. The Conscription Administration has been established under the MOI to administer alternative service.

Alternative service is defined as a male of draft age performing government public affairs or other social services, in an auxiliary capacity, at an agency in need of such service. Alternative service is classified as (i) social security (including police, fire fighting), (ii) social service (including social, environmental, medical, and educational), and (iii) other categories to be specified by the Executive Yuan.

The quotas for each category will be fixed by the MOI. If there are more applicants than the quotas, they will be subject to lot drawings. However, applicants with religious or family reasons may be exempted from lot drawing. The qualifications, procedure, time limits, and conditions for application are to be prescribed by the MOI.

A person whose physical fitness is classified as regular military service level *may* apply for alternative service; however, he whose physical fitness is classified as alternative service level *must* perform alternative service.

For persons with physical fitness at the regular military service level, the term of alternative service is four to six months longer than that of regular military service. For those at the alternative service level, the term of alternative service is the same as that of regular military service. However, persons applying for alternative service for religious reasons must perform alternative service for a term 1.5 times as long as regular military service.

With respect to the persons performing alternative service, they shall be paid and allowed and extended the same pay and allowances as are provided to statutory military officers and soldiers.

Any alternative service enlisted man may apply for deferment in case of sickness or any other material cause.

Any alternative service man must be suspended from alternative service if he is contagiously ill, or too sick to perform alternative service, or is a fugitive, or is detained or imprisoned, or unjustifiably fails to perform alternative service for more than seven days. The suspension period does not count as part of the term of alternative service.

Early completion of alternative service is allowed upon the MOI's approval in the event of any material family or other special reasons.

Alternative service enlisted men will be given basic military training or professional training. Those who perform alternative service for religious reasons shall be given basic training and professional training by the agency where alternative service is to be performed.

The SIAS provides for benefits, disability and death compensation, and insurance.

Alternative service enlisted men are not allowed to engage in any other part-time occupation or business or any commercial activities.

2000, two days after the President's promulgation, while Article 63 of the SIAS authorizes the Executive Yuan to decide when the SIAS will be implemented. On February 19, 2000, the Director of the Conscription Department of the Ministry of the Interior ("MOI") stated that the MOI expects to accept applications for alternative services in April 2000 and to arrange applicants for drawing lots in June 2000, and that eligible applicants must have been born in 1980 or earlier and college graduates may be given priority. The SIAS requires the MOI to establish a Conscription Administration to administer conscription and alternative service matters.

As a result of the new legislation, many young men who object to military service for reasons of religious belief or conscience, who have not been conscripted may apply for performing alternative service pursuant to the Statute for Implementation of Alternative Service ("SIAS"). Under the Amendment to the Military Service Law, those who have been conscripted and sentenced to imprisonment for conscientious objection to military service will be prohibited from alternative military service if: (i) they were ever sentenced to imprisonment of five years or more, or (ii) the aggregate term of all sentences actually enforced reaches three years or more. According to the Ministry of National Defense ("MND"), 1,307 Jehovah's Witnesses have been sentenced to imprisonment, and nine of them are still not qualified for prohibition from military service under the amendment. As the SIAS is applicable only to those who have never been conscripted, the MND is studying how to accommodate the new legislation to these nine Jehovah's Witnesses.

Any person who should have performed regular military service but performed alternative service for illegitimate religious reasons, are subject to criminal liability of imprisonment up to two years.

The MOI may establish an Alternative Service Review Board to review annual plans of agencies requiring alternative service, to evaluate applications for religious reasons, and to resolve material disputes.

There is also a need for similar legislative action in Korea. Korea's Christian population is estimated to be 30% of the general population. Among them are over 87,000 who are Jehovah's Witnesses, who are known worldwide for their refusal to participate in any military service based on their understanding of the Bible. Among these 87,000 Witnesses, some 1,400 young Christian men now serve in Korean prisons for following their conscience and religious beliefs.

