

LAW AND MORALITY IN THE
HAN FEI ZI

LIM XIAO WEI, GRACE

NATIONAL UNIVERSITY OF
SINGAPORE

2005

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LIM XIAO WEI, GRACE
(B.A.(Hons), NUS)

A THESIS SUBMITTED
FOR THE DEGREE OF MASTER OF ARTS
DEPARTMENT OF PHILOSOPHY

NATIONAL UNIVERSITY OF
SINGAPORE

2005

Acknowledgements

All thanks and praise be to God, who has brought me back into relationship with Himself through the death and resurrection of Jesus Christ, and who sustains me daily by His grace.

My heartfelt thanks, also, to my supervisor, Associate Professor Tan Sor Hoon, for her patience with me through the whole writing process – from the time I began mulling over my thesis topic, through the submission of each chapter to the final submission. Thanks for all the feedback and criticism and sharpening of my thoughts and ideas, which have been invaluable to the completion of this thesis.

I also thank God for the following people:

Lincoln, for his constant encouragement and love, and for supporting me through my every endeavour.

Wanjing, for teaching me how to use Chinese software without making me look like an absolute idiot and for having me over as and when I needed to use her computer.

My siblings, for growing up with me and loving me in spite of all our differences.

And most of all, this thesis is dedicated to my parents, who have spent their lives loving me and giving me everything within their means to give.

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Summary

Han Fei, the pre-Qin Legalist philosopher, has often been accused of advocating a complete break between law and morality in a bid to secure absolute power for the ruler. This thesis is an attempt to consider anew the relationship between law and morality in the *Han Fei Zi*, and to show that, contrary to what most scholars claim, Han Fei does not espouse “government for the ruler.” I argue that the *Han Fei Zi* was not meant as an apology for despotism, but instead, as an antidote to the critical disorder that plagued the Warring States period. As such, it must be read for its valuable insights into the perennial debate on good government: what it is and how it can be achieved.

The first two chapters focus on defending Han Fei against the charge that he is a defender of despots. In the first chapter, I explore the Daoist influence on Han Fei to understand how and why he appropriates Daoist metaphysics. I begin this chapter by trying to prove that Han Fei is a genuine Daoist, that his *fa* is derived from the *Dao* and therefore also constrained by it. If such a case can be made, then Han Fei cannot be said to give the ruler inordinate powers to create the law according to his whim and fancy. By the end of the chapter, however, I conclude that it is impossible to determine whether or not Han Fei is a genuine adherent of the *Dao*. An equally reasonable case can be made that he is merely using the *Dao* as a convenient rubber stamp for his severe Legalist programme. A different approach is thus needed to challenge the standard account of Han Fei as an apologist for tyranny.

In the second chapter, I argue that the standard account of Han Fei is flawed because in spite of his vitriol against the Confucians, Han Fei shares their fundamental belief that government is to *li min* (benefit the people). I consider those portions of the

Han Fei Zi that critics typically use to justify their Machiavellian reading of Han Fei and show that these passages are, in fact, perfectly compatible with Han Fei's commitment to *li min*. So although Han Fei renounces the conventional morality of the Confucians, there is an implicit morality in his political system, which is his overarching 'moral' goal to benefit the people.

After the standard account of Han Fei as a defender of despots has been discredited, I turn, in the third and final chapter, to give an account of why Han Fei believed that his was the best government for a critical age. There, I present Han Fei's blueprint for the perfect state, and show how it addresses the flaws inherent in the Confucian system. I conclude finally by assessing the viability of Han Fei's proposal for good government.

Introduction

The traditional scholarship portrays the advent of Legalism as a shameful episode in the annals of Chinese thought. The 法家 or Legalist school comprises several thinkers classified together retrospectively by the Han doxographers because of their common emphasis on government by *fa* (法: laws or standards). Many scholars see the Legalists as advocates of a complete break between law and morality, and therefore regard them as China's answer to Machiavelli.¹ Rubin Vitaly goes even further, arguing that the “[Legalist] concept of law, devoid of all moral and religious sanctions, is unique in world history.”² The Legalists are accused of promulgating a ruler-centred theory of government that views the people as mere tools in the hands of a despot, valuable only insofar as they serve the latter's interests. This is certainly Vandermeersch's point when he writes, “Not realising that the public good or the fatherland can be such a goal [i.e. a state goal], the Legalists continued to centre the state around the prince.”³ Needham, too, in his influential work, “Science and Civilisation in China,” begins his section on the *Fa Chia* (Legalists) with the following comment:

If the student of the history of Chinese thought is often tempted to become impatient with Confucian sententiousness, he has only to read the writings of the Legalists to come back to Confucianism with open arms, and to realise something of that profound humanitarian

¹ Too many scholars have made this comparison between Han Fei and Machiavelli. See, for example, Robert T. Rowe's article, “Han Fei Tzu and Niccolo Machiavelli,” in *Chinese Culture*, vol. XXIII, no. 3, September 1982.

² Vitaly A. Rubin, *Individual and State in Ancient China – essays on four Chinese philosophers*, trans. Steven I. Levine, Columbia University Press, New York, 1976, p. 66.

³ Leon Vandermeersch, *La formation du legisme*, Paris: Ecole française d'extreme orient, 1965, p. 192. Quoted by Rubin, *ibid.*, p. 70.

resistance to tyranny which forms the background of the sacrificial liturgy of the Wên Miao.⁴

Han Fei, the chief proponent and synthesiser of the Legalist school, has also been read in this same vein. Kung-Chuan Hsiao, in “A History of Chinese Political Thought,” writes this about Han Fei:

[The] Confucians held the people to be the objective of politics, and regarded ethics as the standard of life... Han Fei Tzu’s elevation of the ruler was wholly different from that... Thus the ruler in his own person became the objective of politics, and its sole standard... [This] governing by power became the most logical theory for monarchic despotism. The Confucians merged ethics and politics into one in their discourses, retaining some of the colouring of ancient thought. As Han Fei Tzu discussed power, he set ethics completely outside the realm of politics, and established a wholly political kind of thought, having thereby a modern flavour.⁵

This thesis is an attempt to consider anew the relationship between law and morality in the *Han Fei Zi* (韩非子), and to show that, contrary to what most scholars claim, Han Fei does not espouse “government for the ruler.” I will argue that the *Han Fei Zi* was not intended as an apology for despotism, but instead, as an antidote to the disorder that plagued the Warring States period. As such, this thesis will consider the *Han Fei Zi* for its contribution to the perennial debate on good government: what it is and how it can be achieved.

In the first chapter, I will explore the Daoist influence on Han Fei and consider how and why he appropriates Daoist metaphysics. The underlying assumption in this

⁴ Joseph Needham, *Science and Civilisation in China*, vol. 2, Cambridge University Press, 1991, p. 204.

⁵ Kung-chuan Hsiao, *A History of Chinese Political Thought*, vol. 1, trans. F. W. Mote, Princeton University Press, 1979, pp. 385-386.

chapter is that if Han Fei's *fa* were somehow based upon the *Dao* (道), then Legalist law, far from being subject to the whim and fancy of a tyrannical despot, would in fact be constrained by and reflective of the normative *Dao*.

In the second chapter, I will argue that in spite of his vitriol against the Confucians, Han Fei shares their fundamental belief that government is to *li min* (利民: benefit the people). To make this argument, I will consider those portions of the *Han Fei Zi* that critics typically use to justify their Machiavellian reading of Han Fei and show that these passages are, in fact, perfectly compatible with Han Fei's commitment to *li min*.

After debunking the traditional account of Han Fei as a defender of despots, I will attempt, in the third and final chapter, to excavate from his writings insights into the debate on good government. I will present Han Fei's blueprint for the perfect state, and show how it addresses the flaws inherent in the Confucian system. I will then conclude by assessing the viability of Han Fei's proposal for good government.

