

Washington International Law Journal

Volume 2 | Number 1

6-1-1993

International Human Rights, Morality in War, and the Structure of Rights

Edward C. O'Dowd

Robert F. Schopp

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wilj>



Part of the [Human Rights Law Commons](#), and the [Military, War, and Peace Commons](#)

Recommended Citation

Edward C. O'Dowd & Robert F. Schopp, *International Human Rights, Morality in War, and the Structure of Rights*, 2 Pac. Rim L & Pol'y J. 37 (1993).

Available at: <https://digitalcommons.law.uw.edu/wilj/vol2/iss1/5>

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington International Law Journal by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

INTERNATIONAL HUMAN RIGHTS, MORALITY IN WAR, AND THE STRUCTURE OF RIGHTS

Edward C. O'Dowd[†]

Robert F. Schopp^{††}

Abstract: A careful analysis of certain issues of morality in war demonstrates important differences in the duties recognized by Western and Chinese military officers toward their soldiers. These differences reflect fundamentally different theories of social morality in the societies these officers represent. Although Western countries and China have endorsed a common set of internationally recognized human rights, a meaningful consensus regarding human rights must remain consistent across three levels of analysis. The putative contemporary consensus among Chinese and liberal societies fails because the fundamental differences in underlying principles of social morality that give rise to divergent principles of morality in war also generate conceptions of rights that diverge at the third level. The distinction between conceptual and contingent rights explicates this divergence.

I. INTRODUCTION

Many countries, including Western liberal democracies and the People's Republic of China, have endorsed various international political documents recognizing certain human rights.¹ The apparent consensus represented by these widely accepted documents suggests that many countries and cultures share a set of individual political rights that provide

[†] Colonel, United States Army.

^{††} Assistant Professor of Law and Psychology, University of Nebraska.

An earlier draft of this paper was presented at a faculty colloquium attended by members of the faculties of law and philosophy at the University of Nebraska. We are grateful to Wendy Frieman, Robert McGeorge, Kidder Smith, and especially to Nelson Potter for comments on earlier drafts of this paper.

¹ By "human rights" we mean rights that are attributed to all human beings simply by virtue of their being human. JOEL FEINBERG, *SOCIAL PHILOSOPHY* 85-88 (1973); JAMES W. NICKEL, *MAKING SENSE OF HUMAN RIGHTS* 1-6 (1987). China has ratified the following human rights conventions: Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment; Convention on the Elimination of All Forms of Discrimination Against Women; International Convention on the Elimination of all Forms of Racial Discrimination; Convention Relating to the Status of Refugees; Convention on the Prevention and Punishment of the Crime of Genocide; International Convention on the Suppression and Punishment of the Crime of Apartheid. Ma Jun, *Human Rights: China's Perspective*, *BEIJING REVIEW*, Nov. 28 - Dec. 4, 1988, at 21, 22. For an account of the current state of human rights in China from the perspective of the Chinese government see INFORMATION OFFICE OF THE STATE COUNCIL, *HUMAN RIGHTS IN CHINA* (1991). China has also ratified a series of conventions and treaties addressing the law of war. JEROME A. COHEN & HUNGDAH CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY* 1415-16 (1974).

common ground for international discourse. In this paper, we examine two issues involving morality in war and freedom of expression regarding which Chinese practices depart markedly from those of liberal societies.² We argue that these examples reveal deeper differences regarding the respective conceptions of rights and the underlying principles of social morality. These discrepancies render illusory the apparent consensus regarding human rights.

The focal example involves the ethical standards for military officers as one aspect of morality in war. Ethical codes for Western military officers require that officers observe a duty of truthfulness toward their soldiers. This duty reflects both a general value for honesty and a specific responsibility to treat the soldiers with respect.³ Traditional Chinese standards for officers' conduct recognize no comparable duty of truthfulness, emphasizing the officers' primary responsibility toward the state which requires that they do whatever is necessary to protect the state by winning the war.⁴ This contrast regarding acceptable officer conduct reveals a corresponding contrast in the principles of social morality supporting that conduct.⁵

We contend that this specific issue of morality in war reveals a second and much broader difference regarding the nature and value of rights. These discrepant positions regarding officers' duty of truthfulness to their soldiers reflect different conceptions of rights and different attitudes toward the soldiers as citizens with rights. The Western view emphasizes the soldiers' claim to respect as autonomous individuals who command a substantial domain of self-determination. In contrast, the Chinese system grants no significant weight to this concern.⁶

2 We adopt the following terminology for the sake of brevity. We use "western" and "liberal" interchangeably to refer to political systems in the western liberal tradition as described at notes 39-42 *infra*. We make no attempt to defend any specific formulation of liberalism or the general tradition. Our purpose here is to articulate certain contrasts between these political systems and the mainland Chinese system regarding the structure and significance of rights rather than to endorse either approach. "Chinese" is used broadly to denote the cultural traditions that have evolved from the time of Sun Tsu, through the Han, and culminating in the modern People's Republic of China. This usage of the term is not intended to imply the exclusion of the Taiwanese from those traditions, but rather to emphasize that aspect of Chinese thought that continues to be heavily influenced by, and is best illustrated by, Sun Tzu. Given the influence of the West and its democratic liberal traditions in the development of Taiwan, the issues addressed in this article are less relevant in Taiwan. Moreover, we do not claim that this tradition (derived of Sun Tsu's thought) is exhaustive of Chinese thinking on the subject, even within the parameters of our usage of the term "Chinese." We contend only that this tradition has been and continues to be a powerful influence on mainland Chinese military thought.

3 See *infra* notes 10-14 and accompanying text.

4 See *infra* notes 15-26 and accompanying text.

5 See *infra* notes 27-32 and accompanying text.

6 See *infra* notes 39-51 and accompanying text.

Individual rights constitute a core element of Western liberal democracy. Liberal political thought defines a relationship between the individual and the state, requiring that the state respect certain basic liberties of the individual, and particularly that it treat individuals as beings capable of directing their own lives within broad limits. This respect requires recognition of basic political rights.⁷ Chinese political institutions purportedly recognize human rights and endorse the basic international political declarations referred to previously.⁸ In addition, some scholars have argued that the Chinese social structure accommodates the same values protected by Western rights although perhaps through different legal mechanisms.⁹ Can one reconcile these claims with the different views held by Western and Chinese societies of acceptable officer conduct toward soldiers in war and with the Chinese government's willingness to override or revoke individual rights in order to promote social goals?

In this article, we examine carefully the specific contrast between the Western and Chinese positions regarding officers' duty of truthfulness toward their soldiers. This contrast reflects broad, fundamental differences between the two systems regarding their substantive political philosophies and the conceptions of rights that prevail within those political structures. These underlying differences illuminate a broader set of issues regarding the meaning and significance of rights in Western and Chinese societies. A brief discussion of the second example involving freedom of expression reveals the significance of these differences in that arena.

