

Communitarianism, Properly Understood

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Abstract

Communitarianism has been misunderstood. According to some of its proponents, it supports the ‘Asian values’ argument that rights are incompatible with communitarian Asia because it prioritises the collective interest over individual rights and interests. Similarly, its critics are sceptical of its normative appeal because they believe that communitarianism upholds the community’s wants and values at all costs. I dispel this misconception by providing an account of communitarianism, properly understood. It is premised on the idea that we are partially constituted by our communal attachments, or constitutive communities, which are a source of value to our lives. Given the partially constituted self, communitarianism advances the thin common good of inclusion. In this light, communitarianism, properly understood, is wholly compatible with rights, and is a potent source of solutions to controversial issues that plague liberal societies, such as the right of a religious minority to wear its religious garment in public.

Introduction

During its heyday in the 1990s, the Asian values challenge to universal human rights, as advanced by some Asian states, confidently asserted that the individualistic nature of rights is incompatible with communitarian Asia. Specifically, antagonistic rights claims against the state contradict the preference of “most people” in Asia for a less adversarial relationship between the state, society, and the individual.¹ According to Amitai Etzioni, this account of communitarianism “[extols] social obligations and the importance of the common good and [accords] much less weight to autonomy and rights, viewing individuals as more or less interchangeable cells who find meaning in their contribution to the social whole.”² Although this version of the ‘Asian values’ argument has been largely discredited as “a mystification by certain authoritarian elites hoping to . . . legitimize illiberal politics in order to keep themselves in power,”³ the

1. Bilahari Kausikan, “Asia’s Different Standard” (1993) 92 Foreign Policy 24 at 37.
2. Amitai Etzioni, “Communitarianism Revisited” (2014) 19:3 Journal of Political Ideologies 241 at 244.
3. Donald K. Emmerson, “Region and recalcitrance: Rethinking democracy through Southeast Asia” (1995) 8:2 The Pacific Review 223 at 236. Of course, scholars have provided plausible interpretations of the Asian values argument that do not reject rights out of hand. It has been argued that cultural factors can affect the prioritization and justification of rights, and provide the moral foundations for different political policies and practices: see Daniel Bell, “Communitarianism” (2020), online: <https://plato.stanford.edu/archives/fall2020/entries/communitarianism/>. I do not dispute that cultural factors can have an impact on how rights are justified and practised in different societies. My target here, however, is the original reductive version of the Asian values argument that states like Singapore and Indonesia advanced to reject individual rights for being incompatible with Asia’s communitarian values. I focus on this version because it is still applied in some form in places like Singapore, and it captures the misconception of communitarianism that I criticize in this article.

idea that communitarianism is incompatible with rights continues to maintain its stranglehold in some societies in Asia. For instance, Singapore's professed communitarianism is premised on the assumption that "[c]entral to communitarianism is the idea that collective interests are placed above individual ones."⁴ In the same vein, the Singapore judiciary's rights balancing process is informed by the "prioritisation of the collective welfare over individual concerns"⁵ where rights are treated as "defeasible interests, rather than as trumps."⁶ This ostensibly substantiates the Asian values claim that rights are incompatible with communitarian Asia.

This conception—or rather, *misconception*—of communitarianism exemplifies a more general negative perception of communitarianism. Etzioni observes that the association of communitarianism with authoritarian regimes in Singapore and Malaysia, among others, has caused "the three leading [communitarian] academic scholars of the 1980s [to] systematically [refrain] from using the term at all."⁷ Etzioni is referring to Michael Sandel, Charles Taylor, and Michael Walzer. Sandel, for instance, rejects the communitarian label insofar as it implies that "rights should rest on the values or preferences that prevail that predominate in any given community at any given time."⁸ A fourth philosopher, Alasdair MacIntyre, whose work has also been labelled communitarian, has stated that he has never been a communitarian.⁹

This misconception of communitarianism—call it the *Misconception*—is a prevalent view amongst many scholars. George Kateb says that communitarianism sees a good society as one that lords over its inhabitants and "provides the script," such that "in good societies all play their parts and say their lines unself-consciously."¹⁰ Sungmoon Kim contends that one of communitarianism's central aims is to "put the core argument of deontological liberalism in reverse, that is, to place the common good and civility prior to the right."¹¹ In his reconstruction of communitarianism, Beau Breslin claims that "the community's values exist prior to, and are more critical than, the wants of any single resident of the polity."¹² He claims, too, that all communitarians "defend the principle that the community's values supersede all competing noncommunal interests."¹³ Communitarianism would thus resolve controversial issues according to the community's "collective

4. Beng Huat Chua, *Communitarian Ideology and Democracy in Singapore* (Routledge, 1995) at 191.

5. Li-ann Thio, "Protecting Rights" in Li-ann Thio & Kevin Tan, eds, *The Evolution of a Revolution: 40 Years of the Singapore Constitution* (Routledge-Cavendish, 2009) 193 at 195.

6. Li-ann Thio, "Soft constitutional law in nonliberal Asian constitutional democracies" (2010) 8:4 Intl J of Constitutional Law 766 at 779.

7. Etzioni, *supra* note 2 at 245.

8. Michael J Sandel, *Liberalism and the Limits of Justice*, 2d ed (Cambridge University Press, 2012) at 186.

9. See Alasdair MacIntyre, *After Virtue*, revised ed (Bloomsbury Academic, 2013) at xv.

10. George Kateb, *The Inner Ocean: Individualism and Democratic Culture* (Cornell University Press, 1994) at 228.

11. Sungmoon Kim, *Confucian Democracy in East Asia: Theory and Practice* (Cambridge University Press, 2014) at 53.

12. Beau Breslin, *The Communitarian Constitution*, revised ed (Johns Hopkins University Press, 2006) at 80.

13. *Ibid* at 85.

and shared will,” and these solutions will be based “entirely on the interests of the collective whole.”¹⁴ In the Asian context, Confucian communitarianism has been similarly described, with scholars alleging that it “[advocates] that individual values should be subordinated to community values.”¹⁵

It is unfortunate that communitarianism has been tainted by the Misconception. Communitarianism, properly understood, is far from how the Misconception has misrepresented it; rather, it is a normatively appealing political philosophy that values both individual and community without championing one over the other. It retains the best aspects of liberalism and collectivism in articulating a political philosophy that protects the individual in harmony with community. The Misconception is thus fundamentally flawed because proper communitarianism does not necessitate the *a priori* prioritisation of the collective interest, whatever it may be, over the individual’s rights and interests. In this light, regimes in Asia that rely on the Misconception to justify their weak protection of rights should look for another political philosophy.