Chapter One: The Daoist influence on Han Fei

Han Fei is best known as a practical-minded political philosopher who wastes no time in metaphysical musings. In “The Five Vermin (五蠹),” for example, when Han Fei criticises people “whose words are subtle and mysterious (微妙之言),”¹ he is presumably targeting those people who were engaged in abstract metaphysical discussions. On the other hand, the term “Daoist” has been applied retrospectively by the Han doxographers to those thinkers who enquired into the origin and ultimate nature of all things, or the *Dao*. At first glance then, it seems unlikely that Han Fei would have anything to do with Daoism. The Han historian Sima Qian, however, postulates precisely such a relationship between these two unlikely bedfellows. He remarks in the “Lao-tzu Han-fei lieh-chuan:”²

Han Fei deliberated on affairs according to inked-string [objective standards] thereby making clear what is right and what is wrong; he was extremely severe and lacking in humanheartedness. *He drew his principles from Taoist canons* but Lao Tzu was by far the more profound.³ (Italics mine)

Indeed, there are five chapters in the *Han Fei Zi* that either deal directly with or draw significantly from the *Dao De Jing* or the *Lao Zi*. These are, “Commentaries on Lao Tzu’s teachings (解老)”, “Illustrations of Lao Tzu’s Teachings (喻老)”, “Wielding the Sceptre (扬权)”, “The Tao of the Sovereign (主道)”, and “The Principal Features of

¹ Burton Watson’s translation in *Han Fei Tzu: Basic Writings*, Columbia University Press, 1964, p. 108.

² The *pinyin* method of romanization is used throughout this thesis. However, the spelling used in the secondary works cited has been preserved, and so have some of the names.

³ Ssu-ma Ch’ien, *Shih Chi*, IV, Taipei: Ming-lun ch’u-pan she, 1972, p. 2156. Translated by Wang Hsiao-Po and Leo S. Chang, and quoted in *The Philosophical Foundations of Han Fei’s Political Theory*, University of Hawaii Press, Monograph no. 7 of the Society for Asian and Comparative Philosophy, 1986, p. 94.

Legalism (大体).”⁴ Many critics have dismissed these chapters as inauthentic on the basis that they are isolated chapters and are largely inconsistent with Han Fei’s thought system.⁵ However, I think that such a criticism does not take into proper account Sima Qian’s record in the *Shi Ji* (史记: Historical Records). If we start from the assumption that his record is reliable, that Han Fei did in fact “[draw] his principles from Taoist canons,” we could reach the equally reasonable conclusion offered by Wang and Chang, that what Han Fei does in these five chapters is to provide a “philosophically coherent framework” or “theoretical basis”⁶ for his governing techniques, which are elaborated in the rest of the *Han Fei Zi*.

In the same chapter of the *Shi Ji*, Sima Qian also describes Han Fei as having based his principles on Huang and Lao.⁷ According to Wang and Chang, this raises two possibilities for a consideration of Han Fei’s relationship to Daoism. From the statement that Han Fei based his teachings on Huang and Lao, one could conclude that he drew on “a unique system of thought,” one that combined the teachings of the Yellow Emperor and Lao Zi in a “complex and coherent” way.⁸ For Wang and Chang, however, there is insufficient evidence to argue for the existence of such an integrated thought system during Han Fei’s time. They therefore opt for the second possibility, that Han Fei was tapping on two distinct but related patterns of thought, which are recorded in the *Huang*

⁴ These are W. K. Liao’s translation of the Chinese titles. See Liao, *The Complete Works of Han Fei Tzū*, Arthur Probsthain, 1939.

⁵ For a more detailed discussion of the authenticity question, look at Wang Hsiao-Po and Leo S. Chang’s appendix to *The Philosophical Foundations*, op. cit., pp. 87-109.

⁶ *Ibid.*, p. 106.

⁷ Ssu-ma Ch’ien, “Lao-tzu Han Fei lieh-chuan,” *Shih Chih*, IV, op. cit., p. 2146. Ssu-ma Ch’ien wrote: “Han Fei ... delighted in the study of punishments (and) names, law and methods of government, while basing (his principles) upon Huang and Lao.” Translated by Wang and Chang and quoted in *The Philosophical Foundations*, op. cit., p. 87.

⁸ *Ibid.*, p. 87.

Di Jing and the *Dao De Jing* respectively. Tradition recognises the Yellow Emperor as the author of the former, and Lao Zi, as the latter's author.⁹

There is little to be said about just how much and what exactly Han Fei borrows from the *Huang Di Jing*, since he only quotes once from it explicitly¹⁰ and, furthermore, this quotation cannot be traced to any of the extant texts. Wang and Chang only go so far as to say that there is a striking parallel between the content of the *Huang Di Si Jing* and Han Fei's thought-system.¹¹ A lot more can be said about the relationship between Han Fei's political philosophy and Lao Zi's Daoism, and it is to an examination of this that we now turn.

On the face of it, Han Fei's Legalist techniques seem to be completely at variance with Lao Zi's Daoism. While Lao Zi espouses small government and minimal government intervention, Han Fei argues for a strong, centralised bureaucracy that extends its control over every aspect of the people's lives. Again, Lao Zi argues that the ruler should not advance men of worth so that the people will not contend, whereas Han Fei makes the contrary case that one of the very reasons for the prevailing disorder of his day is that rulers have not exalted the worthy. It is also unthinkable that Lao Zi would endorse the severe penalties meted out by Han Fei's ruler.

⁹ So as not to digress from the main point of this chapter, I will circumvent the thorny issues surrounding the authorship of both works. Just as a quick note, only fragments of the *Huang Di Jing* remain although a prima facie case can be made that the four separate chapters preceding the volume of the *Lao Zi* text discovered in a Han tomb at *Ma Wang Dui* in 1973-4 correspond to those chapters of the *Huang Di Si Jing* mentioned in "Yi Wen Zhi" of the *History of the Former Han Dynasty or Qian Han Shu*. For an insight into the debate on the authorship of the *Dao De Jing*, refer to Alan K. L. Chan's "The *Daodejing* and Its Tradition" in *Daoism Handbook*, ed. Livia Kohn, Köln: Brill, 2000, pp. 4-6.

¹⁰ Han Fei quotes the Yellow Emperor in "Wielding the Sceptre." See Liao's *The Complete Works*, vol. 1, op. cit., p. 59. The quotation reads, "The Yellow Emperor made the saying: 'Superior and inferior wage one hundred battles a day.'...."

¹¹ Wang and Chang, *The Philosophical Foundations*, op. cit., pp. 90-93. For an in-depth study of the *Huang Di Si Jing* and its similarities and differences with the *Han Fei Zi*, read R. P. Peerenboom's *Law and Morality in Ancient China*, State University of New York Press, 1993.

In the light of all these striking dissimilarities, several intriguing questions are raised. First, in what sense or how did Han Fei “draw upon Taoist canons”? A related albeit more speculative question is, given his practical bent and his contempt for abstruse thinking, why did Han Fei even borrow the Daoist metaphysical framework? Was he genuinely interested in discovering and following the *Dao*, or was he, in typical Machiavellian fashion, merely making use of the *Dao* as a convenient rubber stamp for his harsh Legalist regime? We will attempt to answer these questions by making the following preliminary assumption: If it can be shown that Han Fei’s *fa* is somehow based upon and thereby constrained by the *Dao*, that his laws are not simply made at the ruler’s whim, then we would have succeeded in debunking the traditional account of Han Fei as a defender of despots.

1.1 Natural law theorist or legal positivist?

Western scholars on the *Han Fei Zi* have generally cashed out the debate in terms of the familiar distinction in the West between natural law and legal positivism.¹² Peerenboom represents one camp within the scholarship, which insists on reading Han Fei as a legal positivist, whilst Wang and Chang represent the other camp, which sees him as some kind of a natural law theorist.

