

Confucianism and human rights

Justin Tiwald

One of the most accessible ways to wrap one's mind around the controversy over Confucianism and human rights is to consider what would happen to a well-functioning family if it instituted many of the same practices as rights-protecting societies. As many Confucians see rights-protecting societies, their members have certain obligations to others by virtue of the fact that they are fellow citizens or fellow human beings, not by virtue of being friends, cousins, neighbors, or siblings. People are free or even encouraged to lay claim to their rights when they are threatened, and when they do so there are formal and often informal mechanisms that help to protect them. When they invoke their rights, they typically invoke them *against* other citizens, creating a potentially adversarial relationship between them. And the rights that people claim tend to be fixed and non-negotiable, making them less inclined to look for ways to harmonize their interests with one another.

If families were to operate in these ways, most of what is distinctive (and distinctively valuable) about family life would be undermined. Within the family, members often act out of love or a sense of commitment to their role-specific responsibilities (as mothers, grandfathers, daughters, or brothers), not out of concern that other members wield the power to claim and thus enforce their rights against them. Family members are constantly renegotiating and revising the ways that they work to protect the interests of each member, which makes them reluctant to lay down hard-and-fast obligations and entitlements for any one of them. A family that behaved as people in rights-protecting societies often do would either be profoundly dysfunctional or no family at all. On the Confucian view, much of the dysfunctionality of the rights-protecting family is dysfunctional in rights-protecting societies as well. People should be encouraged to harmonize their interests. They should act out of affection or a sense of commitment to their responsibilities as neighbors, community elders, and colleagues, without the threat that others might use rights-enforcing mechanisms against them.

Among the worries that Confucians have about rights-protecting institutions, three of the most prominent can be drawn from the ways in which well-functioning societies should mirror well-functioning families. The first is that rights-protecting social institutions emphasize role-independent obligations and entitlements that we have as fellow human beings, at the expense of role-dependent concerns that we have as neighbors, coworkers, acquaintances, and so on. The second is that rights give rights-holders too many ways to undercut the hierarchical

structure of Confucian institutions. The third and probably most pervasive concern is that the practice of invoking and enforcing rights introduces too much conflict and adversarial thinking. To give a preview of my argument, I aim to show that (1) the worry about role-dependent ethics underestimates the versatility of human rights principles, (2) the Confucian commitment to social hierarchy poses a more serious problem for the integration of Confucianism and human rights, which can be accommodated only by compromising the system of checks and balances that Confucians normally prefer, and (3) the worry about social conflict and disharmony poses the most fundamental challenge to those who wish to reconcile core Confucian doctrines with the practice of protecting rights. I will begin with a rough definition of human rights and then proceed to this three-part analysis. I will focus primarily on the two texts most widely considered to be the foundations of *orthodox* Confucian beliefs: the thought of Kongzi (Confucius) and Mengzi (Mencius), which the tradition respectively derives from the *Analects* and the *Mengzi*.¹

What is a human right?

A “human right” in the sense that I will use here requires two things at minimum: something to which virtually all human beings are entitled, and some set of significant rules or norms that helps to guarantee the entitlement, should normal means fail. If Huang has a right to shelter, it is not enough that someone be obligated to provide her with shelter. There should be mechanisms in place to help guarantee that the right is protected. When people talk about human rights, they sometimes speak as though having something of fundamental worth to which all human beings are entitled is sufficient for it to be a right, whether or not there are significant mechanisms that help to protect it. But rights in this thin sense are not the primary object of contention in Confucian circles: it is uncontroversial that Confucians believe a decent government should provide its citizens with an array of basic goods. The primary Confucian worry is that the practice of claiming and enforcing these rights will undercut traditional social structures (Peerenboom 1998, pp. 248–251).

Rights and role-dependent ethics

One feature of the well-functioning family is that people generally treat one another in role-specific ways: children generally respect the wishes and instructions of their parents, parents attend to their children’s education and development, and (perhaps) grandparents dote on their grandchildren. Ethics within families is thus largely *role-dependent*: the relevant ethical obligations (and corresponding entitlements) depend largely on the social relationship between the person who is obligated and the person to whom the obligation is owed. It is widely held that well-functioning Confucian communities should exhibit the same role-dependent ethical outlook on a larger scale, and some have cited this as a reason to think rights-protecting practices problematic for Confucians (Rosemont 1988; Ames 1988).