Another upshot of a proper account of communitarianism is that it is a rich source of solutions to social problems in liberal societies. A significant source of controversy in recent years is the clash between religious minorities and the majority’s preferences that seem unable to accommodate these minorities. An apt example is the ban on the full Islamic face veil in France and Belgium,¹⁶ commonly known as the ‘burqa ban.’ One liberal critique would be that the ban violates the right to freedom of religion because it restricts, for an illegitimate purpose, the *individual’s freedom* to religious expression. This critique presupposes that the primary purpose of rights is to protect the individual’s freedom to choose her own conception of the good; or, more reductively, to “make [her] own choices on what to wear.”¹⁷

However, the emphasis on individual freedom risks losing matters of profundity in the cacophony of competing assertions of freedom. Those opposed to the full Islamic veil may claim that they have the freedom not to be confronted with the sight of women in the full Islamic veil, or the “right” to see their fellow citizens’ faces in the public sphere.¹⁸ In other words, emphasizing individual freedom risks misplacing the focus in such controversies on what *I* am entitled to, what *my* rights and freedoms are, and not what the other is entitled to *as a member*

14. *Ibid.*

15. Weixi Hu, “On Confucian Communitarianism” (2007) 2:4 *Frontiers of Philosophy in China* 475 at 477.

16. See *SAS v France*, [2014] ECHR 695 [*SAS*] and *Dakir v Belgium*, [2017] ECHR 656. For other cases involving bans on wearing Islamic headscarves (not the full-face veil) in the public sphere, see e.g. *Dahlab v Switzerland*, [2001] ECHR 899 and *Sahin v Turkey*, [2005] ECHR 819. For an analysis of these cases, see Jill Marshall, “Women’s Right to Autonomy and Identity in European Human Rights Law: Manifesting One’s Religion” (2008) 14:3 *Res Publica* 177.

17. Jill Marshall, “*SAS v France*: Burqa Bans and the Control or Empowerment of Identities” (2015) 15:2 *Human Rights L Rev* 377 at 379.

18. Sune Lægaard, “Burqa Ban, Freedom of Religion and ‘Living Together’” (2015) 16:3 *Human Rights Law Review* 203 at 211. See the final section, entitled ‘Communitarianism and Rights’ (below), for a further discussion of this issue.

of my community. It risks, too, a failure to foster genuine understanding and concern between citizens exclusively pursuing their private interests. Indeed, the resistance of some segments of liberal Western societies to wearing a face covering during the current Covid-19 pandemic¹⁹ has exposed the dark side of individual freedom, and substantiated communitarians' fear that an excessive pursuit of individual freedom causes a break down in civil society.

Communitarianism provides another way to resolve social controversies and foster communal harmony by shifting the focus from individual freedom to *community* as a source of meaning and value for individuals, and the normative significance of community membership. And it does so without sacrificing individual rights. This article will refute the Misconception by articulating the elements of a proper account of communitarianism. However, due to the article's limited space, I will not be able to fully defend all the claims in the article. My aim here is thus modest: to clarify what communitarianism is, properly understood, and provide a sketch of how communitarianism can robustly protect rights. It is hoped that the article will provoke further thought into fleshing out a communitarian theory of rights.

The article will proceed as follows. The first section develops the partially constituted self: we are partly constituted by our various communal attachments, or constitutive communities, which are a source of meaning and value to our lives. The second section shifts the focus to a form of communitarianism in Asia—that is, Confucian communitarianism—and argues that it does not support the Misconception; as such, the Asian values argument stands on shaky ground. Next, I argue, first, that, given the communitarian self, communitarianism cannot promote a politics of a common good based on thick comprehensive worldviews; and second, that the Misconception finds no support in the Confucian notion of community. This is followed by an account of the common good that communitarianism *does* promote: the good of inclusion. The final section briefly demonstrates how communitarianism, properly understood, would hold that the burqa ban violates the right to freedom of religion.

The Partially Constituted Self

Western communitarianism begins with the partially constituted self. It was developed to oppose a specific liberal conception of the self, paradigmatically represented by John Rawls' *A Theory of Justice*. In developing his two principles of justice, Rawls places individuals in the original position behind a veil of ignorance where they have no knowledge of their social context in order to arrive at principles of justice that are fair and just. Hence, Rawls' claim that the self is "prior to the ends that are affirmed by it" suggests that individuals are radically

19. See Edward D Vargas & Gabriel R Sanchez, "American individualism is an obstacle to wider mask wearing in the US" (31 August 2020), online (blog): *Brookings* <https://www.brookings.edu/blog/up-front/2020/08/31/american-individualism-is-an-obstacle-to-wider-mask-wearing-in-the-us/>.

free, unencumbered by a pre-existing social context, with total autonomy to paint on the blank canvases of their lives.²⁰ I will invoke Sandel and call this the Unencumbered Self.²¹

Communitarians reject the Unencumbered Self for two reasons: it is a false description of who we are, and it unjustifiably discounts the normative significance of community for “personal identity, moral and political thinking, and judgements about our well-being.”²² On the first point, we cannot be completely free from prior social encumbrances because we are *partially constituted* selves. We are born into, and embedded in, a particular social context, and depend on our constitutive attachments to “family or community or nation or people”²³ for the “formation of [our] personalities.”²⁴ Our inheritance of the history of the family or nation to which we belong gives our lives their “own moral particularity.”²⁵ Being so encumbered, we cannot be totally or sufficiently abstracted from these particular attachments and their values when thinking about principles of justice. Contrary to the Unencumbered Self, then, the self is partially constituted.

More importantly, the Unencumbered Self is unable to appreciate the normative significance of community. Consider two related implications of the Unencumbered Self. First, the Unencumbered Self, being in a position to choose freely, can only affirm as valuable that which it chooses. This implies that choice itself is of the highest value without which the Unencumbered Self cannot act as the self-determining agent that it is. The second implication is that the Unencumbered Self is unable to affirm the value of its unchosen communal attachments. Because we are born into a particular social context, our identity is constituted, at least partly, by our communal attachments,²⁶ or constitutive communities; our ends are not things that we choose, but discover.²⁷ But for the Unencumbered Self, these constitutive communities have no inherent value because the constituent *communal* features of its identity are unchosen. Community is thus little more than an instrumental association of self-interested individuals solving coordination problems. This threadbare notion of community neglects the constitutive nature of community and excludes the possibility that individuals see their community membership as an inherent part of their identity.²⁸

Communitarianism therefore rejects the Unencumbered Self because it is descriptively false and insufficiently accounts for community’s normative

20. John Rawls, *A Theory of Justice*, revised ed (Harvard University Press, 2005) at 560.

21. See Michael Sandel, “The Procedural Republic and the Unencumbered Self” in Shlomo Avineri & Avner De-Shalit, eds, *Communitarianism and Individualism* (Oxford University Press, 1992) 12.

22. Daniel Bell, *Communitarianism and Its Critics* (Clarendon Press, 1993) at 4.

23. Sandel, *supra* note 21 at 23.

24. Philip Selznick, “The Idea of a Communitarian Morality” (1987) 75:1 Cal L Rev 445 at 447.

25. MacIntyre, *supra* note 9 at 255.

26. Bell, *supra* note 22 at 93.

27. Sandel, *supra* note 8 at 150.

28. Stephen Mulhall & Adam Swift, *Liberals and Communitarians*, 2d ed (Wiley-Blackwell, 1996) at 51.

significance. In contrast, the communitarian partially constituted self accurately describes how our identities are formed. If this is so, then communitarianism, as opposed to liberalism premised on the Unencumbered Self, is committed to the view that community is inherently valuable because it is a source of meaning and value to individuals. Put another way, instead of liberalism's minimalist conception of community, communitarianism adopts a substantive and pluralistic conception of community as many constituents of identity. Contra Rawls, then, the self cannot be prior to its ends, for these ends partly constitute the self.