Although we discuss morality in war at some length and freedom of expression briefly, we do not attempt to provide exhaustive or definitive analyses of these issues. The central argument of this paper advances conceptual claims about the nature of rights and the importance of interpreting those rights in the context of the broad social morality within which they are embedded. Societies accepting different substantive theories of social morality might reach apparent consensus regarding human rights by endorsing facially similar rights. This consensus remains merely apparent, however, if these societies differ regarding the underlying social morality within which they ground those rights. In these circumstances, societies may

7 A. Buchanan, *Assessing the Communitarian Critique of Liberalism*, 99 *ETHICS* 852, 853-54 (1989).

8 See *supra* note 1.

9 See, e.g., JAMES C. HSIUNG, *Human Rights in East Asian Perspectives*, in *HUMAN RIGHTS IN EAST ASIA: A CULTURAL PERSPECTIVE* 1, 9-11 (James C. Hsiung ed., 1985).

differ regarding what it means to have a right in that society and in the normative force vested in various rights. The discussion of morality in war and freedom of expression demonstrates the practical significance of these conceptual claims in two disparate but important arenas of political interaction.

We contend that the apparent international consensus regarding human rights is illusory and that an adequate cross-cultural analysis of rights requires a complex conception of rights including their foundations in the substantive social morality in which they are embedded. In order to understand the relationship between liberal and Chinese rights, one must distinguish conceptual and contingent rights. Although this paper directly addresses only rights in the Western liberal tradition and their counterparts in the Chinese system, a similar analysis applies more broadly to the comparison of rights embedded in disparate substantive moralities.

The argument proceeds in the following manner. Section II defines more precisely the officers' duty of truthfulness toward their soldiers, with particular attention to the apparent foundations of the officers' conduct in the relevant duties and rights. Section III examines this issue and the discrepant conceptions of rights that it reveals. In this section, we contend that a satisfactory explication of rights must address three levels of analysis. Finally, section IV summarizes and concludes the argument.

II. LYING AND MORALITY IN WAR

A. *The Western Standard*

The responsibility (or lack thereof) of military officers to be truthful with their own soldiers during war represents one aspect of a more comprehensive professional ethic for military officers. This code of ethics constitutes, in turn, a major component of that society's approach to morality in war.¹⁰ The Western officer's duty of truthfulness arises from a more general commitment to the virtue of honesty; the good officer does not lie,

¹⁰ Moral questions about war can be roughly divided into two categories. Questions about the morality *of* war are directed toward the moral justifications for fighting wars. The study of morality *in* war examines the moral quality of particular types of conduct people engage in during a war. The chivalric codes and later laws of war, for example, limited the actions that a combatant could legitimately engage in against various classes of persons. M. WALZER, JUST AND UNJUST WARS 21, 34-35 (1977). This paper will address morality *in* war. See generally J.T. JOHNSON, JUST WAR TRADITION AND THE RESTRAINT OF WAR (1981).

cheat, or steal.¹¹ Honorable officers do not accept mere expediency as a sufficient justification for lying to their soldiers because they endorse honesty as one of the principles that guide officers' conduct during warfare.¹²

This duty also reflects respect for the rights of the individual soldier. Soldiers are viewed as citizens who hold certain rights against the state and whom the state must treat with respect. Although military service necessarily limits selected liberties, soldiers retain their status as citizens who retain as many of their rights as possible.¹³ Thus, the Western standard arises from a theory of correct moral principles for an honorable officer and from the right of the individual soldier to be treated with respect as a citizen.

Although the abstract standard categorically condemns officers' lying to their soldiers, one can imagine hypothetical circumstances in which most readers would probably agree that officers have a moral duty to deceive their soldiers because only by doing so can they prevent catastrophic results. These examples do not reduce the principle to a mere rule of thumb, however, because a merely incremental benefit is not sufficient to override the principled importance of honesty. In addition, when faced with circumstances in which the expected consequences of truth-telling are so adverse as to justify deception, the officer who endorses the Western standard should lie reluctantly, regretting the lie as a necessary sacrifice of an

11 L.P. CROCKER, *THE OFFICERS' GUIDE* 36 (45th ed. 1990).

12 U.S. DEPT OF DEFENSE, *THE ARMED FORCES OFFICER DOD GEN-36*, at 46-47, 79 #14 (1988) (emphasizing the officer's duty of honesty toward the troops). Western honor codes prescribe standards of acceptable conduct for officers and soldiers during warfare. For a discussion of a professional military ethic for American military officers emphasizing a conception of honor including integrity, honesty, and candor, see A.E. HARTLE, *MORAL ISSUES IN MILITARY DECISION MAKING* 46-54 (1989). Officers' codes are intended to serve both as moral constraints on conduct and as guides to achieving long-term resolutions to armed conflict. See generally DEPT OF THE ARMY, *THE LAW OF LAND WARFARE, FIELD MANUAL 27-10* (1956, reprinted 1990). This manual serves as the basis for training and discourse regarding the law of land warfare in the U.S. military. Sidney Axinn discusses the intended relationship between moral constraints and effective long-term resolutions to conflict in *A MORAL MILITARY* (1989).

13 DEPT OF THE ARMY, *FUNDAMENTALS IN MILITARY LAW, ROTC MANUAL 145-85*, at 14-19 (1980). Since the French Revolution, armies have increased in size, drawing upon "citizen-soldiers" as well as professional military officers. The obligation of officers to treat their soldiers with respect arose from the understanding that these citizen-soldiers fought in wars in order to defend the state which protected their rights. Effective warfare required that these soldiers sacrifice certain liberties, but they retained others, especially the rights to participate in the political compact they were protecting and to be treated with dignity as a person with a stake in the society for which they were fighting. JOHNSON, *supra* note 10, at 172-90. For further discussion of American officers' duty toward their troops as arising from broader principles of American political morality and the standing of the troops as American citizens, see HARTLE, *supra* note 12, at 36-54.

important moral principle. That is, deception, even when justified by overriding consequentialist considerations, is viewed as a necessary evil.¹⁴

B. *The Chinese Approach*

Although it is extremely difficult to assess current views in the People's Republic of China on morality because so little information is available about the internal workings of the Chinese People's Liberation Army, the broad outline of Chinese thought on correct officer conduct is available in the classic works of the Chinese military tradition. Sun Tzu provides the foundation of this tradition. Sun Tzu's *The Art of War* was probably written between the fifth and third centuries B.C.E. Throughout Chinese history it has remained so important to the study of military thought that statesmen, soldiers, and philosophers have written commentaries on its applications, and the dynasties used it as the basis for the military examination system until the beginning of the twentieth century.¹⁵ Mao Tse-tung quoted and paraphrased sections of *The Art of War*, and The People's Liberation Army continues to conduct conferences and publish volumes on Sun Tzu's thought.¹⁶ The moral

14 M.S. Klimov, *Lying to the Troops: American Leaders and the Defense of Bataan*, 20 PARAMETERS: THE U.S. ARMY WAR COLLEGE QUARTERLY 48 (1990). Klimov examines an historical episode in which superiors lied to their subordinates, condemning the deception as unjustified by a stringent standard of "military necessity." He clearly understands lying to one's troops as rarely justified and as highly regrettable in those rare cases. H.L.A. Hart describes a similar pattern of reluctant and regrettable sacrifice of moral principle when extreme circumstances require punishment of the innocent. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 11-13 (1968).