There are at least two versions of this claim at work here. One, which is most important for our purposes, is that Confucian ethics is role-dependent *in content*: the particular kinds of obligations and entitlements by which we live varies largely according to the social roles that one plays. Scholars often attribute this to the Confucian emphasis on the traditional “five relationships” (*wu lun*), and the importance of living according to traditional rituals and proprieties (*li*). The “Five Relationships” are father and son, husband and wife, elder brother and younger brother, ruler and ruled, and friend and friend. Confucians traditionally see these as playing the most important role in maintaining social harmony and cultivating moral virtue (Mengzi 1990,

3A4; Van Norden 2008, p. 71). The other version of this claim is that Confucian ethics is based in a role-dependent *conception of persons*: when we properly explain why a person has one entitlement rather than another, we do not appeal to characteristics or properties that confer moral standing regardless of her relationships to others (such as the properties that make her a human being); instead, we can only appeal to specific social roles that she has vis-à-vis particular others, as a colleague, daughter, sister, and so on. In the words of Henry Rosemont, Jr., speaking on behalf of the latter view, “For the early Confucians there can be no *me* in isolation, to be considered abstractly: I am the totality of roles I live in relation to specific others” (Rosemont 1988, p. 177; see also Rosemont 1991).

Let us look more closely at these two claims. Although the role-dependent conception of persons might point to something distinctive about Confucian ethics, it would be a stretch to conclude that Confucians see persons as constituted *entirely* by their roles. Among the ways that Confucians use to explain what is good or bad about a person, two are prominent: one, as Rosemont indicates, is to describe how well he performs his roles; the other and more prevalent one is to describe how closely the person’s character approximates the chief Confucian virtues, which share certain behavioral and psychological features regardless of his role. For example, a humane or benevolent (*ren*) person exhibits love and concern, and a wise (*zhi*) person is a good judge of human character. If the pure role-based conception of persons were correct, then among these two patterns, the former would play the more fundamental explanatory role: that is, the Confucians would explain what is good or bad about a person’s character in terms of how well he executes his role-specific responsibilities. But in the foundational Confucian texts, passages that could plausibly be construed as final appeals to role-based responsibilities are quite rare (*Analec*s 12.11, pp. 130–131). Final appeals to the virtues are ubiquitous, and where Kongzi and Mengzi have opportunities to explain what is right or wrong about the way someone manages his or her role-specific obligations, they often do so by appealing to virtues that cut across roles, such as benevolence (*ren*), wisdom (*zhi*), or trustworthiness (*xin*) (Ivanhoe 2007). The two virtues whose prescriptions vary most according to one’s relative status and position are righteousness (*yi*) and ritual propriety (*li*), but these too have universal features: the righteous are unbiased in their judgments and indifferent to personal benefit; the ritually proper are reverent and attentive (or “fully present”) on the appropriate occasions (*Analec*s 4.10, pp. 32–33; 4.16, p. 35; 3.12, pp. 21–22; 19.1, p. 221). Finally, the Confucian masters think these virtues are worth cultivating no matter what role one might assume – whether one finds oneself an outcast or in a position of power and influence, or whether one assumes the role of a child or a parent, cultivating and manifesting these virtues is necessary for all. While these problems may not be the end of the story for defenders of the purest version of the role-based conception of persons, they surely impose upon them a tremendous burden of proof. Another un-Confucian implication of the pure role-dependent conception is that there are no direct obligations to those who leave society altogether, as Ames appears to acknowledge (1988, pp. 210–211).