The discussion thus far is likely to be met with two objections. First, the discussion does not rule out the Misconception as a *type* of communitarianism: the communitarian rejection of the Unencumbered Self and the priority of the right over the good does not preclude the priority of the good over the right. However, while it may be that the communitarian rejection does not *per se* rule out the priority of the good over the right, the Misconception goes wrong by *a priori* placing the collective interest above the individual's and claiming that communitarianism *always* places the good over the right. Not only does this not follow from the communitarian partially constituted self, but it cannot automatically follow because the communitarian conception of the self does not prescribe criteria to choose in advance which collective interest is to be prioritised over the individual's. This will be explained in the next section, below.

The second objection is that the Unencumbered Self *can* value its constitutive communities by *choosing* to do so. This would then undermine communitarianism's starting premise and render my account of proper communitarianism unnecessary: if the Unencumbered Self can be modified to accommodate the communitarian critique, we would have no need for communitarianism at all. By choosing to value its attachments, the Unencumbered Self acknowledges and embraces its attachments without compromising its radical autonomy.

However, this 'way out' misses the key communitarian insight about the inherent value of community which, if co-opted by liberalism's perpetual emphasis on choice, would be diluted. The value of community is not contingent on whether it is chosen; our unchosen constitutive communities can be, and often are, a source of meaning to our lives. As Bell argues, constitutive communities usually operate in the background, such that we are connected to them "in a way which resists articulation."²⁹ It may be that we are unaware of their importance until a jarring event occurs—say, moving to a foreign country and realising the importance of one's constitutive national community. Neither the fact that one did not choose to be born in and shaped by Nation X, nor the individual's prior indifference to X, robs X of its value to the individual whose identity it has partly constituted. Rather, X community's value has operated in the background, surfacing when the individual is thrown out of their comfort zone. It would thus be putting the cart before the horse to say that X community's value obtains only when the individual chooses it.

29. Bell, *supra* note 22 at 97.

The analysis so far—the claim that community is intrinsically valuable—may sound alarm bells for champions of individual autonomy. They may caution that, by vesting inherent value in constitutive communities, the individual would be so thoroughly constituted that they would be unable to “think at all critically about [their] practices and traditions,” thereby “consigned to a life of community-sanctioned oppression and exploitation.”³⁰ If this is right, then my account of communitarianism simply collapses back into the Misconception; it may, much to the individual’s detriment, uphold community values—because intrinsically valuable—above the individual’s values and interests. Call this the Autonomy Objection.

The Objection, however, runs too quickly ahead of the argument. The claim here is a modest one: it is that we are *partially*, not completely, constituted by our communal attachments. It is also that community’s value is intrinsic in the sense that it is not contingent on choice; that is, on being chosen *a priori* and/or *a posteriori* by its members. These two claims are compatible with individual autonomy. The pluralistic conception of community that undergirds my account—namely, community consists of various overlapping constitutive communities—suggests that there remains a sphere of individual autonomy left uncolonized by community with which the individual navigates their communities’ competing demands and conflicting values. A gay Catholic man, for instance, necessarily needs, and has, the autonomy to define the contours and content of his identity in reconciling his competing constitutive communities. Similarly, the member of X does not forgo their autonomy simply because they affirm X’s value to their life. The claim that the gay, Catholic, and X communities are inherently valuable does not negate the individuals’ autonomy to ascertain which values to affirm or reject. Rather, it presents these communities and their values as a “tool kit of options” with which the communitarian partially constituted self exercises its autonomy.³¹

Both the Misconception and the Autonomy Objection are thus flawed for asserting that communitarianism, properly understood, forces the individual into normative insignificance. The point of the Western communitarian critique is that the Unencumbered Self cannot value its unchosen community, not that community is the final arbiter of what is valuable. As Bell notes, the fact that we are “deeply bound up in [our] social world” does not mean that one ought to “subordinate [one’s] individuality to the good of the community.”³² This would be undesirable because, even though it is a part of human existence that one’s well-being is affected by others, “[no] individual is so thoroughly socialised that there is no trace of a ‘residual’ sense of self, of agency, that does not react to repressions by the social.”³³ In other words, communitarianism, properly

30. Richard Dagger, “Individualism and the Claims of Community” in Thomas Christiano & John J. Christman, eds, *Contemporary Debates in Political Philosophy* (Wiley-Blackwell, 2009) 303 at 312.

31. Kwame Anthony Appiah, *The Ethics of Identity* (Princeton University Press, 2005) at 107.

32. Bell, *supra* note 22 at 31.

33. Chua, *supra* note 4 at 9.

understood, does not require the community's values to automatically prevail over the individual's. Therefore, the Misconception is fundamentally flawed.

The Confucian Role-Bearing Person

The discussion thus far invites the obvious challenge: what has Western communitarianism got to do with Asian values? The point of the Asian values argument, it may be said, is to reject alien Western culture and define an Asian communitarianism for Asia. The problem with such an endeavour, of course, is that there are no “quintessential values that apply to this immensely large and heterogeneous population, that differentiate Asians as a group from people in the rest of the world.”³⁴ We can then analyse a specific form of communitarianism in Asia to see whether it supports the Misconception—such as Confucian communitarianism. Not only is Confucianism commonly associated with East Asian societies, but as noted earlier, it is often thought to support the Misconception because “[the] Confucian tradition has often been credited with a strong allegiance to the value of community.”³⁵

More crucially, the Confucian conception of the person may be said to ground the Misconception: it goes further than the Western communitarian rejection of the Unencumbered Self in denying the very notion of the individual self. Whereas the liberal self is a free, rational, and autonomous *individual*, the Confucian *person* is constituted by their social roles through the practices of ritual propriety which dissolve the tension between the self and society.³⁶ As Henry Rosemont Jr states, we do not simply play the roles of daughter, mother, and friend; we live them, and are constituted by them, such that we *are* the “aggregate sum of the roles [we] live.”³⁷ If we are thoroughly constituted by our social roles, then there is “no *essential* self” that remains at the core of the person who is now a mother in addition to her role as a daughter.³⁸ In other words, there is no *individual* with their own interests and needs independent of their social roles. ‘Individual,’ then, has neither metaphysical nor normative significance, and refers only to discrete *persons*. These individuals *qua* discrete persons have no special sphere of personhood and individuality that needs protection from the collective, and bear no moral costs when the collective interest is placed above their own. If this is right, then the Misconception is a form of Asian—that is, Confucian—communitarianism, which would vindicate the Asian values version of communitarianism.

34. Amartya Sen, *Human Rights and Asian Values* (Carnegie Council for Ethics in International Affairs, 1997) at 13.

35. Sor-hoon Tan, “From Cannibalism to Empowerment: An Analects-Inspired Attempt to Balance Community and Liberty” (2004) 54:1 *Philosophy East & West* 52 at 52.

36. Kim, *supra* note 11 at 31.

37. Henry Rosemont Jr, *Against Individualism: A Confucian Rethinking of the Foundations of Morality, Politics, Family, and Religion* (Lexington Books, 2015) at 94.

38. *Ibid* [emphasis added].