¹² K. K. Lee, for example, wrote an article titled: “The Legalist School and Legal Positivism,” published in *Journal of Chinese Philosophy* 3, 1975, pp. 23-56. As the title suggests, Lee draws a connection between the Chinese Legalists and the legal theory of legal positivism. Needham, too, appears to take it for granted that the Legalists were legal positivists. He writes, “The central conception of *fa*, or positive law, enacted by the lawgiving prince without regard to considerations of accepted morality or the goodwill of the people, appears everywhere in Shang Yang and Han Fei Tzu [p. 206].” And again, “The Legalists were conscious of this conflict between theoretically constructed positive law on the one hand, and ethics and equity, and even what one might call human common sense, on the other [p. 207].” Needham also argues that with the “steady replacement of Legalist by Confucian ideals ... natural law came to be overwhelmingly dominant in China, and positive law reduced to the minimum [p. 214].” Joseph Needham, “The *Fa Chia* (Legalists),” in *Science and Civilisation in China*, vol. 2, Cambridge University Press, 1991.

1.1.1 Some definitions

In the history of Western jurisprudence, John Austin and H. L. A. Hart stand out as two of the more prominent legal positivists. Austin argued that laws are the general orders of the sovereign backed by threat of sanction.¹³ Austin's command theory of law thus makes the ultimate authority of the sovereign the yardstick of legal positivism. Hart's minimum separation thesis, on the other hand, labels as "positivist" those theories that deny that there need be any necessary connection between law and morality.¹⁴ Peerenboom measures Han Fei against both of these accepted standards of legal positivism and concludes that he is a legal positivist. As Peerenboom reads it, Han Fei not only establishes the ruler as the ultimate authority over the law¹⁵, he also "shares [Hart's] belief that morality and the law need not coincide."¹⁶

Natural law theory is commonly perceived as the antithesis to legal positivism. Like legal positivism, the natural law tradition is extremely heterogeneous and defies any simple definition. Acknowledging the risk of oversimplification, Peerenboom proceeds to identify some key features of natural law theory.¹⁷ One of its fundamental tenets is that there is a necessary relation between law and morality. Natural law proponents on the whole reject the legal positivist's notion that "what pleases the prince has the force of law."¹⁸ They reject the idea that something has the force of law simply in virtue of its being issued by a sovereign. There needs to be an ethical or rational reason underlying

¹³ John Austin, "Positivist Conception of Law", in *Philosophy of Law*, ed. Joel Feinberg and Hyman Gross, Belmont, Calif.: Wadsworth Pub. Co., 1980.

¹⁴ H. L. A. Hart, *The Concept of Law*, Oxford, Clarendon Press, 1961.

¹⁵ Peerenboom, *Law and Morality*, op. cit., p. 142.

¹⁶ *Ibid.*, p. 143.

¹⁷ *Ibid.*, see section 2.1, "Philosophy of Law: A Hermeneutical Framework", pp. 20-26.

¹⁸ *Ibid.*, p. 20. In his footnote, Peerenboom refers the reader to John Austin's command theory put forth in *The Providence of Jurisprudence Determined*. I think he probably meant Austin's *The Province of Jurisprudence Determined*.

our laws and our obligation to obey the law, they argue. According to Peerenboom, however, the mere insistence that the law reflects ethical considerations is not sufficient to make a natural law argument “in the strict sense.”¹⁹ He wants instead to clarify the “foundational nature” of natural law arguments, and by this, he means that natural law “is often grounded in some ultimate source of value that is beyond further questioning.”²⁰ Examples of such ultimate sources of value are divine law, the laws of nature and fundamental ethical principles. It is on these criteria, then, that Peerenboom believes Wang and Chang label Han Fei a natural law proponent.²¹

It is intriguing how one text has spawned two diametrically opposite interpretations. I suggest that the best way to understand both of these positions is to juxtapose them, and have them respond to each other, as in a debate. I will attempt to do this in the following section.

1.1.2 The positivist reading of Han Fei and a natural law critique

As I have earlier intimated, one of the reasons why critics have by and large favoured the positivist reading of Han Fei is because the so-called “Daoist elements” are perceived to be confined to just a few chapters in the *Han Fei Zi*. Peerenboom, for example, while acknowledging that the aforementioned five ‘Daoist chapters’ “may represent Han Fei’s sincere effort to adopt Daoism and Huang-Lao thought as the cosmological basis on which to erect his Legalist political edifice,” contends that Han Fei is at best only “partially successful” for he “never fills in the rough outline sketched in these few chapters.”²²

¹⁹ Peerenboom, *Law and Morality*, op. cit., p. 22.

²⁰ Ibid., p. 21.

²¹ Ibid., see the chapter, “The Pragmatic Statesmanship of Han Fei”, pp. 139-170.

²² Ibid., p. 146.

Wang and Chang dispute this claim and argue instead that, “in the Han Fei-tzu, the Tao-te ching views are more pervasive and more widely interspersed than is generally believed.”²³ They see the five Daoist chapters as setting the theoretical ground for the rest of Han Fei’s political programme, which is spelt out in the remaining chapters of the *Han Fei Zi*. An example they cite is from “Illustrations of Lao Tzu’s Teachings,” where Han Fei comments on Chapter Thirty-Six of the *Lao Zi*, in particular the sayings: “The fish should not escape from the deep,” and the “state’s sharp tools [should] not be shown to anybody.”²⁴ Han Fei elaborates on these sayings in “Inner Congeries of Sayings, The Lower Series: Six Minutiae (内储说下六微),” which is not one of the five famed Daoist chapters, and is, furthermore, judged to be authentic by Sima Qian, who specifically mentions it in his *Shi Ji*²⁵: “High authority is the pool of the lord of men. Ministers are the fish swimming in high authority ... The weapons of the state should not be shown to anybody.”²⁶ Wang and Chang argue that Han Fei adopts Lao Zi’s “dialectical logic,” which he expounds in the Daoist chapters, to moor his Legalist *shu* (术: statecraft)²⁷. The “lord of men” must lie low in order to control from above. He must not “show”, or rather, share his weapons, which are his instruments of reward and punishment, with his ministers, or he will end up being controlled by them.²⁸ Wang and Chang’s view is corroborated by Zhang Jue, who writes that of the fifty-five chapters in the *Han Fei Zi*, at least nineteen contain either a direct quotation from the *Lao Zi* or an exposition of Lao

²³ Wang and Chang, *The Philosophical Foundations*, op. cit., p. 106.

²⁴ Liao, vol. 1, pp. 210-212.

²⁵ “Lao-tzu Han-fei lieh-chuan”, *Shih-chi*, IV, op. cit., p. 2147.

²⁶ Liao, vol. 2, pp. 5-6.

²⁷ This is Fu Zhengyuan’s translation of *shu*. See *China’s Legalists: The Earliest Totalitarians and Their Art of Ruling*, M. E. Sharpe, 1996.

²⁸ Wang and Chang, *The Philosophical Foundations*, op. cit., p. 106.

Zi's Daoism.²⁹ Much more can and must be said to substantiate Wang and Chang's thesis, but we will leave this for another section, where we attempt a natural law reconstruction of the *Han Fei Zi*.

Another reason that lends weight to the positivist reading of Han Fei is his apparent condemnation of Daoism as a “useless” and “lawless” creed. Liao believes that Han Fei is targeting Daoists when he writes in “Loyalty and Filial Piety: a Memorial (忠孝),” “Thy servant, however, thinks the philosophy of peace and quietude (恬淡之学) is a useless creed and the doctrine of vagueness and illusion (恍惚之言) is a lawless creed.”³⁰ According to Liao, the former is a reference to Chapter Thirty-One of the *Lao Zi*, “Quelling War,” while the latter is a reference to Chapter Twenty-One of the *Lao Zi*, where the *Dao* is described as “恍惚.”³¹ If Daoists are indeed his intended target of abuse in chapters such as “The Five Vermin” and “Loyalty and Filial Piety,” then a more probable case can be made that Han Fei is, elsewhere, merely using Daoist terminology to justify his severe Legalist programme. However, according to Wang and Chang, the reason why Han Fei is seen at times lauding Daoism, and at other times, renouncing it, is because he is speaking to different audiences. They write:

Han Fei, then, like other pre-Chin thinkers, differentiated the genre of knowledge appropriate for the ruler from the one considered fitting for the ruled. Thus, abstract philosophical thoughts, “wonderfully mysterious” and “transcendentally abstruse,” were considered not only comprehensible but also appropriate for an effective government by the ruler.³²

²⁹ See Zhang Jue's (张觉) foreword to his 韩非子全译 (上), 贵州人民出版社, 1990, pp. 12-13.