There is also a legitimate question about the implications of the role-dependent conception of persons for the actual content of Confucian ethical norms. The particular array of my obligations to Huang might be grounded in my relationship to her as a friend rather than brother or mere fellow citizen, but there might be some overlapping obligations that all people – whether friends, brothers, or mere fellow citizens – share. If I see a moral imperative to criticize a policy at the risk of imprisonment, some might be obligated to encourage me, some (such as my family) might be obligated to discourage me, but it is conceivable that all of them should at least permit me to speak. Less controversially, family members and mere acquaintances may be obligated to victims of abuse in different ways, but all share the minimal obligation to help stop the abuse. So long as we can find areas of significant overlap across types of role-based obligations,

this will be enough to ground a system of entitlements that apply to all human beings, conceivably entitlements of many different types.

In spite of the controversy about role-independence in Confucianism more generally, there is a widespread consensus that Confucian peoples share a common obligation to attend to others' basic needs and interests. At the same time, most scholars believe Confucians prioritize needs and interests differently than do many liberal democracies. The *Analects* and the *Mengzi* do not particularly stress the value of autonomy or political participation, and instead emphasize the ruler's duty to provide for (a) the basic material needs of the people and (b) the conditions necessary to develop essentially social virtues – the virtues necessary to contribute properly to one's family and one's community (Xiao 1983, pp. 95–97). This emphasis is reflected today in scholars and other public figures who say that Confucian societies should give the highest priority to “subsistence rights” (*shengcun quan*) and the community-oriented rights necessary to become a full and virtuous member of society (Peerenboom 1993, p. 55; Rosemont 2004). However, Angle and Svensson point out that Mengzi gives the people no power to act against rulers who neglect their basic material needs, even though he thinks their misbehavior is often understandable and excusable (2001, pp. xix–xx).

The way that many contemporary Confucians defend these rights is by appeal to the chief Confucian virtue *ren*, most often translated as “humaneness” or “benevolence.” Joseph Chan has made perhaps the most influential argument for this view:

human persons are first and foremost moral agents capable of realizing *ren*, which means, among other things, a certain ability or disposition to care for and sympathize with others. Although the sites for the realization of *ren* are commonly found in personal relationships such as those of father – son and husband – wife, there are *nonrelational* occasions when moral actions are also required by *ren*.

(Chan 1999, pp. 217–218)

Even strangers, Chan suggests, are owed a minimum level of dignity and humane treatment, for which our properly cultivated sensitivities to human suffering equip us. And Chan's evidence points to elements of Confucian doctrine widely regarded as central to the thought of Kongzi and Mengzi, including Kongzi's famous Golden Rule (“do not impose upon others what you yourself do not desire”), and Mengzi's suggestion that we can discern the roots of benevolence in our natural reaction to a presumably unknown child on the verge of falling into a well (*Analects* 12.2, p. 126; *Mengzi* 2A6, pp. 45–46; Chan 1999, p. 218). Chan here discusses the importance of *exercising* humaneness, but we could add another set of obligations having to do with developing or providing for the *cultivation* of it, which requires a steady supply of basic needs, a nurturing and relatively self-sustaining family, and arguably (when resources are sufficient) state-sponsored education (*Mengzi* 1A3, pp. 3–5). Kongzi and Mengzi both think that living a virtuous life among others is one of the most important constituents of human well-being, and undercutting a person's ability to become virtuous is tantamount to mutilation or robbery (*Mengzi* 1B8, p. 26; 2A6, p. 47).

Of course, just because Confucians should put the rights of subsistence and moral development first, it does not follow that they should reject entirely the usual slate of political rights and liberties. Scholars argue that there are still reasons for Confucians to guarantee freedom of expression, but these reasons would make the freedom more circumscribed and contingent. Chan argues convincingly that a Confucian right of free speech would not automatically extend to speech that inflames racial hatred or appeals to prurient interests (1999, p. 234). Tongdong Bai suggests that a right to criticize the government might only be justified when government

corruption or mismanagement makes it necessary (2009, pp. 84–85). Daniel Bell suggests that Confucianism forbids the acquisition of property through “unrighteous means,” construed much more broadly than theft or blatant deception to include such things as begging or neglecting the needs of elderly parents (2006, pp. 231–254). One popular way of explaining why such rights are more circumscribed and contingent is that Confucians see them as justified primarily on instrumental grounds. On the Confucian view, political participation and individual autonomy do not have tremendous intrinsic value, so Confucians will be more concerned with how property rights, liberties, and voting rights contribute to other ends, such as social harmony or moral development (Angle 2002, pp. 239–249; 2009, pp. 209–215; Peerenboom 1993, p. 55).