The problem, however, is that, like the Western partially constituted self, the Confucian role-bearing person is not forced into normative insignificance. Positing that the Misconception follows from the Confucian role-bearing person is flawed in two ways. First, notice the conspicuous absence of anything resembling ‘individual/collective’ in the five Confucian roles: parent/child; ruler/minister; husband/wife; siblings; and friends. The mere fact that the Confucian roles are embodied in the Confucian person says nothing about the relationship between the Confucian person and the collective. Even if we posited ‘individual/collective’ as a Confucian role, this role would be too qualitatively different from the five Confucian roles which are based on intimate face-to-face relationships. It is therefore unclear why it is appropriate to extend these intimate roles to include the anonymous relationship between the individual and the faceless collective. Further, if the point of the Confucian person is that there is no individual self apart from their five roles, then it follows that there cannot be an ‘individual/collective’ role as the individual simply does not exist. A tentative inference, then, is that Confucian roles-based ethics is silent on the relationship between person and society.

Another problem with positing ‘individual/collective’ as a Confucian role to ground the Misconception is that it misses the important point that the Confucian person is premised on the Confucian roles-based ethics of *reciprocity*. If there is no reciprocity between the Confucian person and the collective, then ‘individual/collective’ would not be a valid Confucian role—which means that the Confucian role-bearing person cannot support the Misconception. What is reciprocity in Confucian ethics? Confucian reciprocity emanates from the family, which is the source of the Confucian person’s morality: it is in the family that the role-bearing person learns true reciprocity of the roles.³⁹ In an ideal Confucian family, children cultivate from childhood the virtue of filial piety (孝) from which flows an “unswerving loyalty”⁴⁰ and gratitude to parents. Because parents do things for their children’s sake, children feel a sense of joy when they have the opportunity to care for them.⁴¹ Hence, reciprocity is not *quid pro quo*, but “loving integrated actions.”⁴²

Of course, the parent-child relationship is not always ideal: parents do not always do the right thing, and some parents, such as abusive ones, are downright evil. Confucianism, however, does not shield parents from criticism; rather, children’s remonstrance of their parents’ wrong-doing is part of filial piety, and is “a valid way to serve our parents.”⁴³ Although classic Confucianism appears not to allow children to reject their attachment to evil parents, it is arguable that, because the evil parent has hardly acted in the child’s best interest, there

39. *Ibid* at 100.

40. *Ibid* at 98-99.

41. *Ibid* at 100.

42. *Ibid*.

43. Yong Huang, “Why an Upright Son Does Not Disclose His Father Stealing a Sheep: A Neglected Aspect of the Confucian Conception of Filial Piety” (2017) 5:1 *Asian Studies* 15 at 28.

is no basis for reciprocity in this specific evil parent-child relationship. The modern communitarian stance ought to be that the child can reject the evil parent. Be that as it may, the parent-child relationship, however imperfect but not defective, is the foundational reciprocal relationship on which the Confucian person's other roles are based. The Confucian role-bearing person works towards the goal of cultivating a common humanity based on mutual concern and respect, and a genuine willingness to carry out their responsibilities to others, unfettered by feelings of resentment that these responsibilities compromise their autonomy.⁴⁴

If reciprocity is integral to a Confucian role, it needs to be present as loving integrated actions between the Confucian person and the collective. The same problem arises once more with including 'the collective' as a counterparty of a Confucian role: the collective is too anonymous for the individual to display the loving integrated actions that define the five Confucian face-to-face roles. But perhaps the argument could be that, as Western communitarianism has shown, because it is a fact of modern-day life that we are also a citizen of a country, we should expand the range of Confucian roles. So long as we can find some reciprocity between 'individual/collective,' it counts as a role that the Confucian person embodies. Now say that 'the collective' refers to the nation-state as a whole; thus, 'individual/collective' means the individual as a citizen of the nation-state. This would seem to rescue the Misconception because reciprocity is often thought to exist between co-nationals.⁴⁵ Here, the argument stands on firmer grounds. We could say that there is reciprocity when, for instance, citizens give at least two years of their lives to compulsory military service in exchange for national security.

Still, even if we could detect some reciprocity in 'individual/collective,' it is arguably too thin for it to count as a proper Confucian role. It differs so qualitatively from the reciprocity in, for instance, the parent/child role that Confucian ethics becomes vulnerable to being weaponised to justify something like the Misconception. Even if there are some who feel a stronger connection to their nations than their family members, the point of Confucian reciprocity is not the strength of one's feelings towards others, but intimate, face-to-face relationships. Arguably, even the most fervent jingoist does not have the same quality of a face-to-face relationship with their 'imagined' nation as a parent and child who share a loving relationship.⁴⁶ This is not to diminish nationalistic fervour, but to say that it is not a proper fit for Confucian ethics. To dilute the requirement of intimate, face-to-face relationships is to fall into the Misconception's trap; conversely, this shows that the Misconception can only follow from a weakened account of Confucian ethics.

44. Rosemont Jr, *supra* note 37 at 99.

45. See David Miller, *On Nationality* (Clarendon, 1995) at 67.

46. See Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, revised ed (Verso, 2016).

Be that as it may, even if we accepted that the reduced reciprocity is sufficient for ‘individual/collective’ to be a Confucian role, there is an additional problem. Thus far, I have not challenged the claim that, because there is no individual in the Confucian role-bearing person, no moral costs are exacted when the Confucian person makes sacrifices for the collective. However, this claim is problematic: it focuses too much on autonomy as moral agency. Even accepting that the Confucian person is not an autonomous self, autonomy is not the only value at stake when the individual’s interests are sacrificed for the collective. The Confucian person can be called upon to make other types of sacrifices, such as sacrificing familial relationships for the nation. To illustrate: say that war broke out between Country X and Country Y, and Country X mobilises all its citizens for the war effort. Xiaoming is obliged to the nation to fight in the war, but his parents are against it out of fear that he would lose his life. Xiaoming thus faces conflicting moral obligations between filial piety to his parents (abiding by their wishes) and loyalty to his nation (fighting in the war).

Now say that Xiaoming fights in the war. Someone preoccupied with autonomy as the only form of moral agency would say that, since Xiaoming is a Confucian person and not an individual, he bears no moral cost because his autonomy is not at stake. On the contrary, Xiaoming bears an onerous moral cost: it is the cost incurred by abandoning his duty of filial piety. Since the family is the moral centre of the Confucian person, and filial piety is one of the bedrock tenets of Confucianism, this moral cost is just as burdensome as the loss of autonomy that Xiaoming *qua* individual self suffers by fighting against his will. This moral cost suggests that there *is* a ‘me’ beyond the Confucian person’s roles, a ‘me’ who is caught in the crossfire of conflicting moral obligations and has to decide which one to give up. The Confucian role-bearing person therefore cannot form the basis of the Misconception. As Joseph Chan argues, it is a mistake to view Confucian roles-based ethics as subjugating individuals’ needs and interests to the collective: in the Confucian paradigm of reciprocity and mutual concern, “*what* are we supposed to care for if not that person’s needs and interests?”⁴⁷ Because the person matters, Confucian ethics stresses reciprocity when a Confucian person carries out their role obligations to ensure that their needs and interests are taken care of. The Misconception does not sufficiently consider the person’s needs and interests, and therefore, does not follow from the Confucian role-bearing person.

In sum, the Misconception thus wrongly discounts the individual’s normative significance. Communitarianism, properly understood, values community and individual—a necessary consequence of partly constituted self because individual and community are mutually reinforcing.