An informal survey of a nonrepresentative sample of American military officers revealed that these officers report that they would avoid lying to their troops if at all possible. When presented with extreme hypotheticals of the type referred to here, they consistently reported that they found passive deception less objectionable than active misrepresentation, suggesting that they vest substantial weight in the letter of the code.

15 SUN TZU, *THE ART OF WAR* (Samuel B. Griffith trans., 1963). The Chinese continue to publish new editions of the work and commentaries on it. See, e.g., WU RUSONG, SUNZI BING FA QIAN SHOU [An Explanation of Sun Tzu's Art of War] (1987).

16 Security practices by the People's Liberation Army render it very difficult to establish official or unofficial policies of that organization through unclassified sources. Our contention that the moral view represented by Sun Tzu retains a central role in Chinese military policy finds support in the following sources. The Military Science Publishing Society in Beijing has recently published SUNZI JIAOSHI [The Comparative Explanations of Sunzi] (Wu Jiulong ed. 1990). A bibliography in a volume published by the Liberation Army Publishing Company, the official publisher of the Chinese People's Liberation Army, lists 19 books and 148 articles addressing Sun Tzu that were published from 1980 to 1988. See SUNZI XIN TAN [New Explorations of Sun Tzu] 399-418 (1990). The discussion contained in section II.B. of this Article is based on materials presented at an international conference in Beijing and to be published in volume II of SUNZI XIN TAN. Sun Tzu's classic work has also been widely translated into Japanese, Korean, and Vietnamese.

view expressed in this classic work represents mainstream Chinese thinking about morality in war and about the relationships between leaders and those they lead.¹⁷

In contrast to the Western standard, Sun Tzu advocates deception in any circumstances in which it is expedient. The general is the protector of the state; as such, the general's only purpose is to protect the people and to promote the interests of the sovereign.¹⁸ In war, victory is the object, and warfare is based on deception.¹⁹ Deceptive strategy often involves maneuvering to confuse and surprise the enemy, but the general should also lie to his superior (the emperor), his officers, and his soldiers whenever doing so will promote his mission of winning the war.²⁰ The general should manipulate his own army "as if driving a flock of sheep."²¹ Deception and manipulation of one's own forces is not limited to concealing plans. The general should also conceal from his own troops the danger they face.²²

Furthermore, the officer should treat his soldiers as children, making use of rewards and punishments in order to control them and render them useful.²³ Sun Tzu discusses reward and punishment purely in terms of rendering the troops effective resources, with no apparent direct concern for fairness, desert, or respect for the soldiers. The general should sacrifice expendable agents in order to convey false information to the enemy²⁴ and he should place his troops in hopeless situations in order to motivate them to fight with desperate intensity.²⁵

Finally, one author of this Article (Colonel O'Dowd) has participated in an extended series of conversations and negotiations with Chinese military officers during his 24 year military career. This series includes his current assignment as senior military officer authorized to negotiate with Chinese and North Korean officers for the United Nations Command in the Republic of Korea.

17 For these reasons, the term "Chinese morality" will be used in this paper to isolate the moral views expressed by Sun Tzu that are representative of systematic Chinese thinking on issues of social morality, particularly in warfare. As indicated in note 2 *supra*, we do not contend that Sun Tzu presents a comprehensive view of Chinese thought regarding military and social ethics.

18 SUN TZU, *supra* note 15, at 3-18, 10-9 (all references to SUN TZU cite to chapter and paragraph).

19 *Id.* at 1-17, 2-3, 7-12.

20 *Id.* at 8, 10-18 (deceiving the sovereign); 11-13, 49 (concealing the truth from the officers and soldiers). See also ALEXANDER L. GEORGE, *THE CHINESE COMMUNIST ARMY IN ACTION: THE KOREAN WAR AND ITS AFTERMATH* 164-65, 179-85 (1967). George reports a modern example in which Chinese officers engaged in a widespread pattern of lying to their troops about the dangers they faced.

21 SUN TZU *supra* note 17, at 11-49.

22 *Id.* at 10-20, 21.

23 *Id.* at 11-55.

24 *Id.* at 10-20, 21 (treat as children and discipline), 9-47 (punish to render them effective).

25 *Id.* at 13-19.

It is important to notice that in contrast to the Western view, lying to serve the desired end is not presented as a regrettable but necessary evil to be tolerated in exceptional circumstances. Rather, lying and deception are endorsed as fully acceptable techniques to be freely employed under ordinary circumstances. Sun Tzu adopts a purely consequentialist stance toward deception and manipulation according to which victory constitutes the only relevant criterion of acceptable conduct, and thus, the moral quality of any particular lie depends solely upon the propensity of that lie to promote victory.²⁶ There is no evidence to suggest that any nonconsequentialist factor, including considerations of moral principle, carry any weight in the decision.

Perhaps the most stark contrast between Sun Tzu and the Western approach lies in the officers' treatment of their own troops. Western and Chinese generals are primarily concerned with winning wars, and this task requires that they view troops as resources, some of whom must be expended in order to accomplish the task. The striking contrast, however, lies in the apparent lack of any moderating attitude toward one's own forces in Sun Tzu. While Western officers view their troops as resources, they also recognize an obligation to treat their soldiers with as much respect as the primary responsibility of winning the war will allow. In short, well-established principles of military responsibility require that Western officers view their soldiers as persons who must be employed as resources in the war.²⁷

One finds no evidence in Sun Tzu to indicate that the general ought to think of his troops as persons as well as resources. There is no evidence of any duty on the part of officers to treat the soldiers with consideration or respect. Discussion of the general's conduct toward the troops is cast purely in terms of behavior that will maximize their value as resources in battle. When Sun Tzu addresses the importance of the relationship between the commander and his soldiers, he relies on an instrumental rationale rather than on a moral one. The commander should treat his soldiers humanely to the

26 As we use the terms in this paper, purely consequentialist theories identify the right action as that which will produce good outcomes, where good outcomes are those which maximize production of the value endorsed by the theory as the fundamental good. Deontological theories deny this direct relationship between the good and the right, contending that the right action is determined at least partially by generally formulated duties and rules that carry positive moral weight independent of the consequences. WILLIAM K. FRANKENA, *ETHICS* 14-16 (2d ed. 1973) (Frankena uses the term "teleological" for the theories we identify as "consequentialist.")