These assertions about political rights and liberties are controversial, but no matter what their plausibility and scope, there is sufficient evidence to conclude that the challenge of role-dependent ethics – by itself – only affects the shape that human rights might take in a Confucian society, not the fundamental viability of rights-protecting practices in Confucian societies.

Rights and social hierarchy

Rights provide their holders with ways of limiting the authority of their superiors. In the case of certain political rights (such as the right to choose one’s leaders by election) the threat is obvious. We have seen that these political rights would be scaled back in a society that adheres to basic Confucian principles, but that other rights – such as rights to basic welfare and education – look to be more promising candidates for compatibility. For Confucians concerned about preserving traditional hierarchical structures, however, even non-political rights are cause for uneasiness. This is because a right in the sense we are using here gives the right-holder the power to *claim* it. That is, it gives the right-holder the power to alert others to the fact that her right is threatened or violated, and in so doing compel others to take action on behalf of her right. If this is a threat to Confucian hierarchy, however, the nature of the threat is not immediately apparent, and thus bears closer examination.

Let us say that a construction worker, Chun-yuen, has a mother who is diagnosed with a rapidly progressing terminal illness, and Chun-yuen has a right to receive a certain amount of paid leave when necessary to care for a dying parent. Chun-yuen has sisters who could also care for the mother, but their mother prefers to spend her final days with her son. However, Chun-yuen’s supervisor refuses to grant Chun-yuen leave: the supervisor knows that Chun-yuen’s sisters will be much better caretakers than Chun-yuen himself, and he is reluctant to lose Chun-yuen’s help in the middle of the peak construction season. Chun-yuen tries to convince his supervisor that he is a more competent caretaker than his supervisor thinks, and that his absence will not unduly affect the company’s productivity. His supervisor disagrees. With no better options, Chun-yuen declares that he will report his case to the relevant rights-protecting authority – perhaps a union or human resources officer – and his supervisor relents.

This is a threat to the company hierarchy, but it is not entirely clear what kind. Some might think Chun-yuen’s ability to claim his right is threatening because it casts doubt on his supervisor’s judgment, for it gives Chun-yuen the power to raise objections to his supervisor’s decisions, often in a very public way. But on the strict Confucian view this too is perfectly acceptable – even encouraged. According to the classical Confucians, authority figures should welcome remonstrations (*jian*) and should not be afraid to change course in light of a persuasive case. The difference here is that in the Confucian case, the superior has the power of *final review*: even if he grants his subordinates some role in the decision-making process, he is free to act against their advice when he sees fit (*Mengzi* 1B7, pp. 24–26).

A better reason to think Chun-yuen's right undermines the company hierarchy is because it provides him with one area of life – the area of life concerning family leave – over which his immediate superior does *not* have the power of final review. This phenomenon does not seem to trouble most believers in the rights-compatibility of Confucianism. It is somewhat difficult to see why not. As Chan has noted, the most authoritative Confucian texts – such as the *Analects* – actually countenance rare acts of disobedience, even by sons against their fathers (1999, pp. 222–226). But this is somewhat beside the point here, since Chun-yuen's right consists not just in having a moral prerogative to disobey under rare circumstances, but in having institutional mechanisms that guarantee regular protection under well-defined circumstances. Rights in the sense that is most controversial for Confucians require a degree of social cooperation and reinforcement, and grant the right-holder considerable latitude in choosing when to claim them.

A more likely reason why rights-compatibilists are unmoved by rights like Chun-yuen's is because the power it grants him is *contained*. It does not give him any say over the supervisor's decisions regarding hiring and firing, the supervisor's assignment of tasks to employees, or any of the countless other routine decisions that fall under the supervisor's prerogative. Even if we add a number of other work-related rights – such as rights to breaks or overtime pay – the scope of Chun-yuen's decision-making sovereignty is relatively small.