Articles 19 and 20 of the Korean constitution protect the right of all citizens to "enjoy freedom of conscience" and "freedom of religion." On December 21, 1965, the South Korea Supreme Court has ruled that military service is mandatory for every citizen as stipulated in the Military Service Law, and every citizen is constitutionally liable for national defense as stipulated by law. Although freedom of religion is guaranteed by the Constitution, the right to reject the liability for military service is not included in this guarantee. Therefore, it appears that the constitutional duty to perform military service implies that every citizen has the absolute duty to complete military training using rifles, and has no right to refuse to carry out the military commander's orders. This moral dilemma so quickly resolved in 1965 under very different political and economic climate must be reexamined. If the Korean constitution is to be read in light of Confucian principles, then both the legislature and the courts must reconsider how to make this reconciliation for the sake of the consciences of its citizens and the protection of its rich Confucian heritage.

CONCLUSION

Of course, no fair minded reader can honestly claim that the rights of the individual, as are defined in the Western political and legal structure, are a dominant theme in Confucius

thought or in the political and social traditions of China. Confucius wrote of social relationships and man as a social creature in relationship with his community, primarily his family. Nevertheless, a careful consideration of Confucius teachings and Chinese history does reveal that his teachings do support the thesis relevant to today's discussion; namely, that Confucius's teachings support the individual's natural and inherent right to oppose legitimate governmental authority when the governmental authority is not in harmony with the moral sense of the individual.

Confucian thought has had a steady, although inconsistent influence on Asian governments and social values. An examination of Confucian thought is relevant today. Confucius is not just a man of the past and his thinking is not irrelevant to today's social issue and politics. The Asian countries who signed the United Nations Declaration of Human Rights in 1948 were all deeply influenced by Confucian thought, it is fair to say that Confucianism and Western values are on a convergent and Confucian values are influencing the world. Thus, a clear understanding of Confucius's thought and tradition is necessary to understand how China and other Asian countries will address their twenty-first century moral challenges.

Today, the expression "Asian values" is "a relatively recent construct,"¹⁴⁴ but an important construct including the combined populations of China, Taiwan, Korea, Singapore, and Southeast Asia, that is greater than fifty-percent of the earth's population. Prominent examples include Singapore's Lee Kuanyew who has combined a traditional authoritarian government with high economic progress and promotion of Confucian values. True, Lee's espousal of Confucian social discipline may be a not too subtle attack on the "decadent

¹⁴⁴ DE BARY, *supra* note 30, at 2.

libertarianism and individualism he sees as undermining the moral fiber of the West.”¹⁴⁵ Nevertheless, Lee is consistent that Confucian tradition has helped to make Singapore the success that it is today. In fact when Mainland China celebrated the 2545th anniversary of Confucius’s birthday in October of 1994, the guest speaker was the former prime minister of Singapore, Lee Guanyew.¹⁴⁶

Taiwan has also shown that human rights and Confucian values can be braided together for democratic and economic advancement. Recently, Korea’s President Kim Dae Jong addressed a group of Korean Confucian scholars, encouraging them to maintain Confucian principles in the public discussion and political decision-making. No longer is Confucius’s name simply being linked to China’s historic feudal tyranny. Rather, many enlightened and progressive minded Asians are looking at Confucius as a source of moral direction and political strategy.

Thus, it is fair to conclude that Confucius’ teachings, condemned in China less than a hundred years ago as “the old tradition of virtue and rituals, the old ethics and the old politics . . . the old learning and the old literature”¹⁴⁷ will continue to influence Asia in the foreseeable future and will emerge as a pattern for support of individual freedoms and human rights. Confucius’ longevity as an influence for social and political activity indicates that as Asian countries move toward maturation as democracies, Confucius will be used as a basis for the conclusion that the individual, under certain circumstances, has the right to and, in fact, must offer opposition to legitimate authority. This conclusion will be the result of many influences, not just Confucian thought. As Allen suggests, “freedom of conscience is not only prized in liberal democracies as

¹⁴⁵ DE BARY, *supra* note 30, at x.

¹⁴⁶ THE ANALECTS OF CONFUCIUS, *supra* note 3, at xv.

¹⁴⁷ HAROLD ISSACS, THE TRAGEDY OF THE CHINESE REVOLUTION 53 (2d ed., 1961).

an acknowledgement of respect for the autonomy and dignity of the individual.”¹⁴⁸ Thus, when the other economic, social and political issues bring individual Asian countries to the status of a mature democracy, Confucian thought will be praised as a protector of the freedom of conscience.

¹⁴⁸ Allen, *supra* note 140, at 119.