27 See *supra* notes 11-13 and accompanying text. See also U.S. DEP'T OF DEFENSE, *supra* note 13, at 54 (discussing officers' duty to protect their troops from injustice).

extent that this type of relationship enables him to use them effectively to carry out his plans, but Sun Tzu provides no evidence to support the notion that the commander might have any nonderivative moral duty running to the troops.²⁸

Although Western and People's Republic of China (PRC) officers must view their troops as resources, some of whom must be expended in order to win the war, they emphasize different modes of leadership, reflecting different underlying values. These differences include divergent views of the individual. Western theories of social morality endorse individual autonomy as an important value and recognize rights as the political institution designed to protect this value. This theory of social morality produces a preference for persuasive, rather than manipulative, modes of leadership. The Chinese system, in contrast, vests primary value in promoting social harmony and lacks an independent value for individual autonomy.²⁹ This value structure supports either persuasive or manipulative modes of leadership according to the circumstances in which either is more effective in promoting the central value. In short, the choice between persuasive and manipulative styles of leadership is merely an instrumental decision for one who endorses the value structure embodied in the Chinese system, but the liberal social morality provides an additional noninstrumental reason for preferring the persuasive mode.

The purely consequentialist Chinese approach is particularly interesting because Chinese approaches to social morality are traditionally interpreted as duty-based systems in which individuals are not expected to act on a consequentialist calculus, but rather, they are required to conform to a set of socially accepted roles in various relationships. Those roles are defined in terms of the duties of each individual in the relationship.³⁰ Consequentialist moral theories are often contrasted with deontological ones which are often understood as duty-based.³¹ It would be consistent with a deontological approach, for example, to contend that people have general duties to tell the truth and to conform to the rules of proper conduct in relationships and that these general duties carry normative weight independently of the consequences. Mixed theories incorporate consequentialist and deontological

28 SUN TZU, *supra* note 15, at 9-48. "Thus, command them with civility and imbue them uniformly with martial ardour and it may be said that victory is certain."

29 See *infra* notes 46-49 and accompanying text.

30 T'UNG-TSU CH'U, *LAW AND SOCIETY IN TRADITIONAL CHINA* 267-80 (1961).

31 See *supra* note 26.

components, holding that under certain circumstances the weight of consequences can override the deontological considerations, resulting in cases in which it is morally right to violate the deontological duty in order to promote the morally superior consequences. Even in these cases, however, the duties would not cease to carry moral weight independently of the consequences. Rather, the continued moral relevance would be overridden by important consequentialist considerations that justify sacrificing these deontological principles in these cases.³²

The general Chinese approach to social morality at least appears to take the form of a duty-based deontological system in which individuals are expected to conform to the duties defined by the various social relationships in which they participate.³³ Yet Sun Tzu advocates a purely consequentialist approach to decision-making for the military officer. Neither the general social morality nor Sun Tzu's prescription for the military officer appears to be amenable to interpretation as a mixed theory. This seems to place Sun Tzu and the military officer in direct conflict with Chinese social morality.

Three possible interpretations of this puzzling state of affairs present themselves. First, the apparent conflict is an actual one; the position advanced in Sun Tzu is inconsistent with the general principles of Chinese social morality. Second, the purely consequentialist nature of Sun Tzu is only apparent. Third, the deontological nature of Chinese social morality is only apparent. Accepting the first interpretation leaves one with the task of explaining and justifying an approach to morality in war that differs fundamentally from the broader social morality in which it is embedded. The second and third interpretations avoid this perplexing inconsistency, providing avenues for integrating the military ethic into the larger social morality. At least at first glance, the second alternative appears to be a more promising strategy for those who argue that the Chinese system corresponds substantially to Western rights-based societies. We conclude, however, that the third interpretation most accurately portrays the Chinese system of social morality and, furthermore, that this alternative renders consistent the military and social moralities of China, but it does not accommodate attempts to reconcile this integrated system with liberal ones.

³² HART, *supra* note 14, at 11-13. Hart discusses a situation in which an actor ought to sacrifice an important moral principle for a greater good without concluding that the sacrificed principle ceases to carry weight.

³³ See *supra* note 30 and accompanying text.

C. *Rights and Duties*

Some scholars have argued that the Chinese duty-based approach protects interests that are roughly equivalent to those protected by Western rights.³⁴ On this interpretation, the Chinese and Western social moralities endorse the same values, or at least highly similar ones, through different legal mechanisms. This thesis initially appears to be consistent with the traditional Hohfeldian conception of legal rights which defines rights in a manner that renders them reciprocal with duties. On this theory, to say that a person X has a right to do act A is to say that all other persons Y, against whom X holds this right, have a duty to refrain from interfering with X's doing A. Thus, to say that X has a right to vote, or to speak freely is to say that all those against whom X holds this right have a duty not to interfere with X's voting or speaking freely.³⁵

When X holds a political right against the government, the correlative of that right may be better understood as a disability or lack of authority on the part of the government rather than as a duty. Insofar as X holds a constitutional right to freedom of speech or religious exercise, for example, the correlative limitation on the government is the government's lack of authority to pass laws that limit speech or the exercise of religion. The central Hohfeldian idea remains, however, that X's right against Y to do A entails reciprocal normative limitations regarding Y's conduct with respect to X's performing A.³⁶

On this conception of legal rights, rights and duties are reciprocal in that they define a relationship between X and Y that can be stated either in terms of X's right to do A or in terms of Y's correlative duty to refrain from interfering in X's doing A. This conceptual structure suggests that one might be able to demonstrate that a Western rights-based political system and a Chinese duty-based system share similar fundamental values and establish similar basic protections for human beings through complimentary political structures, each of which could in principle be translated into the other.

This strategy builds upon the duty-based understanding of the Chinese system, raising perplexing questions about the consequentialist approach of Sun Tzu. First, can one integrate Sun Tzu's consequentialist position with the

34 See, e.g., Hsiung, *supra* note 9, at 9-11.

35 WALTER N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 35-50 (Walter W. Cook ed., 1978).

36 NICKEL, *supra* note 1, at 31-32. When we refer to correlative rights and duties in this paper we use "duties" in this extended sense, referring to normative limitations on Y's conduct.

general emphasis on duty in Chinese social morality and then interpret this integrated system as one which protects the same fundamental values that the Western systems protect through the mechanism of human rights? Second, does this interpretation sufficiently explain the apparently stark differences between the two systems regarding the officers' duty of truthfulness toward their soldiers?

III. RIGHTS AND DUTIES IN WAR AND POLITICAL PHILOSOPHY

A. *Rights and Duties: Syntax and Semantics*

Hohfeld's framework provides an analysis of rights by defining the structure of the relationship between the parties in terms of rights and correlative duties. It can be understood as a syntactical analysis in that it describes the interactional structure of rights and correlative duties between the parties, but it does not address the content of rights. An actual system of political rights that conforms to Hohfeld's syntactical structure will also reflect the content of the substantive political philosophy represented (however imperfectly) by that system of rights. One can think of this content as the semantics of the system of rights and analyze it at two levels.