There are a couple of responses one might have to the argument that rights only provide subordinates with contained powers of limited scope. One is to insist (in the manner of a slippery slope argument) that human psychology is such that, once subordinates are granted limited powers over their superiors, they will naturally incline to claiming more and more such powers for themselves, and perhaps society will grow increasingly tolerant of this expansion of power. But even if we reject this debatable empirical claim, many Confucians will find one thing troubling about the contained power to claim one's right to family leave or overtime pay: namely, that the right to these things is hard and fast and not usually susceptible to bending or breaking. Kongzi and Mengzi insist that conducting human affairs calls for much more nuance and discretion than hard-and-fast rules can provide, both because morality itself is better suited to flexible “rules of thumb” than invariant principles, and because the warmth of genuine care and concern is lost when one applies laws and regulations too rigidly (Ivanhoe 2008a).

A remaining move for the rights-compatibilist is to point out that even in the eyes of most rights-oriented thinkers, there will be special provisions for the suspension of rights in extraordinary circumstances. Presumably Chun-yuen's right to family leave could be suspended if his labor were necessary to cope with a national crisis (to build shelters for people made homeless by an earthquake, for example). Perhaps it would be acceptable to deny him his family leave if his company were teetering on the verge of bankruptcy. Nevertheless, a crucial difference between most rights-protecting social institutions and Confucianism is that the former often handle exceptions by appealing to a third party, such as a court or a board of arbitration. Most rights-protecting societies assume that properly guaranteeing people's rights – such that discretion to suspend them is not abused – requires a separation of powers. If Chun-yuen's right is to be suspended, therefore, it will likely be someone other than his immediate supervisor who suspends it. On the Confucian view, there is no compelling need to de-centralize power in this way, and doing so might in fact interfere with the more caring and cohesive administrative practices of a single political authority.

Rights-claiming and social conflict

One of the most pervasive worries about Confucianism is that the practice of claiming one's rights is conflictual. That is, it both reflects a breakdown in social harmony and is a cause of

further social strain. Our hypothetical rights-protecting family is illustrative here. Rights-claiming within a family implies that there is a breakdown in trust. If the youngest brother in the family needs medicine which his well-paid older sister is best positioned to buy, and he relies on a right to compel her to pay for it, it would seem that he no longer trusts his sister to act in his best interest. Moreover, rights-claiming initiates a process that has the potential to lead to forced compliance, which casts a threatening shadow over what should be the sister's more spontaneous or affectionate motives to help her brother. And finally, the fact that the brother resorts to rights-claiming implies that he thinks his sister's cares and concerns conflict with his own, as though it would not particularly pain her to see her brother suffering from a debilitating illness. By Confucian lights, members of the same communities should have a similar sense of trust and care, and they should share the presupposition that their concerns will converge with the concerns of other community members, at least on matters of importance. Even if there are some instances where rights-claiming does not reflect a breakdown in trust and care, it is enough for Confucians that they frequently do, and that the divisive ways of thinking that rights-claiming evokes will tend to grow on those who do it.

On this issue most scholars of Confucianism take their cues from Confucian views about law and litigation. If we assume that rights come packaged with mechanisms of enforcement, then many (although perhaps not all) of the relevant mechanisms of enforcement might be enshrined in law and backed up with the coercive power of government. On this point there is widespread consensus that laws are at best a "fallback apparatus," to use Joseph Chan's phrase (1999, p. 221), to be utilized only when preferred ways of protecting people's interests have failed. For example, neighbors engaged in a land dispute should find ways that draw upon their mutual affection and commitment to neighborly cooperation. If these are insufficient the neighbors should try to arrive at some sort of mutual agreement. Invocation and enforcement of law is necessary only when consensus cannot be reached, as Kongzi maintains in a widely cited passage in the *Analects*: "When it comes to hearing civil litigation, I am as good as anyone else. What is necessary, though, is to bring it about that there is no civil litigation at all" (*Analects* 12.13, p. 132).