³⁰ Liao, vol. 2, p. 315.

³¹ Ibid. See Liao's footnotes 2 and 3.

³² Wang and Chang, *The Philosophical Foundations*, op. cit., p. 101.

So when Han Fei criticises what appears to be Daoist-types who engage in metaphysical speculation, he is in fact chastising the common man who has no access to the mysterious workings of the *Dao*.

Someone might object to Wang and Chang's above explanation because it suggests that Han Fei's scheme requires a Daoist sage-ruler who, alone among the people, is capable of apprehending the *Dao* and ruling in accordance with it. This seems to go against the general idea in the *Han Fei Zi* that "government is for the average person by the average ruler."³³ Han Fei does exhort the ruler time and again to depend solely on the law, so that the empire is not held ransom to the rare appearance of a Confucian sage-king before order can be achieved. In "The Way to Maintain the State (守道)," for example, Han Fei remarks, "Therefore to construct a cage is not to provide against rats but to enable the weak and timid to subdue the tiger; to establish laws is not to provide against Tsêng Ts'an and Shih Ch'iu but to enable the average sovereign to prohibit Robber Chê."³⁴ Nevertheless, I believe that we can meet the above objection if we imagine Han Fei to be that Daoist sage who teaches the mediocre rulers of his age the Way of government. However, because he is petitioning these rulers to heed his proposals, he appeals to them rhetorically to use their "privileged access to the *Dao*" to authenticate and implement his ruling methods.

Such a reading is, I think, justified if we consider two similar chapters in the *Han Fei Zi* where Han Fei laments the ineptitude of the rulers of his day, who would rather listen to the state-ruining proposals of their fawning cronies than heed his state-saving advice. In "Solitary Indignation (孤憤)" and "The Difficulty of Pien Ho (和氏)," Han Fei

³³ Peerenboom, *Law and Morality*, op. cit., p. 141.

³⁴ Liao, vol. 1 p. 268.

bemoans the isolation and bitter fate of the “upholders of law and tact,” who are marginalised at court because they “have neither the relationship of the trusted and beloved nor the favour of the long acquaintances and old intimates, and, what is still worse, intend to reform the biased mind of the lord of men with lectures on law and tact; which altogether is opposed to the taste of the lord of men.”³⁵ Like Pien Ho, whose gift of an uncut jade was wrongly regarded by the ruler as an ordinary stone, and who subsequently even had his left foot cut off for lying, these “upholders of law and tact” too are looked over, even censured and punished, because foolish rulers are blind to their wisdom. From these two chapters, then, we get the sense that Han Fei is that lone Daoist sage who grasps the *Dao* of government and spells this out in no uncertain terms to the befuddled rulers of his age, whom he nonetheless appeals to as “enlightened rulers”³⁶ in order to persuade them to act on his proposals.

Zhang Jue explains away the apparent inconsistencies in the *Han Fei Zi* by using a different tack. While Wang and Chang accept that Han Fei’s diatribes against abstruse, metaphysical thinking is possibly targeted at Daoists, or at least those Daoists among the common people, Zhang insists that in these passages, Han Fei is really attacking a different group of people. In “The Five Vermin,” for example, some have read Han Fei’s criticism of those people “whose words are subtle and mysterious”³⁷, as a criticism of Daoists. Zhang, however, believes that Han Fei is in fact repudiating the Confucians and proponents of the Horizontal and Vertical Alliance (纵横家), who confuse the law with their eloquence and persuasions.³⁸ Again, in “Loyalty and Filial Piety,” Zhang avers that

³⁵ “Solitary Indignation,” Liao, vol. 1, p. 99.

³⁶ See, for example, “Wielding Power.” Watson’s translation, p. 37.

³⁷ Watson, p. 108.

³⁸ 张觉, 韩非子全译(上), op. cit., 前言p. 13.

the main brunt of Han Fei's vitriol here should be borne by the Confucians, the proponents of the Horizontal and Vertical Alliance, and the so-called "heroes of antiquity,"³⁹ whose "philosophy of peace and quietude" and "doctrine of vagueness and illusion" disturb the public standards of the ruler.⁴⁰ Zhang's explanation, however, does not seem to me to be a very good one because without any evidence to prove that these groups were propagating such teachings, it is hard to imagine the Confucians, in particular, spewing "subtle and mysterious" doctrines.

Peerenboom provides one of the more thoroughgoing accounts of Han Fei as a legal positivist, and it is his account that we will now focus our discussion on. As we saw earlier, Peerenboom labels Han Fei a legal positivist on the basis that he satisfies Austin and Hart's positivist theories. Austin, we remember, says that laws are the general commands of a sovereign backed by threat of sanction. The implication of his sovereign command theory is, as Hart points out, that there could be no legal limitations to the sovereign's power. As Peerenboom puts it, "By definition, he [the ruler] need answer to none ... In the final word, law is what the ruler says it is; it is what pleases the ruler."⁴¹ He then argues that Han Fei similarly "confers on the ruler ultimate authority to determine what the laws will be, how they ought to be applied, and whether or not they should be changed."⁴² He cites this passage from the *Han Fei Zi* to substantiate his point:

As laws are the means to forbid extra-judicial action and exterminate selfish motives and severe penalties the means to execute decrees and censure inferiors, legal authority

³⁹ Liao, vol. 2, p. 314.

⁴⁰ 张觉, 韩非子全译(上), op. cit., 前言p. 13.

⁴¹ Peerenboom, *Law and Morality*, op. cit., pp. 142-143.

⁴² *Ibid.*, p. 143.

should not be delegated to anybody and legal control should not be open to common use.

Should legal authority and control be held in common, all manners of abuse will appear.⁴³

Fu Zhengyuan, too, portrays Han Fei and the Legalists in very much the same way as Peerenboom. He writes, “For the Legalists, law is simply the command of the ruler, which publicly represents his preference and volition. The ruler alone is distinguished from other mortals by his absolute authority to issue decrees that become law. The ruler is the sole source and creator of the law.”⁴⁴ Herein lies one of the main differences that Peerenboom notes between Han Fei’s ruler and the Huang-Lao ruler of the *Boshu*.⁴⁵ Han Fei’s ruler is the ultimate authority for the law, and is therefore effectively beyond its reach. In contrast, the Huang-Lao ruler does not *create* laws according to his whim and fancies. In the *Boshu*, it is the Way that generates the laws.⁴⁶ Consequently, even the ruler is not above the law and must abide by it.⁴⁷ To summarise what has been said so far, what emerges from Peerenboom’s account of the *Han Fei Zi* is the image of an immensely powerful ruler whose word, literally, is the law, and who, as the creator or the source of the law, is unconstrained by it. It is easy to see how such an account lends itself to the widespread interpretation of Han Fei as a defender of despots, although Peerenboom himself argues for a more charitable view of Han Fei.⁴⁸

In his account, Peerenboom also considers and rejects Wang and Chang’s natural law reading of the *Han Fei Zi*, which he summarises as follows:

⁴³ Han Fei, “Having Regulations (有度),” Liao, vol. 1, op. cit., p. 44.

⁴⁴ Fu, *China’s Legalists*, op. cit., p. 60.

⁴⁵ This refers to what has come to be known as the *Huang-Lao Boshu* or the Silk Manuscripts of Huang-Lao, which were discovered in a tomb at *Mawangdui* in 1973.