The first semantic level of a system of rights consists of the face content of those rights. While X's right to do A syntactically implies normative limitations on any Y against whom X holds this right, this first level of semantic analysis gives content to A. For example, the rights to engage in free speech or religious worship and the government's correlative lack of authority to pass laws limiting this type of conduct represent the semantic content of political rights protected by the first amendment of the United States Constitution.³⁷

It is possible, however, for two political systems to provide facially identical rights for different reasons. Rights can serve as legal devices that advance a variety of agendas and underlying values. The right to free exercise of religion, for example, might reveal a deeper principle of self-determination, holding that each individual ought to be allowed to determine her own fundamental moral principles. Alternately, however, it might reflect a primary value for religion itself or the intent to promote social harmony and the belief that suppression of religious exercise usually generates social

37 U.S. CONST. amend. I.

unrest. In short, two systems of political rights may vary semantically at the level of face content or at the level of the underlying value that provides the foundation for the right.

A complete explication of rights must attend to all three levels of analysis. The syntactic and facial semantic levels provide a topographic description of rights as they are recognized in a particular legal or moral structure. The foundational level of semantic analysis provides an account of the substantive political philosophy underlying these rights. Some critics might contend that this foundational level of semantic analysis is more appropriately understood as addressing the moral theory that justifies the right than as a component of the right itself. We argue, however, that two topographically identical rights that differ at the foundational level also differ in their normative force and practical impact. For this reason, topographic descriptions that do not address the foundational level can mask important differences among apparently similar sets of rights.³⁸

B. *Rights in the Western Liberal Tradition*

John Stuart Mill articulated a principle of government that many people accept as the classic statement of the English liberal political thesis. "[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. . . . [T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to

38 Jules Coleman has advanced a theory of legal rights in which he addresses syntactic and semantic aspects of rights. His theory concentrates on the role of liability, property, and inalienability rules in the analysis of rights. As Coleman analyzes rights, these transaction rules form part of the semantic level of analysis in that they specify the content of the rights. J. COLEMAN, *MARKETS, MORALS, AND THE LAW* 28-63 (1988). Our analysis is consistent with Coleman's in that at the syntactic level, rights are reciprocal with duties in the extended sense in which that term means normative limitations on action as discussed *supra* at note 36 and in the accompanying text. The facial level of semantic analysis addresses the content of the right which includes the subject matter and the transaction rule. The rights that concern us in this paper would be rights defined by property rules in Coleman's terms. In this paper, we do not advance a complete theory of rights. Although our discussion of rights is consistent with Coleman's, it differs from his in that it distinguishes the facial and foundational levels of semantic analysis describing the relationship between the topographic right and the foundation in the deeper theory of social morality. We are concerned with describing the three levels of analysis and with establishing the distinction between conceptual and contingent rights. The distinction between these two illuminates the fundamental differences between the liberal and Chinese conceptions of rights.

others. . . . Over himself, over his own body and mind, the individual is sovereign."³⁹

Joel Feinberg's contemporary formulation of liberalism emphasizes and develops the value of individual autonomy. He distinguishes four senses of "autonomy" and focuses attention on autonomy as a right to self-determination or personal sovereignty. When a person possesses autonomy as a right, he has authority to choose for himself over primarily self-regarding matters, especially central life decisions involving his person, privacy, and property. In Feinberg's view, government may not interfere in voluntary, self-regarding choices by a competent person for that person's own good because the value of autonomy is morally basic, not derivative.⁴⁰

Ronald Dworkin advances a liberal conception of equality as the core of liberalism. This liberal conception of equality takes the form of an abstract right to be treated with equal concern and respect. This abstract right generates the less abstract right to be treated as an equal and independent person rather than as one who is subservient to others. Finally, at the most concrete level, liberalism protects legal rights that give specific content to the political status of the autonomous individual.⁴¹

Interpreted collectively, Mill, Feinberg, and Dworkin reveal a picture of liberalism as a political theory that vests a nonderivative value in the autonomy of the individual. This fundamental value for personal sovereignty gives rise to individual rights at three levels of abstraction. Legal rights to specific liberties and to equal treatment regarding societal resources protect a sphere of self-determination and give effect to the most abstract right to respect as an autonomous person. Soldiers in a liberal society are citizens who hold these rights that reflect the fundamental value for individual autonomy. Soldiers retain the abstract right to be treated with respect and as many of the concrete rights and liberties as can be maintained given the special needs of the military function.⁴²

39 JOHN STUART MILL, *ON LIBERTY* 68-69 (Gertrude Himmelfarb ed., 1974).

40 FEINBERG, *HARM TO SELF* 28-62 (1986).

41 RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 259-78 (1977).

42 We do not endorse any particular conception of liberalism. We are committed only to the claims that mainstream liberal thought vests fundamental value in individual autonomy and that this value requires some substantial sphere of individual self-determination. We do not claim that autonomy must be the only fundamental value in a liberal society. Others such as human welfare and social harmony or community may also be important, but individual autonomy is fundamental in the sense that it is not derived from, or reducible to, any other.

Rights are a particularly appropriate mechanism for instantiating this value for individual autonomy because recognizing X's right to do A does more than just allow X to do A. Establishing and protecting X's right to do A also identifies X as the primary source of decision making authority over X's doing A. It vests X with standing to decide whether X will do A, waive the right to do A, or retain the right while refraining from exercising it. The right to do A not only allows X to do A, it authorizes X to stand up and demand that he be allowed to do A as his due rather than to request it as largesse from the government.⁴³

The authority to determine whether one will exercise a right may not constitute part of what it means to have a right because in some circumstances, X may have both a right to do A and a duty to do A. X may have, for example, a right to travel guaranteed by the Constitution and a contractual obligation to travel to a particular place at a particular time such that he is not free to decide not to travel without incurring a burden under the contract. A few mandatory political rights do not allow the holder to decide whether to exercise them. For example, school children are often understood to have a right to an education, but mandatory attendance laws do not allow them discretion regarding their exercise of these rights.⁴⁴ The point here is that rights provide a particularly effective mechanism for instantiating a liberal political philosophy in a legal system because under most circumstances, rights vest control and decision-making authority in the rights holder in a manner that renders them highly compatible with the fundamental value for individual autonomy.

The officer's duty not to lie to or mislead the soldiers is at least partially grounded in the duty to respect the individual autonomy of the soldiers who retain their standing as citizens.⁴⁵ To a substantial degree, then, the officer's duty of truthfulness is derivative from the soldiers' right to respect

43 JOEL FEINBERG, *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY* 143-58 (1980). Recall that the rights we are discussing are those which are defined by property rules in Coleman's terms, as explained in note 38 *supra*.

44 *Id.* at 157-58.