The view that Confucianism can make room for rights as a fallback apparatus is widespread. The problem is that both parties to the Confucian debate – rights-compatible and rights-incompatible – tend to cite this view and declare victory for their side. Rights-compatible think it shows that Confucian doctrines can make room for the essential features of human rights thought (Chan 1999, pp. 220–222). Rights-incompatible think that it shows that Confucian values – while not utterly opposed to rights – are nevertheless deeply averse to them (Ames 1988, p. 213; Ihara 2004). What, then, do the two sides disagree about? In what follows I will venture some answers and then show that they force both sides to think more precisely about the sort of fallback mechanism they have in mind.

At first blush, there might not seem to be anything particularly distinctive about the Confucian "fallback apparatus" view. Many liberal thinkers also regard rights-claiming as an inferior alternative to systems that protect interests by appealing to personal affection and other social bonds. To be sure, some liberal rights thinkers believe rights-claiming can have some intrinsic value for the claimant – as a source of dignity or self-esteem, for example (Feinberg 1970). But others see cases of rights-claiming as a necessary but unfortunate recourse for people who would be better served by affection and other social bonds (Waldron 1988). It would be surprising if they did not.

On my view, we cannot see what is truly distinctive about a Confucian version of the fallback apparatus account of rights until we think about more passive ways in which rights can influence the moral contours of human behavior. Much of the talk about fallback rights focuses

on what happens once someone decides to claim her rights, but the mere existence of the right, even when unclaimed, has a remarkable effect on group dynamics as well. In fact, many of the worries about rights that are manifest in the analogy to the rights-protecting family are more concerned with the *power to claim* rights than rights-claiming itself. For the high-earning sister and her sick younger brother considering whether to acquire medicine for him, awareness of their claimable rights (“rights consciousness”) might encourage them to think of their interests as competitive with one another. If the brother has a right to garnish his sister’s wages, just knowing that he could potentially enforce this right would cast a shadow over their relationship, warping their feelings and motives in ways fundamentally at odds with family life.

There are other ways in which rights can alter the moral dimensions of relationships even when they go un-invoked. If I have a right to something that would significantly benefit someone else, then opting not to exercise the right affects the moral quality or praiseworthiness of my act. Let us say I am on a rural highway and come across someone who needs help changing a flat tire. I have a right to use my spare time as I wish, but I decide to help the unfortunate driver nonetheless. In rights-protecting societies, many would construe this as making my act supererogatory, and nobler than it would have been if there were no such right. Had there been good Samaritan laws that required me to provide aid to drivers with flat tires and thus no right to refrain from helping, it would have been less admirable of me to help (Meyer 1997). Confucians are arguably less comfortable with this way of thinking, particularly if the unfortunate driver is related to me as a member of my community or fellow citizen. To see why, consider again how this way of thinking might play out in the context of a family. Imagine that my younger brother is struggling in his Chinese history courses and needs my tutoring, and yet I have a right to use my spare time as I wish. If we apply the same principles here as we did in the case of the flat tire, there should be something nobler or more valuable about helping my brother. But this is a bizarre and disconcerting conclusion. Surely helping my brother is the least I could do.

This shows that rights – even in the form of a fallback apparatus – have both active and passive ways of influencing social dynamics and the moral quality of actions. Traditional Confucians would find even the passive forms troubling. This being the case, can Confucianism make room for rights as a fallback apparatus? On my view, much depends on how and under what circumstances the fallback mechanism would be set into motion. If the rules and procedures that help people to claim and enforce their rights are available at any time, should an oppressor’s behavior become egregious enough, then they would figure prominently in the minds and calculations of community members. Were a land dispute to arise, each party would come to the dispute with an acute awareness of their legal and moral entitlements and an understanding that it would take relatively little trouble to secure them. Rights in this case are close to the foreground, so to speak. At the other end of the spectrum are rights-protecting rules and procedures that only get established when a social unit has reached the point of complete breakdown – perhaps when political authorities utterly neglect the interests of the larger community, or when most neighbors would sooner settle differences by violence. If this is how we conceive of the fallback apparatus, rights are sunk well into the background, being neither at the forefront of the potential rights-holders’ minds nor a near-term threat to rights-abusers.