⁴⁶ Peerenboom, *Law and Morality*, op. cit., p. 62.

⁴⁷ *Ibid.*, p. 78.

⁴⁸ *Ibid.*, pp. 154-170.

[Wang and Chang] claim that, like Huang-Lao, Han Fei synthesizes Daoism and Legalism by basing fa (law) on dao; advances a holistic naturalism; and sponsors an epistemology in which one empties oneself of bias by becoming empty and tranquil (*xu jing*) so that one then objectively discovers the Way, understands the relationship between names and reality, and knows how to *wu wei*.⁴⁹

He rejects such a reading because he believes that “Han Fei differs significantly from the author of the *Boshu* on issues ranging from philosophy of language to epistemology, indicating that he is a legal positivist and not a natural law theorist.”⁵⁰

On all of these issues, Peerenboom’s main argument against a natural law reading seems to be his observation that Han Fei is a “tough-minded pragmatist”⁵¹ whose “spirit of down-to-earth practicality infuses and is manifest in every area of Han Fei’s thought, be it politics, epistemology, jurisprudence, or aesthetics.”⁵² Han Fei does berate the artisan who took three years to paint intricate designs on the Ruler of Chou’s whip because, to him, utility is what matters.⁵³ He is renowned for his scathing criticisms of Confucian scholars and their like for neglecting to till the land and fight. He also minces no words in condemning the Dialecticians (名家) for their sophistry and word games.⁵⁴ Furthermore, he rejects the ancients’ prescriptions for order because they do not match the political realities of his day. However, we can admit all these and still not reach Peerenboom’s conclusion that “Han Fei is a pragmatist rather than a Huang-Lao foundationalist,” who, “unlike the author of the *Boshu*, does not look to a transcendent,

⁴⁹ Peerenboom, *Law and Morality*, op. cit., p. 140.

⁵⁰ *Ibid.*, pp. 146-147.

⁵¹ Peerenboom uses the term ‘pragmatist’ loosely to denote a ‘practical-minded’ person. He is not using it in the philosophy of law sense to denote the particular school of legal pragmatism.

⁵² *Ibid.*, p. 147.

⁵³ Han Fei, “Outer Congeries of Sayings, Upper Left Series (外储说左上),” Liao, vol. 2., pp. 39-40.

⁵⁴ See for example “Outer Congeries of Sayings, Upper Left Series,” Liao, vol. 2, p. 37, where Han Fei criticises the Dialectician Ni Yüeh.

normatively predetermined natural order as the standard for political order.”⁵⁵ I think the problem with Peerenboom’s argument is that he takes it for granted that a practical attitude or a concern with the practical goals of government is somehow incompatible with “Huang-Lao foundationalism” or natural law theory. I suggest, however, that it is not unreasonable to make the opposite case, that it is precisely because Han Fei is a “pragmatist” that he looks to the *Dao* for the uniquely efficient path of government, one that best promotes the interests of the people. Consider Han Fei’s words at the beginning of “The Principal Features of Legalism:”

The ancients who completed the principal features of legalism, looked upon heaven and earth, surveyed rivers and oceans, and followed mountains and ravines; wherefore they ruled as the sun and the moon shine, worked as the four seasons rotate, and benefited the world in the way clouds spread and winds move.⁵⁶

The “ancients” based the principal features of legalism on the *Dao* and consequently found “the myriad things well provided [for]” and “the country rich.”⁵⁷ Contrary to what Peerenboom believes then, it is entirely conceivable that Han Fei is both a practical man *and* a natural law theorist.

To justify this criticism of Peerenboom, let us examine two issues on which he judges Han Fei to be a legal positivist. First, Peerenboom concludes that Han Fei is a legal positivist based on the latter’s philosophy of language. He compares Han Fei with the author of the *Boshu*, who “sponsors a semantic or realist correspondence theory of language where names pick out objects and reflect distinctions that exist in objective

⁵⁵ Peerenboom, *Law and Morality*, op. cit., p. 148.

⁵⁶ Liao, vol. 1, p. 278.

⁵⁷ Liao, vol. 1, p. 280.

reality.”⁵⁸ In contrast, Han Fei’s theory of *xing ming* (刑名) is “more of a technique for political control than a theory of correspondence between word and a predetermined natural order.”⁵⁹ This indeed seems to be the thrust of the following passage. Han Fei begins by describing the enlightened ruler who empties himself of personal bias in order to discern objective reality as it is, replete with names and their proper forms, and ensure that in the empire, names match forms:

The Way is the beginning of all things and the measure of right and wrong. Therefore the enlightened ruler holds fast to the beginning in order to understand the wellspring of all beings, and minds the measure in order to know the source of good and bad. He waits, empty and still, letting names define themselves and affairs reach their own settlement. Being empty, he can comprehend the true aspect of fullness; being still, he can correct the mover.⁶⁰

However, he immediately goes on to spell out how the ruler can control his ministers:

Those whose duty it is to speak will come forward to name (*ming*) themselves; those whose duty it is to act will produce results (*xing*). When names and results (*xing ming*) match, the ruler need do nothing more and the true aspect of all things will be revealed.

This only confirms Peerenboom’s suspicions that Han Fei’s theory of *xing ming* is but “one pragmatic art of rulership in the Legalist ruler’s bag of tricks.”⁶¹ In Han Fei’s scheme, it is not the *Dao*, but the ministers themselves who generate names; they *name* their proposals before the ruler, who need only ensure that *forms*, or their performances, match their words. Peerenboom points out that even Wang and Chang admit that Han Fei’s theory of *xing ming* is a “practical, political one: ‘Han Fei’s discrimination between

⁵⁸ Peerenboom, *Law and Morality*, op. cit., p. 148.

⁵⁹ *Ibid.*, pp. 148-149.

⁶⁰ Han Fei, “The Way of the Ruler,” Watson, p. 16.

⁶¹ Peerenboom, *Law and Morality*, op. cit., p. 150.

what is apparent and what is intrinsically real is not epistemological in nature; rather, ... [it] has everything to do with the reality of effective performance’.”⁶²

Peerenboom rehashes exactly the same argument on the issue of epistemology. He argues that in Han Fei’s hands, the key elements of Huang-Lao epistemology: *xu jing* (虚静), *wu si* (无思), and *wu wei* (无为), have become mere political tools to protect the ruler.⁶³

As I said earlier, I think Peerenboom’s argument fails because he argues for Han Fei as a legal positivist on the untenable premise that one cannot have “practical and political interests” and *at the same time* be a natural law theorist. To put this loosely, Peerenboom seems to be saying that just because Han Fei is not interested in the *Dao* for its own sake, he cannot be a genuine Daoist. This conceptual error, unfortunately, abounds in the secondary literature on the *Han Fei Zi*.⁶⁴ Just to cite another example, Robert Rowe writes, “[Han Fei] had no interest or concern with ‘sin’ or virtue or morality. That is what puts him at odds with orthodox Confucianists. He was a ‘practical’ man trying to solve ‘practical’ problems in a difficult time.”⁶⁵ Rowe seems to suggest that being a “practical man” somehow precludes Han Fei from being concerned with morality. Scholars from Peerenboom to Rowe thus argue, fallaciously, that since Han Fei is undeniably a practical man with mainly political interests, he cannot be a natural law theorist and, also, he must be uninterested in morality. Such conceptual confusion is, I

⁶² Wang and Chang, *The Philosophical Foundations*, pp. 70-71. Quoted by Peerenboom, *ibid.*, p. 149.

⁶³ I will reserve the explanation of these terms for section 1.1.3.

⁶⁴ This conceptual confusion is especially a problem amongst Western scholars of the *Han Fei Zi*. Their Chinese counterparts are concerned with wholly different issues in the text.

⁶⁵ Robert T. Rowe, “Han Fei Tzu and Niccolo Machiavelli,” in *Chinese Culture*, vol. XXIII, no. 3, September 1982, p. 35.

suspect, the reason why the traditional account of Han Fei as an apologist for tyranny has been accepted as orthodoxy.