45 DEP'T OF THE ARMY, *LEADERSHIP AND COMMAND AT SENIOR LEVELS*, FIELD MANUAL 22-999, AT 27 (1986). Military officers are exhorted to "develop and sustain the ethical climate," emphasizing loyalty, duty, integrity, and candor. Conduct marked by integrity and candor toward the troops is mandatory because American soldiers are American citizens whose rights are only subject to the minimum limitations essential to accomplish the mission of the military. See HARTLE, *supra* note 12, at 36-54. Hartle discusses the American officers' ethical duties as the product of a broad underlying duty to uphold the U.S. Constitution and the principles of political morality represented in the Constitution, including the individual rights and liberties of soldiers as citizens.

as an autonomous person, and this right is primary in the sense that it directly represents the fundamental value of the liberal system and provides a rationale for the officer's duty. The officer's duty of candor promotes the soldiers' ability to exercise their specific rights and thus, their capacity for autonomous self-determination, to the degree possible in the circumstances.

C. Rights in the Chinese Social Morality

The traditional Chinese social morality is usually understood to be duty-based in that for each person X, X acts rightly when X fulfills all responsibilities in each social relationship in which X participates. The Chinese emphasize the importance of these duties through the concept of *li* (ritual or propriety) which includes both proper conduct in relationships and the propensity or disposition to engage in such conduct. Those who have successfully cultivated *li* consistently engage in social conduct that fulfills their responsibilities in all relationships.⁴⁶ By doing so these individuals contribute to the social harmony which is the good of the people, where "the people" is understood in the collective sense.⁴⁷

The social harmony is the fundamental good toward which all right acts are directed. Each X fulfills the duties of each social relationship with each Y because a complete system of social relationships with all social duties properly fulfilled constitutes the social harmony, which constitutes the good of the people. That is, the fundamental good in the Chinese social morality is social harmony; social harmony consists of a complex network of relationships within which all persons participate by fulfilling the duties defined by those relationships.

This theory of social morality emphasizes duty in that individuals ordinarily select the proper act by fulfilling specified duties rather than by engaging in a consequentialist calculus expected to identify the acts expected to maximize some state of affairs that is perceived as good independently of

46 WING-TSIT CHAN, A SOURCE BOOK IN CHINESE PHILOSOPHY 790 (1963).

47 Some critics might contend that the priority of social harmony in Chinese society has been illusory. These critics would contend that those in power have defined the relationships required by "social harmony" in a manner calculated to promote their own interests. It is certainly possible that the Chinese system, as well as the liberal one, has been manipulated for personal gain. Our concern here, however, is with the putative compatibility of the principles of political morality represented by the Chinese and liberal social structures. In order to evaluate this claim in the most favorable light, we will accept at face value the priority of social harmony in Chinese society, and we will argue that the compatibility thesis fails in principle.

the acts themselves. It also resembles Western consequentialism, however, in that one ought to perform one's duties because doing so promotes a state of affairs (social harmony) which has been identified as the fundamental good toward which all should strive. Thus, right acts produce social harmony in the sense that a complete set of interpersonal relationships in which the parties fulfill their duties constitutes social harmony. Fulfilling one's duty in social relationships is not a right-making property of action independently of the product of such action. Rather, doing one's duty is a right action because doing so contributes to the social harmony by constituting part of it.

If one understands a consequentialist morality as one which defines right actions purely as those which maximize the good and a deontological morality as one which denies that right actions are defined purely by their tendency to produce the good, then the Chinese social morality is duty-based, but it is not deontological.⁴⁸ It remains similar to Western consequentialism because the rightness of fulfilling one's duty reflects the role of such conduct in producing the good of the people rather than any right-making property that stands independently of social harmony. Thus, the direct consequentialist relationship between production of the good and rightness of action obtains.

The Chinese social morality differs from more familiar Western consequentialist theories in that duties are defined into the state of affairs that constitutes the good and serves as the sole criterion of rightness for actions. Under ordinary circumstances, therefore, most people will be able to promote that state of affairs only by fulfilling their duties in social relationships. It remains possible, however, that in unusual circumstances a particular individual may be able to promote the social harmony through conduct that does not constitute part of it but will encourage harmonious behavior by others.

Some readers might argue that the Chinese social morality is appropriately categorized as a consequentialist theory, while others might disagree. One's position in this dispute might vary with the precise formulation of consequentialism adopted. Arguably, some familiar Western concepts, such as the distinction between consequentialist and deontological theories, do not transfer smoothly to the Chinese social morality because the Chinese view does not share the Western emphasis on the role of the individual as a moral decision maker. We do not pursue these issues here. The analysis presented here requires only the claim that the Chinese system

48 See *supra* note 26.

resembles Western consequentialism in that a direct relationship exists between production of the good and rightness of action. The Chinese approach defines the fundamental good as social harmony. The tendency to promote this good serves as the sole measure of the moral quality of individual actions and of social institutions.

In this view, the social harmony—rather than Y—forms the primary focus of X's duty to act properly in the relationship with Y because the social harmony is the fundamental value underlying the entire set of relationships and duties. If Y has standing to complain that X has failed to fulfill his duty, the force of Y's complaint arises from X's failure to promote the social harmony rather than from X's failure to give Y his due. In short, X's duty to act in a particular manner in the relationship with Y is not most accurately understood as a duty to Y. Rather, it is a duty to promote social harmony through a certain type of conduct directed toward Y.⁴⁹

The Chinese officer's duty in war, like the private individual's duty in interpersonal relationships, is directed toward promoting the social harmony. Officers at war, however, pursue social harmony under extraordinary circumstances in that they are primarily concerned with using violence to protect and restore the relationships that constitute social harmony. The officer's acts are intended to have a direct and dramatic effect on disrupted relationships, promoting harmonious conduct by the participants. This anticipated effect justifies the officer's behavior in war. While the officer's duty in war calls for conduct that differs markedly from that required of participants in ordinary peaceful relationships, the common thread lies in the underlying value: social harmony. Social harmony provides the criterion of rightness both for the officer's conduct in warfare and for individual behavior that fulfills prescribed duties in peaceful relationships.

D. An Officer's Duty in War

The Chinese officers' duty regarding their conduct toward their soldiers is primarily a matter of duty to promote the social harmony, rather than one of

49 For a general discussion of these issues involving Chinese social morality, see P.R. Peerenboom, *Confucian Justice: Achieving a Humane Society*, 30 INT'L PHIL. Q. 17 (1990); T'UNG-TSU CH'U, LAW AND SOCIETY IN TRADITIONAL CHINA 226-47 (1961).