47. Joseph Chan, “A Confucian Perspective on Human Rights for Contemporary China” in Joanne R Bauer & Daniel A Bell, eds, *The East Asian Challenge for Human Rights* (Cambridge University Press, 1999) 212 at 220 [emphasis in original].

Against the Thick Common Good

Another consequence of the Misconception is the claim that communitarianism promotes a thick theory of the common good. If the collective interest always prevails over individual rights and interests, this implies that any collective interest, including thick comprehensive worldviews, overrides individual ones. The communitarian “politics of the common good”⁴⁸ has been understood to mean that a community organises itself around politics based on “a substantive moral belief powerful enough to inspire the citizenry.”⁴⁹ Call this the Thick Common Good. Proponents argue that communitarian politics uphold the community’s “substantive conception of the good which defines the community’s ‘way of life,’” providing a “standard by which [people’s] preferences are evaluated.”⁵⁰ Thus conceived, the Thick Common Good resolves conflicts between comprehensive worldviews and allows the public pursuit of the community’s way of life to “[take] precedence over the claim of individuals to the liberties and resources needed to choose and pursue their own ends.”⁵¹ If communitarianism advanced the Thick Common Good, it would substantiate Sandel’s worry that communitarianism simply endorses the prevailing preferences and values in a community at any given time.

However, communitarianism, properly understood, cannot advance the Thick Common Good because it does not follow from the communitarian conception of the self. The communitarian self partially embodies *many* constitutive communities, not just the one. These communities have their own comprehensive worldviews and conceptions of the good which are imbued in the individual of whose identity they form a part, and there are no prescribed criteria to decide which conception of the good should triumph as *the* Thick Common Good. As such, proper communitarianism, because premised on the partially constituted self, does not engage in the politics of the Thick Common Good.

Granted, a truly homogeneous community can advance the Thick Common Good if all its members share its unifying *telos*. An example is MacIntyre’s argument for an Aristotelian community where “my good as a man is one and the same as the good of those others with whom I am bound up in human community.”⁵² Put another way, the good of individuals *is* the good of the community: members work towards “the shared achievement of those common goods without which the ultimate human good cannot be achieved.”⁵³ There is thus no tension between the Thick Common Good and individual members’ conception of the good because they are the same.

MacIntyre’s ideal community, however, is steeped in a particular Aristotelian metaphysics that is not easily translatable to pluralistic modern societies. It is

48. Will Kymlicka, *Liberalism, Community, and Culture* (Clarendon Press, 1989) at 78.

49. Breslin, *supra* note 12 at 80.

50. Kymlicka, *supra* note 48 at 77.

51. *Ibid.*

52. MacIntyre, *supra* note 9 at 266.

53. *Ibid.* at xv.

more likely that, as Bell points out, our “communal attachments [and] loyalties stretch to more than one community—home-town, nation, family,” and so communitarianism must “[recognise] the fact that most of us identify with *many* communities.”⁵⁴ Given this, the Thick Common Good can be advanced only if there is enough convergence within the community’s diverse worldviews such that it can be endorsed by all. The diversity of modern societies, however, makes it suspect whether even seemingly homogeneous societies can promote the Thick Common Good without exacting costs on some of its members. This is particularly acute when it is the nation-state that promotes the Thick Common Good because it is usually at the cost of subjugating competing comprehensive worldviews with varying degrees of violence. Islamic Iran, for instance, has enforced the Islamic state to the detriment of its non-Muslim minorities who constitute 2% of the population.⁵⁵ Proper communitarianism would not neglect the worldviews of the 2%.

Since modern societies typically consist of individuals who identify with many communities, promoting the Thick Common Good raises the question of which comprehensive worldview is to be advanced as *the* common good. Advancing one, or some, at the expense of others is at odds with proper communitarianism because it undermines communitarianism’s starting premise: we are partly constituted by our communities, all of which are a source of value and meaning to our lives. In this light, communitarian politics aims to enable people to “experience their life as bound up with the good of the communities which constitute their identity.”⁵⁶ A community that advances the Thick Common Good would fail to value the members and their constitutive communities whose good it suppresses. The Misconception is thus defective because it suppresses differences when communitarianism, properly understood, recognises and promotes differences—a consequence of the partially constituted self.

What about Confucian communitarianism? It should be noted from the outset that the idea of community is tangential to Confucianism. As Wm Theodore De Bary points out, while Confucian ethics have developed a sophisticated system of thought regarding the family, little work has been done to develop the concept of the group, including the community. There is thus little support in Confucianism for community as an “organization . . . mediating between individual and state.”⁵⁷ Despite this, scholars have attempted to theorize about what a Confucian community would be like and the values that it would endorse. As mentioned earlier, it is a common perception that Confucianism endorses the Misconception. Following from this, some have argued that a Confucian community would promote the Thick Common Good because it is “composed of

54. Bell, *supra* note 22 at 91.

55. For a study of Iran’s religious minorities, see Eliz Sanasarian, *Religious Minorities in Iran* (Cambridge University Press, 2000).

56. Bell, *supra* note 22 at 93.

57. Wm Theodore De Bary, *Asian Values and Human Rights: A Confucian Communitarian Perspective* (Harvard University Press, 2000) at 37.

virtuous members thinking of shared goals and values over one's own."⁵⁸ Confucian communitarianism allegedly regards "the interest and value of the community [as] higher than those of the individual,"⁵⁹ advocating that "individual values should be subordinate to community values, and [that] the former can be achieved only through the execution of the latter."⁶⁰ If these claims are right, then Confucian communitarianism would support the Misconception.

Other scholars, however, have drawn on Confucian ethics to provide more nuanced accounts of a Confucian community—accounts that are arguably more in line with Confucian reciprocity. According to these accounts, a Confucian community is one where individuals strive towards the ultimate Confucian moral value of *ren* (仁), or virtue. Sor-hoon Tan argues that community is created through *li* (禮), or rituals—that is, the performance of one's rituals based on the five Confucian roles. As such, a Confucian community "should be understood not as a closed collective—an abstract entity to be set above its individual members—but as an open network of relationships."⁶¹ Put another way, as Russell Arben Fox contends, "community in classical Confucianism is a *horizontal* concept"⁶² and it is "a morally immanent community."⁶³ Members strive to achieve *ren* through performing their role rituals, and by participating in community activities, members have "the potential to show forth . . . the sort of authority which binds the community together."⁶⁴ Further, because Confucianism presupposes that everyone has the capability to cultivate *ren*, this must be respected by the individual and the community, so that "instrumental concerns" cannot "trouble the cultivation of [*ren*]."⁶⁵ Neither the person nor community should be subordinated as a means to serve the other; rather, they "stand as mutually implicatory ends."⁶⁶ In this light, Confucian communitarianism can be "conceived as consensual rituals."⁶⁷

Two points should be noted from the above. First, the Confucian community would advance the Thick Common Good in the same way as MacIntyre's Aristotelian community: that is, there is one common good, that of cultivating *ren*, and it is the good of both individual and community. Hence, in the Confucian community, advancing the Thick Common Good imposes no costs on its members because there is no tension between the community and the individual's good. However, modern societies hardly resemble the Confucian community, and so, as is the case with MacIntyre's ideal community, it would

58. Seung-hwan Lee, "Was There a Concept of Rights in Confucian Virtue-Based Morality?" (1992) 19:3 *Journal of Chinese Philosophy* 241 at 252.