Wang and Chang, who argue for Han Fei as a natural law theorist, clearly do not see any difficulty in suggesting, as seen in the earlier quote, that Han Fei is “reality-oriented” and “very much performance-oriented.”⁶⁶ To understand why, it might be helpful to think about what Creel says with regard to Daoism. Creel does not see any dichotomy between what he terms the “contemplative” and “purposive” aspects of philosophical Daoism. He says that in the *Lao Zi*, there is a tendency to “treat the *tao* as a method of control, of acquiring power.”⁶⁷ However, this in no way undermines it as being equally a treatise on the *Dao*. The “purposive” is simply the flip side of the “contemplative” aspect in the *Lao Zi*. Similarly for the *Han Fei Zi* then, we can read its “purposive” aspects or its governing strategies as a direct product of the enlightened ruler’s contemplation on the *Dao*. I will make the full case for this in the following section.

1.1.3 A natural law reconstruction of the *Han Fei Zi*

I have been suggesting throughout this chapter that Han Fei’s political theory is based on a Daoistic world-view. In this section, I will give a sketch of Han Fei’s understanding of the *Dao* and suggest how it translates into the three pillars of his political philosophy: *shi* (勢: power or position), *shu* (術: statecraft), and *fa* (法: laws or standards).

In “Wielding Power,” one of the five acclaimed Daoist chapters, Han Fei writes:

⁶⁶ Wang and Chang, *The Philosophical Foundations*, op. cit., p. 78.

⁶⁷ Herrlee G. Creel, “What is Taoism?” in *What is Taoism? and Other Studies in Chinese Cultural History*, The University of Chicago Press, 1970, p. 5.

The Way is vast and great and without form; its Power is clear and orderly and extends everywhere. Since it extends to all living beings, they may use it proportionately; but, though all things flourish through it, it does not rest among things. The Way pervades all affairs here below. Therefore examine and obey the decrees of Heaven and live and die at the right times; compare names, differentiate events, comprehend their unity, and identify yourself with the Way's true nature.⁶⁸

In the above passage, Han Fei describes the *Dao* as vast and far-reaching. Although it pervades and supports all things in the universe, it does not rest among them. He then exhorts the ruler to “identify [himself] with the Way's true nature,” which suggests that the ruler ought to embody the characteristics of the *Dao*; to be similarly vast, great, formless, all-pervasive and yet unique from the myriad things. Sure enough, Han Fei continues, in the following paragraph, to describe exactly how the ruler ought to put his understanding of the *Dao* into practical use for ruling the empire:

Thus it is said: The Way does not identify itself with the myriad beings; its Power does not identify itself with the yin and yang, any more than a scale identifies itself with heaviness or lightness, a plumb line with bumps and hollows, a reed organ with dampness or dryness, or a ruler with his ministers. All these [the myriad beings, the yin and yang, heaviness and lightness, etc.] are products of the Way; but the Way itself is never plural – therefore it is called a unity. For this reason the enlightened ruler prizes solitariness, which is the characteristic of the Way. The ruler and his ministers do not follow the same way. The ministers name their proposals, the ruler holds fast to the name, and the ministers come forward with results. When names and results match, then superior and inferior will achieve harmony.⁶⁹

⁶⁸ Watson, p. 37. Watson writes in footnote 3 that “in Taoist terminology, Heaven is synonymous with the Way, or Tao.”

⁶⁹ Ibid.

I have quoted Han Fei at length because in this passage alone, we get a glimpse of how his understanding of the *Dao* translates into both the *shi* and *shu* aspects of his political programme.

First of all, we see Han Fei laying the theoretical basis for his concept of *shi*. Just as the Way is never plural, the enlightened ruler must rule in solitude; he must distinguish himself from his ministers, inasmuch as the Way does not identify with the myriad beings. This concept of *shi* is elaborated in other chapters of the *Han Fei Zi*. In “Outer Congeries of Sayings, The Upper Right Series (外储说右上),” for example, Han Fei exhorts the ruler to “remove” those ministers who refuse to be transformed by his *shi*, lest they undermine his unique and exalted position of authority.⁷⁰ Since the ruler cannot possibly see to the minutiae of daily governance, he must also make use of his “august position (*shi*)” to get his ministers to do the job. In “Outer Congeries of Sayings, Upper Left Series,” Han Fei tells of King Chao of Wey who wanted to have a hand in the official routine. After reading “ten and some bamboo slips” of the legal code, however, he fell asleep. The lesson for King Chao was: “if a ruler does not hold the august position and supreme handles firmly in hand but wants to perform the duties which the ministers ought to perform, is it not reasonable that he falls asleep in so doing?”⁷¹ Han Fei presses the point home by comparing the ruler with the skilled horse-handler, Tsao-fu, in “Outer Congeries of Sayings, Lower Right Series (外储说右下).” He writes, “...The State is the carriage of the ruler; the august position is his horse. If the Ruler does not know how to drive the carriage, then even though he exhausts himself, he cannot avoid chaos. If he knows how to drive, he will remain in the place of ease and joy and accomplish the

⁷⁰ Liao, vol. 2, p. 86.

⁷¹ Liao, vol. 2, p. 57.

achievement of the emperor and the king.”⁷² So central indeed is the concept of *shi* in Han Fei’s political thought that in the chapter “Achievement and Reputation (功名),” he argues that *shi* is more important than the conventional virtue of *xian* (贤: worthiness) for achieving order in the state. Just as a foot of timber at the top of a high mountain overlooks the ravine a thousand fathoms below solely in virtue of its high position, so too an unworthy ruler like Chieh could rule over All-under-Heaven solely because “his position was influential.” Chieh is contrasted with the ancient sage-king Yao, who, while a commoner, could not rectify three families. Han Fei’s explanation: “Not that he was unworthy, but that his position was low.”⁷³

The earlier quoted passage from “Wielding Power” also highlights the importance of *shu* or statecraft in the Legalist political edifice. Maintaining his august position alone is insufficient for the ruler to govern effectively. Since he must involve the ministers in the daily running of the state, he has to employ *shu* to control them, otherwise, his *shi* or position would be undermined.⁷⁴ In that passage, Han Fei spells out one of the key techniques of political control (*shu*) that the enlightened ruler must wield – *xing ming*. Han Fei’s theory of *xing ming* encompasses a cluster of terms that he borrows from the Daoists. These include: *xu jing* (虚静), *wu wei* (无为), *wu yu* (无欲) and *qu zhi* (去智).⁷⁵

In “Wielding Power,” one of the ways in which the ruler ought to “identify with the Way’s true nature” is to be “empty, still, inactive (*xu jing wu wei*), for this is the true

⁷² Liao, vol. 2, pp. 133-134.

⁷³ Liao, vol. 1, pp. 275-276.

⁷⁴ In the “Outer Congeries of Sayings, Lower Right Series,” Han Fei quotes the saying: “If the lord of men does not apply tact (*shu*), his prestige and position (*wei shi*: 威势) will become insignificant and ministers will celebrate themselves at leisure.” Liao, vol. 2, p. 134.