With a clearer understanding of the difference between a rights apparatus that is in the foreground and one that is in the background, we can now identify a set of issues about which rights-compatibilists and rights-incompatibilists truly disagree. In the most familiar rights-protecting societies, rights are clearly foregrounded. People are encouraged to “know your rights!” and society members are aware that should their rights be abused or endangered, the rules, procedures, and legal authorities are at the ready. If these practices can be integrated into

traditional Confucian societies without significant cost to their core principles, then presumably the fallback apparatus should be near at hand for them as well. As we have seen, this seems highly implausible, for even passive forms of influence are cause for consternation among Confucians.

Although this poses a significant challenge for defenders of the rights-compatible reading of Confucianism, it also highlights an array of issues that rights-incompatibilists need to articulate more clearly. Some, such as Roger Ames, speak as though Confucians might already have rights-protecting laws that should nevertheless go un-invoked (1988, p. 213). There is in fact some textual evidence for this view: in the *Analects* and some less canonical sources, Kongzi and the sage kings are seen establishing laws without ever using them (Wang 1990, *Analects* 20.1, p. 233). But as we have seen, this position is not specific enough to identify what is distinctive about Confucianism, since many liberal rights thinkers also prefer that rights go un-invoked. Other rights-incompatibilists, such as Craig Ihara, seem to indicate that a proper Confucian society would institute rules and procedures only when the community is in complete disarray (2004, pp. 27–28). Without further clarification, however, this would appear to offer little recourse to small groups of oppressed peoples in otherwise functional communities. Moreover, it at least appears to tell against the aforementioned evidence that Confucians endorse the establishment of laws and procedures for litigation, so long as they find ways of not using them. If a viable position is to be found, it must fall somewhere between the view that rules and procedures “kick in” only at the point of complete social breakdown, and the view that oppressed individuals should be able to walk to the nearest police station and file an actionable report against other community members (however reluctantly). Intriguingly, the theorists who have been clearest about the extent to which rights-protecting mechanisms can be foregrounded are those who seek compromises between traditional (classical or canonical) Confucian values and contemporary liberalism (Angle 2009, pp. 216–222; Ivanhoe 2008b). As these positions are avowed innovations or modifications of traditional Confucianism, however, those who defend strong versions of rights-incompatibilism need to identify the ways in which a true Confucian fallback apparatus would stand even further in the background than these compromises suggest.

Conclusion

An important upshot of this analysis is that the debate about Confucianism and human rights turns greatly on how Confucians might structure the *power to claim* individual rights. Issues that do not bear directly on this structure – such as the role-dependent elements of Confucian ethics – are somewhat less important to those most concerned about justifying rights (particularly individual rights) on orthodox Confucian grounds. The threat that rights pose to social hierarchy turn out to have much to do with whether or not the power to entertain and enforce rights-claims can be separated from the authorities responsible for everyday decision-making. And in the debate about the conflictual aspects of rights-claiming, we cannot even distinguish the two sides until we look at the ways in which the mere power to claim rights (rather than the regular practice of claiming them) might or might not fit into a Confucian society. A crucial step forward, then, is to look closely at the many configurations that this sort of power can take. Should the rights-holder herself be the one that is encouraged to claim her rights, or would it be better to have people claiming rights on one another’s behalf? How can rights be a fallback mechanism without figuring too largely in the thoughts and calculations of community members? Should traditional Confucians allow that certain minority groups have rights-claiming rules and procedures more readily available than others? These might appear to be nothing more than the finer points of the debate, but until they are sorted out it will be hard to

identify the real tensions between orthodox Confucianism and most contemporary rights-based ideologies.

Note

- 1 Chinese editions and English translations of these texts are plentiful. I will use the traditional form of citation employed in most editions, which identifies each work by book and chapter number (e.g., *Analects* 2.4, *Mengzi* 6A1), and then cite the relevant page numbers in Slingerland 2003 (in the case of the *Analects*) and Van Norden 2008 (in the case of the *Mengzi*).

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