59. Hu, *supra* note 15 at 482.

60. *Ibid* at 477.

61. Tan, *supra* note 35 at 54.

62. Russell Arben Fox, "Confucian and Communitarian Responses to Liberal Democracy" (1997) 59:3 *The Review of Politics* 561 at 582 [emphasis in original].

63. *Ibid* at 591.

64. *Ibid* at 582.

65. *Ibid* at 585.

66. David L Hall & Roger T Ames, *Thinking Through Confucius* (State University of New York Press, 1987) at 159.

67. De Bary, *supra* note 57 at 91.

be inappropriate to use it as a basis on which to promote the Thick Common Good in modern societies.

Second, even accepting that the Confucian community advocates the Thick Common Good, the above analysis shows that it does not support the Misconception's contention that the Thick Common Good should prevail over individual interests. The individual and the Confucian community enjoy a symbiotic and mutually reinforcing relationship, not one of domination, and the Confucian community seeks harmony amongst its members, not discord; an individual who has realized *ren* "would seek consensus in a way that respected difference and did not expect uniformity."⁶⁸ Indeed, the Confucian idea of harmony (和) is about the harmonization of differences, not the enforcement of sameness, or conformity.⁶⁹ According to the *Analects of Confucius*, exemplary persons harmonize while petty persons merely echo.⁷⁰ It follows that a community with individuals who have cultivated *ren* would respect each other's differences and not *a priori* prioritise the community's good over the interests of some of its members. For these reasons, the Confucian community does not support the Misconception.

Community and the Common Good of Inclusion

Rather than promoting the Thick Common Good, communitarianism, properly understood, advances the thin common good of *inclusion*. This follows from the partially constituted self and the inherently inclusive nature of the concept of community that lies at the heart of communitarianism. As argued earlier, if communitarianism is premised on the partially constituted self and aims to enable people to be immersed in the constitutive communities that give meaning to their lives, then communitarianism does not determine in advance which community to promote over others. It follows that communitarianism's common good has to be truly common—that is, applicable to all. This is the good of inclusion. Inclusion is consonant with communitarianism's premise as it encompasses all of the partially constituted self's constitutive communities, thereby enabling communitarianism to realize its aim.

Inclusion is also inherent in the notion of community. A community is a group of people with shared commonalities, which are the criteria for community membership. For example, the Vegan Runners running club is a group of people who are vegans and runners; the criteria for membership are therefore being vegan and a runner. The inclusive nature of community is heightened by the obligation of inclusion owed by the community to those who meet the membership criteria. Concretely: Vegan Runners can deny membership to non-vegans and people who hate running, but not to vegan runners who are also tennis players, or who are gay, or over a certain age. This is because playing tennis, being gay,

68. Fox, *supra* note 62 at 585.

69. See e.g. Chenyang Li, "The Confucian Ideal of Harmony" (2006) 56:4 *Philosophy East & West* 583.

70. Confucius, *The Analects*, translated by Annping Chin (Penguin, 2014) at para 13.23.

and being of a certain age are irrelevant to the membership criteria, i.e. veganism and running, and thus have no bearing on an applicant's suitability for membership. Vegan Runners, then, is obliged to include as members applicants who meet the relevant membership criteria, i.e., applicants who are vegan runners.

The communitarian politics of the common good of inclusion is open to any community to implement. Nonetheless, the *national community* deserves special scrutiny.⁷¹ This is because it has the power to impose legally binding obligations and sanctions on its members, and it is where clashes between constitutive communities with seemingly unresolvable differences arise. That the national community should promote the good of inclusion has been argued, albeit in different ways, by Sandel and Taylor. For Sandel, the communitarian politics of the common good is the politics of "civic virtue," a recognition of the "full membership of fellow citizens wrongly excluded from the common life of the nation."⁷² For Taylor, it is the bond of solidarity between citizens of a nation. Citizens identify with "the republic as a common enterprise," creating a sense of shared fate that binds members of a community where "the sharing itself is of value."⁷³ Taylor calls this 'patriotic identification': a "common identity and history, defined by a commitment to certain ideals" shared amongst citizens of a particular nation.⁷⁴

We need not go so far as to require members of the national community to also be patriotic. Neither is it necessary for a proper account of communitarianism for members to feel a sense of solidarity with each other. All that is required is the minimum standard of inclusion, which is presupposed in both Sandel's and Taylor's conceptions of the communitarian politics of the common good. Inclusion underlines the notion of the full membership of previously excluded citizens: recognizing their full membership—granting rights previously denied to black people, for instance—is to include them in the common life of the nation. Similarly, the sense of solidarity amongst citizens based on a common identity can only exist if members bearing this identity have already been included in the common enterprise.

The references to nation and citizenship hint at the membership criterion that guarantees the good of inclusion in the national community: a *civic* national identity, prima facie evidenced by nationality. By a civic national identity I mean—and at the risk of oversimplification⁷⁵—that the national identity does not promote any non-national constitutive communities over others, and is not based on any comprehensive doctrines of the good. Rather, it is based on what David Miller calls 'public culture,' a "set of ideas about the character of the community which also helps to fix responsibilities," with the qualification that these ideas are

71. For this article, I take the political boundaries of the nation-state (e.g. United Kingdom and Singapore) to coincide with the national community, and am not considering nations within nation-states (e.g. the Scots in UK).

72. Michael Sandel, *Public Philosophy: Essays on Morality in Politics* (Harvard University Press, 2006) at 153-54.

73. Charles Taylor, "Cross Purposes: The Liberal-Communitarian Debate" in Nancy L Rosenblum, ed, *Liberalism and the Moral Life* (Harvard University Press, 1989) 159 at 170.

74. *Ibid* at 174.

75. I develop this point in depth in another work.

inclusive.⁷⁶ Given the communitarian partially constituted self, the civic national identity must be based on values and beliefs that can be applied to, and upheld by, *all* members of the national community. These values can be profound, such as equality, or trivial, such as “queueing as a way of deciding who gets on to the bus first.”⁷⁷ The good of inclusion thus entails that the national community is obliged to allow and enable its members to be sufficiently embedded in the thicker values that partially define them; to be able to “live as”⁷⁸ members of their constitutive communities, including the national community. Concretely, the national community should not impede, and should promote, its members’ access to, and participation in, their various constitutive communities.

This argument seems to beg a question: that there is convergence within the national community on the content of its common civic national identity. It is more likely, the sceptic may say, that there is disagreement between citizens about what it means to be a member of their national community. In particular, my insistence on a national identity that does not encompass a comprehensive worldview is at odds with the fact that some national identities are based on a “reified core ethnic identity” that denies equal membership to those of different ethnicities.⁷⁹ Some national identities, then, are intricately bound up with thick communal identities. An example is Israel, which Breslin uses as an example of a communitarian society premised on a comprehensive worldview, i.e. Judaism.⁸⁰ One consequence of a Jewish Israeli national identity is that non-Jewish citizens do not enjoy equal and full citizenship. The Jewish Nation-State Law, for instance, asserts that Israel is the “nation-state of the Jewish people” (Article 1(b)) and enshrines Hebrew as the state language, but confers only a “special status” on Arabic people (Article 4(b)).