⁷⁵ This list is not exhaustive. I have picked out some of the key Daoist terms that Han Fei appropriates to explain his theory of *xing ming*.

nature of the Way.”⁷⁶ Han Fei is most likely referring to a very similar chapter in the *Lao Zi*, Chapter Thirty-Seven, which reads: “The way never acts yet nothing is left undone. Should lords and princes be able to hold fast to it, the myriad creatures will be transformed of their own accord.”⁷⁷ Here, the ruler is exhorted to “hold fast to,” or model himself after the *Dao* and not resort to any conscious activity. The reason for such a policy is not explicitly given, although Lao Zi says elsewhere that “governing a large state is like boiling a small fish;”⁷⁸ the more you handle it, the more you ruin it. D. C. Lau explains that the empire, being part of the natural order, will run smoothly so long as everyone follows his own nature, and does not presume to improve on nature by his petty cleverness. The least interference on the part of the ruler will upset the delicate balance of nature and, instead, lead to disorder.⁷⁹ Consequently, the Daoist ruler must discard wisdom (*qu zhi*) and wile, and cause the people to return to their pristine condition of the “uncarved block,” the state of original innocence. He does this by himself being free from desire (*wu yu*), which results in “the people of themselves [becoming] simple like the uncarved block.”⁸⁰ After the people are transformed, should desire again rear its ugly head, the ruler “shall press it down with the weight of the nameless uncarved block; The nameless uncarved block; Is but freedom from desire; And if I cease to desire and remain still (*jing*), the empire will be at peace of its own accord.”⁸¹ So it is by remaining still and emptying himself of desire and knowledge that the Daoist ruler, through non-action (*wu*

⁷⁶ Watson, p. 38.

⁷⁷ *Lao Tzu - Tao Te Ching*, trans. D. C. Lau, Penguin, 1963, p. 42.

⁷⁸ *Lao Zi*, chapter 60.

⁷⁹ D. C. Lau, *Lao Tzu*, op. cit., introduction p. xxx.

⁸⁰ *Lao Zi*, chapter 58.

⁸¹ *Lao Zi*, chapter 37.

wei), returns the people to their original state of innocence, thereby establishing order in the empire.

Han Fei gives an entirely different account of these same terms. In “Wielding Power,” he exhorts the ruler to be as the *Dao*, “empty, still, and inactive,” so as to be able to compare names and results, and ensure that these match. In quiet repose, the ruler lets the ministers name their proposals before him, and simply makes sure that the achievements tally with the names. According to how these tally, he then dispenses the reward or punishment deserved. In order for *xing ming* to be effective, the ruler must put aside all subjective bias that could prejudice his judgement. He must “discard wisdom and wile” so as to “remain constant”⁸² and “discard both delight and hatred” so that “with an empty mind [he can] become the abode of the Way.”⁸³ For Han Fei, then, it is not to return the people to their original state of innocence and ignorance that the ruler cultivates an attitude of emptiness and quietude (*xu jing*) and reposes in non-action (*wu wei*). Instead, the ruler must “be blank and actionless (*wu wei*);”⁸⁴ he must discard knowledge and get rid of his likes and dislikes so that he can be as objective as the *Dao* in holding ministers accountable for their words.

Fa (laws or standards) is the third plank of Han Fei’s political philosophy. In “Deciding Between Two Legalistic Doctrines (定法),” Han Fei responds to an imaginary inquirer who asks whether *shu* or *fa* is more urgently needed in the state. He replies by means of an analogy: just as both food and clothing are needed to sustain life (the latter, of course, in conditions of extreme cold), so too, both *shu* and *fa* are equally indispensable for government. He writes:

⁸² “Wielding Power”, Watson, p. 36.

⁸³ Watson, p. 38.

⁸⁴ Watson, p. 35.

Tact (*shu*) is the means whereby to create posts according to responsibilities, hold actual services accountable to official titles, exercise the power over life and death, and examine the officials' abilities. It is what the lord of men has in his grip. Law (*fa*) includes mandates and ordinances that are manifest in the official bureaux, penalties that are definite in the mind of the people, rewards that are due to the careful observers of law, and punishments that are inflicted on the offenders against orders. It is what the subjects and ministers take as model. If the ruler is tactless, delusion will come to the superior; if the subjects and ministers are lawless, disorder will appear among the inferiors. Thus, neither can be dispensed with. Both are implements of emperors and kings."⁸⁵

From this passage, we learn that *shu* is the ruler's means of controlling his ministers; it is his weapon to guard against "delusion." Techniques of control include *xing ming* and the ruler's two handles of reward and punishment, by means of which he "exercises the power over life and death." *Fa*, on the other hand, is the whole complex of public laws with its attendant rewards or penalties, ordinances, mandates, which together can be summed up as "standards." These standards act as the ruler's "plumb line,"⁸⁶ according to which he makes all decisions of government. *Fa* also serves as the "model" of proper or approved conduct to which all subjects and ministers must conform. As Han Fei writes in "On Having Standards (有度)," *fa* is the most reliable instrument for "correcting the faults of superiors, chastising the misdeeds of subordinates, restoring order, exposing error, checking excess, remedying evil, and unifying the standards of the people."⁸⁷

As with *shi* and *shu*, Han Fei's concept of *fa*, too, is based on his observations of the *Dao*. In "Observing Deeds (观行)," for example, Han Fei writes:

⁸⁵ Liao, vol. 2, p. 212.

⁸⁶ Han Fei's analogy for *fa* in "On Having Standards," Watson, p. 28.

⁸⁷ Ibid.

Men of antiquity, because their eyes stopped short of self-seeing, used mirrors to look at their faces; because their wisdom stopped short of self-knowing, they took Tao to rectify their characters. The mirror had no guilt of making scars seen; Tao had no demerit of making faults clear. Without the mirror, the eyes had no means to rectify the whiskers and eyebrows; without Tao, the person had no other way to know infatuation and bewilderment.⁸⁸

Just as the *Dao* is useful for rectifying behaviour by showing up a person's faults, infatuations and bewilderments, *fa* too enables the ruler to detect the people's faults and the ministers' schemes and allows him, thereby, to rectify their behaviour.

In "On Pretensions and Heresies (饰邪)," Han Fei suggests that *fa* functions in the human, socio-political realm as the corollary of the *Dao* in the natural realm. He writes: "Therefore, the early kings took Tao as the constant standard, and the law as the basis of government... The intelligent sovereign makes the people conform to the law and thereby knows the true path (饰于道), wherefore with ease he harvests meritorious results."⁸⁹ We saw earlier that in the natural realm, the *Dao* does not resort to any action yet leaves nothing undone. In the same way, this passage implies that if, in accordance with the *Dao*, the intelligent ruler disposes of all matters on the basis of *fa* alone, then he can rule in ease and nothing in the empire will be left undone. When *fa* is entrenched in the hearts and minds of the governed, then "the ruler can sleep without worries; ministers can rejoice in their daily work; Tao will spread all over heaven and earth; and Teh (*de*) will last throughout a myriad generations."⁹⁰

⁸⁸ Liao, vol. 1, p. 258.

⁸⁹ Liao, vol. 1, pp. 164-165.

⁹⁰ "How to Use Men: Problems of Personnel Administration (用人)," Liao, vol. 1, p. 274.

In summary, I have briefly tried to show in this section how Han Fei's political philosophy has been influenced by a Daoist world-view. He is convinced that in order for government to be successful, it must be modelled on how the *Dao* rules the myriad creatures in the universe. The ruler must be like the *Dao*, solitary and unique from the ruled. His *shi* or authority should thus never reside in two places, and the ruler ensures this by removing any minister who presumes to compete with or challenge his authority. Since he cannot personally run all the affairs of government, the enlightened ruler wields his position and employs ministers to implement his *fa*, which constitutes his blueprint for reorganising society and restoring peace to the empire. Because of his need to rely on ministers, conniving and profiteering though they may be, the ruler uses *shu* to control them and thereby prevent them from harming him. It is by thus maintaining his august position, using *shu* to control the restive ministers and *fa* to direct the people, that the ruler is able to govern the empire with ease.

1.1.4 How natural is Han Fei's naturalism?

I suggest that another way to cash out the debate on whether Han Fei is a legal positivist or a natural law theorist is in terms of asking the question: how far does Han Fei's ruler go in his imitation of the *Dao*? Does he aspire to become like the *Dao* in order to align the human socio-political order with the natural order, or does Han Fei simply reduce the *Dao* to the ruler, thereby putting the ruler's position beyond any questioning?