Notice that the Chinese approach to social morality bears striking similarities to Joel Feinberg's "Nowheresville" as he describes it in RIGHTS, JUSTICE AND THE BOUNDS OF LIBERTY, *supra* note 43, at 143-48.

obligation to the soldiers. Officers, like others, act rightly when they act in a manner designed to protect the social harmony, but unlike most others, they do not do so exclusively within a framework defined by relationships that jointly constitute the social harmony. Rather, they engage in warfare in order to restore the prescribed social relationships and chastise those who disrupted these relationships, and thus, the social harmony. They function, therefore, in a more conventionally consequentialist manner; they act rightly when they perform the act calculated to maximize the good, by winning the war and restoring proper relationships.⁵⁰ Lying to one's soldiers, therefore, is correct if and only if it is the act calculated to win the war, and thus, to best promote the social harmony. Moreover, if lying is right by this criterion, it is unqualifiedly right because protecting the social harmony is the only nonderivative measure of rightness. The officer who lies under these conditions has violated no moral principle, and thus has no reason to regret the need to lie.

The officers' duty toward their soldiers in the Western liberal tradition differs fundamentally from that of the Chinese system. The officers' duty of truthfulness to their soldiers reflects the liberal value for individual autonomy in that the duty is partially rooted in the requirement that the officers respect the autonomy of the soldiers to the extent that the special responsibilities of the military allow. Officers ought to avoid lying to their soldiers because those who lie to their soldiers treat them as mere tools to be manipulated. In contrast, those who are truthful with their soldiers treat them as autonomous agents with the capacities needed to comprehend their circumstances and their responsibilities. They are able to conduct themselves as autonomous agents who act out of an understanding of those responsibilities.⁵¹

The principles underlying these different views regarding the propriety of lying to one's soldiers extend to other aspects of morality in war. Both Western and Chinese officers are charged with the primary responsibility of protecting their respective societies by winning the war. The different political philosophies represented by these two societies have important ramifications for the criteria by which officers evaluate the moral acceptability of various methods for fulfilling that responsibility. The officer who accepts the Chinese system—with its promotion of social harmony as

50 If several acts will win the war, that which is least disruptive to the social harmony in other ways is the right act.

51 See *supra* notes 13-14 and accompanying text. See also KLIMOV, *supra* note 14, at 51, 58-60 (discussing lies by superiors to their subordinates as insults to the troops).

the sole moral measure of all acts—concludes that any act that maximizes protection of social harmony is unqualifiedly right. Hence, the fact that an act violates an interest that would be protected in the west by an individual right has no direct bearing on the rightness of that act, although it may have an indirect bearing if protecting that interest is thought to be important in promoting social harmony.

The Western officer, in contrast, operates in a political system in which the fundamental value for individual autonomy places constraints on the acceptability of actions, even when performed in pursuit of the primary responsibility: winning the war. The Western officer who lies to his soldiers in order to win the war infringes on the soldiers' right to be treated with respect as autonomous individuals, sacrificing an important principle of liberal social morality. The officer who decides that circumstances justify such lies should regret this sacrifice of principle, regarding his lie as a necessary evil. This pattern of reasoning extends to other actions that threaten interests protected by individual rights.

E. Rights and Social Policy

The differences in substantive political philosophy that ground these contrasting views of morality in war extend to broader issues of public policy and political relations between the individual and the state. Political rights provide effective legal mechanisms for instantiating respect for individual autonomy in the liberal political structure because in most cases, the right-holder decides whether to exercise that right, to waive it, or to retain it while refraining from exercising it. While rights may be sacrificed in certain cases when they conflict with other more important rights or with overriding interests, they continue to signify the independent value of individual autonomy, providing a principled constraint on the means through which social goals may be pursued.⁵²

The Chinese system vests fundamental value in social harmony rather than in personal autonomy. This political structure can recognize political rights, and these rights might closely resemble those of a liberal society in form and facial content. Insofar as that political structure is consistent with the underlying social morality, however, those rights are maintained because they are thought to support the social harmony rather than because they

52 DWORKIN, *supra* note 41, at 90-92; NICKEL, *supra* note 1, at 16-17.

reflect a nonderivative value for individual autonomy. These rights represent one strategy for promoting the social goal rather than a principled constraint on the manner in which it is pursued.

The foundation for these rights lies in the state of affairs they are expected to promote, allowing them to be violated or retracted without regret or sacrifice of important moral value if it should appear that retaining and respecting these rights undermines social harmony. Rights that fail to promote the social harmony lose their only foundation in moral value, and hence, they retain no residual normative force. The "four bigs," for example, were proclaimed as the Chinese people's rights of expression in the 1950s.⁵³ These rights were guaranteed by the Chinese constitution in 1978. By 1979, however, the political situation had changed, and these rights of dissent were seen as socially disruptive. They were restrained in 1980, and a new constitution which did not mention the "four bigs" was ratified in 1982.⁵⁴

Recall that the Chinese government has endorsed human rights conventions, and that scholars have argued that the Chinese social morality protects interests corresponding to those represented by liberal rights.⁵⁵ On the Hohfeldian syntactical framework, a Chinese duty-based system may well be comparable to a complementary liberal rights-based system. In addition, at the facial level of semantic analysis, the Chinese constitution may endorse a set of political rights similar to those recognized by liberal systems. Assume that these two conditions obtain. Despite these similarities, liberal rights differ significantly from Chinese rights due to important contrasts at the foundational level of semantic analysis.

Rights that share similar topographic properties but differ at the foundational semantic level do not function as rights with identical content that are maintained for different reasons. Rather, the foundational differences can significantly affect the normative force and practical implementation of the rights. Most if not all political rights are limited in the sense that they may be justifiably infringed when they conflict with other rights or with overriding consequentialist considerations. Societies that differ regarding their underlying principles of political morality will also differ regarding the

53 ANDREW J. NATHAN, CHINESE DEMOCRACY 36 (1986). The "four bigs" included: big character posters, great debates, airing one's views, and contending in a big way.

54 *Id.* A Chinese constitution may not carry a special status as the foundation of the legal system comparable to that of the United States Constitution. The point here, however, is that rights of expression were formally recognized but quickly revoked when they were perceived as socially disruptive.

55 See *supra* notes 1-9 and accompanying text.

factors that they accept as sufficient to limit or override a right. Thus, societies that diverge at the foundational level of semantic analysis will limit, infringe, or revoke rights under different circumstances. Two societies with topographically identical rights may differ regarding the normative force and practical effect of those rights, therefore, because they attribute limiting force to different considerations or because they weigh the same factors differently.

Consider, for example, a distinction between conceptual and contingent rights that addresses the relationship between the foundational level of semantic analysis and rights as represented by their topographic properties. Recall that rights provide a particularly appropriate legal mechanism for instantiating the fundamental value for autonomy because respect for autonomy requires a sphere of personal sovereignty or self-determination over central and essentially self-regarding life decisions. Rights usually vest decision making authority in the rights holder, providing the individual holder with a legal device for exercising personal sovereignty over that aspect of life that falls within the scope of the right.⁵⁶ A political structure might protect religion, for example, through a variety of laws. But a political system that protects religion by granting a right to liberty regarding religious exercise protects not only religion but also autonomy in religious life. The right vested in the holder entitles her to exercise discretionary control over her religious life and to claim her sovereignty in this aspect of her life as her due rather than as largesse granted by the government.