However, this seeming blow to my account is no blow at all. First, Jewish Israel and Islamic Iran are not proper communitarian states because they fail to promote the good of inclusion, viz., minority religious and/or ethnic constitutive communities, by denying their equality of membership. A proper communitarian state is one premised on the good of inclusion, not one that promotes the Thick Common Good at some members’ expense. Second, while it may be that the content of a national identity is contested, it is nevertheless plausible to say that there is agreement on some basic some idea, however vague, of what it means to be a member of a certain national community. For instance, the Singaporean national identity is constituted by a commitment to multiracialism, or racial equality, which has been termed a “central element . . . in Singapore’s ‘national culture.’”⁸¹ Once this minimal agreement can be found, the issue then

76. Miller, *supra* note 45 at 68.

77. *Ibid* at 26.

78. Appiah, *supra* note 31 at 16 [emphasis removed].

79. Jan-Werner Müller, “A general theory of constitutional patriotism” (2008) 6:1 Intl J of Constitutional Law 72 at 85.

80. Breslin, *supra* note 12 at 186-96.

81. Michael Hill & Lian Kwen Fee, *The Politics of Nation Building and Citizenship in Singapore* (Routledge, 1995) at 14.

becomes interpreting what the basic value means. As Miller points out, such interpretation, and the content of a national identity, are shaped by public debate, which means that it is open to re-interpretation and change.⁸² And so it should be: not only does it shield communitarianism from the charge that it promotes a “socially conventionalist and morally conformist attitude,”⁸³ but it allows members from minority constitutive communities to challenge dominant, possibly exclusionary, interpretations of the national identity based on the national community’s fundamental values. Communitarianism, properly understood, does not require complete agreement on what a national identity means, but merely that whatever interpretation of a national identity is decided upon by its bearers promotes the good of inclusion.

All of this is not to say that the national community can never exclude any constitutive community whose members meet the membership criterion. On the contrary, because communitarianism is inclusive, the national community can exclude constitutive communities which violate the good of inclusion. Hence, a multicultural national community is entitled to exclude—by, for instance, legislating against—white supremacist groups that undermine the equal membership of non-white members of the national community.

To sum up: contrary to the Misconception’s claim that communitarianism promotes the Thick Common Good by prioritizing the collective interest over individual rights and interests, communitarianism, properly understood, promotes the thin common good of inclusion. But how would proper communitarianism protect rights? The final section of the article briefly addresses this question.

Communitarianism and Rights

This article began with the Asian values claim that the individualistic nature of rights is incompatible with Asia’s communitarian ethos. It is appropriate, then, that it should conclude by showing how this claim is erroneous. Communitarianism, properly understood, protects rights robustly because it values both individual and community. It reconceptualizes rights as protecting not the individual’s autonomy interests (such as their interest in manifesting their religious beliefs), but their interest in their religious constitutive community, and the community itself, from unjustified encroachment by the state and/or the majority. This approach protects the communal interests of an individual living as a constituent of a pluralistic modern society. Rights enable individuals to have access to, and participate in, their various constitutive communities, in order that they may live meaningfully as fully formed individuals, partly constituted by their communities.

Before briefly illustrating how the account of proper communitarianism developed in this article can protect rights, it would be apposite to recapitulate the

82. Miller, *supra* note 45 at 70.

83. Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (Psychology Press, 1992) at 74.

salient aspects of the burqa ban cases of the European Court of Human Rights (ECtHR). I will focus on the leading *S.A.S* case.

On 11 April 2011, France passed Law no. 2010-1192 of 11 October 2010, section 1 of which provides that “[no] one may, in public places, wear clothing designed to conceal the face.” The law created two new offences. First, wearing the prohibited clothing in public is punishable by a fine of €150, or by taking a citizenship class, or both. Second, forcing a woman to wear such clothing is punishable by one year’s imprisonment or a €30,000 fine; if the offence is committed against a minor, the fine increases to €60,000. Though facially neutral, the political discussion leading up to the enactment of the law shows that it specifically targeted the burqa.⁸⁴ The law was motivated by then-President Nicolas Sarkozy, who stated on 22 June 2009 that “the burqa was not welcome on French soil.”⁸⁵ On 11 May 2010, the National Assembly proclaimed that the practice of wearing the burqa was “radical” and undermined “dignity and equality between men and women” and was thus “incompatible with the values of the Republic.”⁸⁶

Unsurprisingly, the French law was challenged before the ECtHR for violating, *inter alia*,⁸⁷ the right to freedom of religion, contained in Article 9 of the European Convention on Human Rights (ECHR). In a controversial decision,⁸⁸ the ECtHR found no violation of Article 9: the ban was found to pursue a legitimate aim, and the ECtHR deferred to France’s margin of appreciation on the question of whether it was necessary in a democratic society. Before discussing the ban’s alleged legitimate aim, it is worth noting that the ECtHR rejected two of the French government’s reasons for the ban: safeguarding public safety and gender equality. Regarding the former, the ECtHR found that France had failed to show that the burqa ban posed a “general threat to public safety.”⁸⁹ Regarding the latter, the ECtHR was not convinced by the argument that the burqa ban served to protect gender equality. Instead, the ECtHR opined that France could not “invoke gender equality in order to ban a practice that is defended by women” in the context of their ECHR rights.⁹⁰

84. It is noteworthy that Singapore and Malaysia, both not known for having functioning liberal democracies, have banned neither the burqa nor the niqab.

85. Gerhard van der Schyff & Adriaan Overbeeke, “Exercising Religious Freedom in the Public Space: A Comparative and European Convention Analysis of General Burqa Bans” (2011) 7:3 European Constitutional L Rev 424 at 425.

86. *SAS*, *supra* note 16, para 24.

87. Violations of Article 3 (prohibition of torture, inhuman or degrading treatment), Article 8 (right to respect for private and family life), Article 10 (right to freedom of expression), Article 11 (right to freedom of peaceful assembly) and Article 14 (non-discrimination) were also alleged. See *SAS*, *supra* note 16.

88. This decision has been widely criticised by scholars. See e.g. Lægaard, *supra* note 18; Melanie Adrian, “The principled slope: religious freedom and the European Court of Human Rights” (2017) 45:3–4 Religion, State & Society 174; Ilias Trispiotis, “Two Interpretations of ‘Living Together’ in European Human Rights Law” (2016) 75:3 Cambridge LJ 580; Kati Nieminen, “Eroding the Protection Against Discrimination: The Procedural and De-contextualised Approach to *S.A.S. v France*” (2019) 19:2 Intl J of Discrimination & the Law 69; Marshall, *supra* note 17.

89. *SAS*, *supra* note 16, para 139.

90. *Ibid*, para 119.