Rights that reflect a nonderivative value for autonomy are conceptual in the following sense. Certain topographic properties of rights, including the syntactic association with normative limitations on the conduct of others, the focus of control in the holder, and the important ability to assert a claim to the right as one's due, bear a close conceptual relationship to autonomy. The concepts of individual discretion, sovereignty, authority, and control are central both to autonomy and to rights. Political structures that reflect fundamental value for autonomy can protect both specific interests and individual autonomy by employing rights as the legal mechanism through which they promote and protect those interests.

Rights do not bear this conceptual relationship to the social harmony that constitutes the fundamental value of the Chinese social morality. While this social system might recognize rights, the foundation for such rights consists of hypothesized contingent relationships between these rights and

⁵⁶ See *supra* notes 43-45 and accompanying text.

social harmony which constitutes the sole criterion for evaluating acts, duties, or social institutions in that society. Thus, these rights are contingent rights in the sense that their topographic properties are only contingently related to the fundamental value that supports them at the foundational level. Contingent rights may in fact provide an effective and appropriate means for promoting the purposes they serve, but there is no deeper conceptual or normative connection between the topographic features of the right and the underlying value. There is no reason, therefore, to respect or retain contingent rights when evidence suggests that the underlying value could be better served through other means.

Although rights might promote social harmony, alternative social institutions might do so at least as effectively. The traditional Chinese social morality, for example, pursues social harmony by emphasizing the duties of participants in social relationships.⁵⁷ It remains an open question whether the recognition of legal rights would promote social harmony more or less effectively than would an exclusive focus on duty. In contrast, it is difficult to understand how one could design a social structure for the purpose of promoting the liberal value of individual autonomy without including rights or some functionally similar institution.

The prospect of disastrous consequences might justify limiting individual expression in a liberal society, for example, but the prospective harm must be extreme in order to override the intrusion into personal autonomy involved in restraint of expression. Even in those cases in which these conditions are met, we would consider it unfortunate that we could avoid those consequences only by restricting expression. That is, we would regard the intrusion into individual autonomy as a necessary evil. A social morality that incorporates freedom of expression as a contingent right rather than as a conceptual right would address similar circumstances in a different manner. A society that vests ultimate value in social harmony and grants a right to free expression only because such a right is expected to promote social harmony has no reason to retain that right or to regret its sacrifice when circumstances suggest that violating or revoking it will promote the underlying value more effectively. Such a society can revoke or violate a right for a merely marginal gain in social harmony and it can do so without regret because a right that does not promote that value retains no normative

⁵⁷ See *supra* notes 46-49 and accompanying text.

weight at all. The sequence of events involving the "four bigs" illustrates this pattern.⁵⁸

In short, rights of expression that correspond topographically are not identical unless they also converge at the foundational level of semantic analysis. The apparent agreement between Western and Chinese rights in this area fails because these societies diverge at this level, recognizing conceptual and contingent rights respectively. Other societies may diverge at the third level for other reasons regarding different rights. The critical point is that in order to provide a true consensus that can serve as common ground for international discourse and mutual criticism, a set of human rights must elicit consensus at all three levels of analysis.

IV. CONCLUSION

The analysis of Chinese and Western approaches to morality in war and freedom of expression reveals important differences between the conceptions of rights adopted by these political systems. These conceptual and normative differences have important practical ramifications. The Chinese officers' lack of any duty of truthfulness toward their own troops reflects the consequentialist nature of their code of morality in war. This code is consistent with the broader conventional social morality which resembles Western consequentialism, although in a more subtle manner. The Chinese conventional social morality defines duties in a manner that is intended to produce a network of social relationships that constitutes the social harmony. Conforming to one's duties, therefore, produces social harmony because each relationship in which duties are fulfilled constitutes part of the social harmony. Although duties play a central role in this system, it resembles Western consequentialism in that the duties that determine right action carry normative force only because fulfilling them produces social harmony by constituting part of it.

Western officers, in contrast, have a duty of truthfulness toward their troops. This duty carries normative force independently of any good consequences it might produce, and it is grounded at least partially in the soldiers' right to be treated with respect as autonomous individuals. Soldiers hold this right as citizens in a liberal society that vests nonderivative value in

⁵⁸ See *supra* notes 53-54 and accompanying text.

individual autonomy, and they retain it despite certain limitations in its concrete implementation in the context of a military organization.

At the syntactic level, the duty-based Chinese system may be susceptible to translation into a liberal system of rights. In addition, the duty-based system may be very similar to liberal societies at the facial level of semantic analysis. The Chinese system provides a series of protections that correspond roughly to those found in the United States Bill of Rights, including freedom of thought and expression and protection from unreasonable search and seizure.⁵⁹ Finally, the Chinese government has endorsed several international political conventions intended to protect human rights consistent with the liberal tradition.⁶⁰

The analogy fails, however, at the foundational level of semantic analysis. Individual rights in the liberal tradition reflect a nonderivative value for individual autonomy, while rights in the Chinese system serve an instrumental purpose insofar as they promote social harmony. Liberal rights are conceptual rights in the sense that rights provide a legal device that bears a close conceptual relationship to the underlying value of personal autonomy. The fundamental value of the Chinese system supports only contingent rights because the role of rights in promoting social harmony is a contingent one, if rights promote harmony at all.

The contingent nature of Chinese rights reflects the substantive social morality within which they occur. Rights retain their value in this system only insofar as they maximize social harmony. When rights do not do so, therefore, they can be freely violated or revoked without sacrifice of any moral principle. Rights that do not promote the social harmony retain no residual normative force or foundation in moral principle.

In contrast, violating or revoking liberal conceptual rights infringes on the fundamental value of individual autonomy that forms the foundation of those rights. When conflicts among rights or extreme circumstances require infringement of a conceptual right, an important moral principle is sacrificed. Thus, infringement of conceptual rights, even when justified, involves a choice of lesser evils that wrongs the rights-holder. Conceptual and contingent rights are not equivalent, therefore, regardless of their topographic similarities.

59 See generally INFORMATION OFFICE OF THE STATE COUNCIL, HUMAN RIGHTS IN CHINA (1991).

60 See *supra* note 1 and accompanying text.

If international consensus regarding human rights is expected to establish a mutually accepted and useful standard of political criticism, topographic agreement will not suffice. The apparent consensus remains illusory unless it extends across all three levels of analysis. This requirement is not merely theoretical. Social structures that converge topographically while diverging at the foundational level of semantic analysis may share certain properties, but they can generate divergent conclusions about the appropriate responses to various states of affairs involving rights and duties. The analysis presented in this paper demonstrates that the apparent consensus among liberal and Chinese societies fails at the foundational level because these societies differ in that they establish conceptual and contingent rights respectively. This theoretical difference generates important practical divergence between the systems regarding morality in war and freedom of expression.