What *was* legitimate, however, was France's aim of protecting the rights and freedoms of others by "[guaranteeing] the conditions of 'living together.'"⁹¹ Although the ECtHR acknowledged that the ban "restricted the reach of pluralism" since it prevented Muslim women who choose to wear the burqa from "expressing their personality and their beliefs" in public,⁹² nevertheless, this restriction was in response to a practice that France "deemed incompatible . . . with the ground rules of social communication and more broadly the requirements of 'living together.'"⁹³ This 'living together' is a "principle of interaction" between members of society which is vital for pluralism and "tolerance and broadmindedness" essential for a democratic society.⁹⁴ The burqa ban, the ECtHR concluded, constituted a "choice of society."⁹⁵

This aspect of the decision is highly controversial. Some scholars have argued that, by recognising the 'living together' principle as a legitimate aim, the ECtHR has created "new and vague concepts" that weaken rights protection.⁹⁶ Others have decried the ECtHR's effective creation of a dubious 'right' to see fellow citizens' faces,⁹⁷ or a "legal right to glance at a smile."⁹⁸ Needless to say, neither of these 'rights' exists in the ECHR. One way to vindicate the Article 9 claim in this case, then, is to say that 'living together' is too vague a concept, and the newly created 'rights' too dubious, to justify an interference with the freedom of religion—which is a vital autonomy interest for the individual.

But how else could the freedom of religion in this case—and that of religious minorities more broadly, not to mention rights as such—be protected? Specifically, what does communitarianism, properly understood, have to say about the burqa ban? It would hold that the ban violates the right to freedom of religion. Its starting point is that women who wear the veil are partly constituted by their religious constitutive community, which is a source of value and meaning to them. The right to religious freedom protects the women's interest in the religious community, or their interest in living as a member of the religious community. In this case, this interest involves wearing the face veil. *Prima facie*, the right to wear the veil is protected by the right to freedom of religion.

Proper communitarianism would then apply the communitarian politics of the good of inclusion to argue why the right should be vindicated despite a vast majority of the national community objecting to it. Because the women targeted by the ban are nationals of the countries that imposed it, *prima facie*, they meet the relevant criterion for membership in the national community. Hence, the good of inclusion operates to enable them to live as members of their religious community so long as their actions do not violate the good of inclusion itself, even if it

91. *Ibid.*, para 142.

92. *Ibid.*, para 153.

93. *Ibid.*

94. *Ibid.*

95. *Ibid.*

96. Adrian, *supra* note 88 at 174.

97. Lægaard, *supra* note 18 at 211.

98. See John Adenitire, "Has the ECHR Recognised a Legal Right to Glance at a Smile?" (2015) 131 Law Q Rev 43.

entails a practice of which the majority disapproves. Put another way, the good of inclusion requires that they are not barred from public life on the basis of an important aspect of this living-as—that is, wearing the veil. The ban on the veil has the precise effect of barring these women from the public sphere because, by choosing to wear the veil, they are prevented from leaving the home.⁹⁹ This effect is aggravated by the fact that the ECtHR rejected public safety and gender equality as legitimate reasons.

But how would the ‘living together’ principle fare on a proper account of communitarianism? Would it be a legitimate reason for the burqa ban? It may be said that, because of communitarianism’s emphasis on the good of the community, the principle may pass muster under communitarianism, especially since it is a choice that French society has made. It may be said, too, that a national community has the prerogative to determine the conditions of civic life. It can decide that secularism is so paramount that it overrides individual expressions of their religious identity in public. This would be fair and even communitarian because what truly matters for public life is one’s national identity. Proper communitarianism should then endorse this mode of a secular national community because it strives for inclusion by excluding controversial and thus divisive aspects of community membership.

Contrary to initial impression, proper communitarianism would reject the ‘living together’ principle because of how it has been invoked: by excluding a segment of the national community and denying their equality of membership. As argued earlier, communitarianism’s good of inclusion ends when it is violated, and so a national community can exclude white supremacists, for instance. However, the burqa per se does not violate the good of inclusion: it is a manifestation of the individual’s membership in her religious community and does not seek to exclude those not a part of the religious community from the national community. In contrast, the burqa ban violates the good of inclusion by excluding women who wish to wear it from public life. Communitarianism, properly understood, cannot strive for inclusion, or ‘living together,’ by excluding unpopular aspects of some constitutive communities because this undermines its core tenet: inclusion. Rather than promoting secularism at the expense of an unpopular religious minority, it would interpret secularism in a manner that includes the minority. Specifically, secularism would be the equal ability of all members of the national community to manifest their membership in their religious constitutive communities.

One may object that the approach I am advancing concretizes the negative aspect of communitarianism that I argued against earlier: that it curtails autonomy and reifies oppressive traditional practices by condoning the potentially detrimental aspects of some constitutive communities, such as the burqa. This objection is misplaced for two reasons. The first is that it begs the question: the blanket assumption that the face veil oppresses the women who wear them is as

99. *Ibid* at 48.

paternalistic as the *involuntary* donning of the veil is patriarchal and oppressive.¹⁰⁰ Second, because the communitarian self is only partially constituted, they retain a sphere of autonomy left uncolonized by their constitutive communities. Communitarianism's endorsement of the face veil thus supports the individual's affirmation of those aspects of her constitutive communities that are valuable to her, including her choice to wear the face veil.

A final point before concluding the article. Another possible objection to my account of communitarianism is that it is essentially a repackaging of liberalism, which is particularly glaring with my insistence on inclusion. To this charge I have two lines of defence. First, communitarianism has been called a "correction of liberalism" for a good reason: the two philosophies are not diametrically opposed, but are located on a continuum.¹⁰¹ Second, and more importantly, there is no obvious reason why liberalism has a monopoly on inclusion and other ideas that this article promotes. While it may be that liberalism is most commonly associated with these ideas, that is precisely the point of this article: to demonstrate that ideas like inclusion, equality, and rights can be robustly defended by communitarianism as well. It would be too dogmatic to insist that any theory that relies on ideas associated with liberalism is basically liberalism by another name.

Be that as it may, there *is* an important difference between my account of communitarianism and liberalism. It is that communitarianism's starting point is the partly constituted individual, the individual-within-community. The crux of communitarianism is the individual's interest in their communal attachments and the normative significance of community membership. Communitarianism, properly understood, is therefore about the value of a life lived in community with others, and the conditions necessary for us—community and individual—to flourish.

Conclusion

By refuting the Misconception and providing an account of communitarianism, properly understood, I have demonstrated that communitarianism is a rich source of solutions to problems in modern pluralistic societies. Contrary to the Misconception, communitarianism does not suppress individual rights and interests. Properly understood, it protects both community and individual by recognizing the importance of constitutive communities to our self-understanding, and, therefore, promoting the good of inclusion. Communitarianism taps into the normative significance of community membership to make a case for why various constitutive communities within a wider community, such as the national community, should be given room to flourish. This is because

100. See Cécile Laborde, "State paternalism and religious dress code" (2012) 10:2 Intl J of Constitutional Law 398.

101. Michael Walzer, "The Communitarian Critique of Liberalism" (1990) 18:1 Political Theory 6 at 15.

community membership entails inclusion—and since individual members are partially constituted by their constitutive communities, these communities are also necessarily included.

On a proper account of communitarianism, rights would protect not individual autonomy interests as such, but our interest in living as a member of our constitutive communities. Rights would also protect the communities themselves from unjustified encroachment by the state and/or the majority. The justification for protecting rights in this manner—especially unpopular constitutive communities—is not individual freedom or autonomy, but the entitlement of fellow members of our community to flourish as fully formed individuals, partially constituted by their communities.

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