Wang and Chang, as we expect, take the former position. They write:

Han Fei sees the natural world and the human world in one continuum. The very same Tao and principle (*li*) pervade both worlds, and it is by being informed by the objective

Tao and *li* that the ruler is able to conform to the truly natural order of things and realise the fullness of his inborn potentiality.⁹¹

Because he sees the natural and the human worlds as inter-connected, Han Fei's enlightened ruler models himself after the *Dao* and governs according to *Dao*'s objective principle, which when applied to the human world, is *fa*. Wang and Chang in fact describe the ruler as "consciously personifying the *Dao*." Just as "*Dao* is never a pair," the ruler is unique from the ruled and rules in solitude. Just as *Dao* does not identify itself with the "ten thousand things," so too the ruler takes a different path from his ministers.⁹² In Han Fei's scheme, then, the *Dao* becomes the theoretical basis for the ruler's autocratic authority.

Schwartz, too, believes that Han Fei aspires to make government correspond to the *Dao*. He reads in the *Han Fei Zi* "an implication that once the true Legalist method of organising society has been realized, it will somehow correspond to a truly 'natural' system of human organization – a system aligned with the *tao*."⁹³ He writes:

Once the system of rewards and punishments has become ingrained in habitual behaviour, once the methods of defining the proper relations of "names and performances" in government are in place and all the devices for controlling bureaucratic behaviour are operative, once the acceptance of the authority of the ruler has been internalised in the attitudes of all men, one will finally be able to say that the processes of human society correspond to the processes of the *tao* in nature.⁹⁴

⁹¹ Wang and Chang, *The Philosophical Foundations*, op. cit., p. 7.

⁹² *Ibid.*, pp. 10-11.

⁹³ Benjamin I. Schwartz, *The World of Thought in Ancient China*, The Belknap Press of Harvard University Press, Cambridge, Massachusetts and London, England, 1985, pp. 343-344.

⁹⁴ *Ibid.*, p. 344.

Such a system can only be brought about by a “Legalist-Taoist sage, [who] is able to draw on his higher gnosis to achieve a clear and unclouded understanding of the principles and processes which should govern human civilization.”⁹⁵

Cheng Chung Ying reads Han Fei in much the same vein. According to Cheng, Han Fei believes that a ruler has to know the *Dao* – “the ultimate reality and ultimate principle of things” in order to rule successfully.⁹⁶ Cheng states three reasons why the ruler has to know the *Dao*.⁹⁷ First, it is only when the ruler reflects on the *Dao* that he can conceive of himself as “an ultimate power of creativity like the *tao*.” Next, in order to achieve *wu wei* government, he must learn from the *Dao* the ability to rule with simplicity and ease. Third, the ruler must learn from the *Dao* in order to be self-controlled and to have insight into, and thereby prevent, the possible forces of decay in the empire. In sum, the ruler “has to know the *tao* not simply because of a need to justify, but because of the practical necessity for stable, effortless, and lasting rule.”⁹⁸

There seems to me to be an uneasy ambiguity in Cheng’s position. Although he appears to read Han Fei as some kind of a natural law theorist, since it is the laws of nature or the characteristics of the *Dao* that inform his political institutions and governing techniques, his belief that the ruler must conceive of himself as “an ultimate power of creativity like the *tao*” sounds positively positivistic! This suspicion is deepened by Wang and Chang’s comment that Han Fei’s ruler “consciously personifies” the *Dao*. We can see how easily their position slides into Ellen Marie Chen’s, who argues that in Han

⁹⁵ Schwartz, *The World of Thought in Ancient China*, op. cit., p. 345.

⁹⁶ Cheng Chung-Ying, “Metaphysics of *Tao* and Dialectics of *Fa*: An evaluation of HTSC in relations to Lao Tzu and Han Fei and an analytical study of interrelationships of *tao*, *fa*, *hsing*, *ming* and *li*,” *Journal of Chinese Philosophy* 10, 1983, p. 253.

⁹⁷ *Ibid.*, pp. 254-256.

⁹⁸ *Ibid.*, p. 256.

Fei's political system, the ruler has in fact reduced the *Dao* to his own person: "Still, like the primitives who dance and act out their roles behind their totem masks, Han Fei's ruler camouflages himself with Nature and mimics the ways of Nature such that it is not he but Tao or Nature that is acting."⁹⁹ Close as their positions might seem, Chen's account of Han Fei is vastly different from Wang and Chang's account. The latter believe that for Han Fei, the ruler must imitate the *Dao* because the human world functions as a microcosm of the natural world. Chen, however, believes that Han Fei has surreptitiously reduced the *Dao* to nothing more than the ruler. It is not surprising then that Chen reaches the very opposite conclusion from Wang and Chang, and insists that Han Fei is a legal positivist through and through. She writes, "[Han Fei's] ruler, through mimicking Nature in every way, has completely usurped the place of Nature. In the *Han Fei Tzu*, we witness the dangerous situation of a reason which by parading itself as Nature abolishes all its own limitations."¹⁰⁰ As an aside, Chen's comment also highlights the reason for our fear of legal positivism. Such a fear is really driven by the belief in the West that legal positivism, by removing all constraints on the ruler, contributed ultimately to the emergence of wicked Nazi laws. Similarly, we fear that if Han Fei's ruler were not answerable to a higher authority like the *Dao*, then all forms of abuse would be permissible.

How natural, then, is Han Fei's naturalism? Is he genuinely interested in discovering the *Dao* in order to correlate the operations of the state with the operations of the cosmos, or is he simply "parading" as the *Dao* so as to fortify the power of the ruler in what then turns out to be a remarkable piece of political sleight of hand? The problem

⁹⁹ Ellen Marie Chen, "The Dialectic of Chih (Reason) and Tao (Nature) in the *Han Fei Tzu*, *Journal of Chinese Philosophy* 3, 1975, p. 1.

¹⁰⁰ *Ibid.*, p. 15.

with the *Han Fei Zi* is that both readings seem to be equally consistent with the text. This problem is compounded by Han Fei's apparent belief that only the Legalist-Daoist ruler who possesses something like the mystic gnosis is able to apprehend the *Dao* and govern in accordance with it. Chad Hansen writes, "Han Feizi saw Laozi's negative *dao* as an authoritarian theory of political leadership based on asserting an absolute point of view. Special people can access this point of view using the techniques of 'empty, unified, and still.'... Xunzi and Hanfeizi, quite predictably, each separately suppose that this neutral, objective, transcendent, mystical point of view is their own!"¹⁰¹ If Han Fei alone has this privileged access to the *Dao*, however, his claim that his is the correct Way of government is simply unverifiable.

1.2 A stalemate?

We began this chapter by asking why Han Fei borrows from Daoism. Is he a genuine Daoist or is he simply a Machiavellian in Daoist guise? We learnt that Western scholars typically cast this question in terms of whether Han Fei is a natural law theorist or a legal positivist. One camp of scholars, represented by Peerenboom, reads Han Fei as a legal positivist and concludes that he distorts Daoism for his own purposes. The other camp, represented by Wang and Chang, insists that Han Fei is some kind of natural law theorist; that he is a genuine adherent of the *Dao* who consciously fashions his laws and institutions after it. We thought that this debate would throw up some clues as to the relationship between law and morality in the *Han Fei Zi*. If Han Fei were shown to be a legal positivist, then on Hart's account of legal positivism, he must deny a necessary connection between law and morality. Because of how legal positivism has come to be

¹⁰¹ Chad Hansen, "Han Feizi: The Ruler's Interpretation," in *A Daoist Theory of Chinese Thought: a philosophical interpretation*, Oxford University Press, 1992, pp. 371-372.

associated with the horrors of the Nazi experience, not a few scholars conclude that Han Fei must therefore be a defender of despots. If, on the other hand, Han Fei turned out to be a natural law theorist, then the traditional scholarship on Han Fei would need to be reconsidered. However, by the end of our investigation, it appears that a good case can be made for both the positivist and natural law readings of the *Han Fei Zi*, which leaves us not any wiser as to how law and morality are related in Han Fei's writings.

It is perhaps wrongheaded to even think about the relationship between law and morality in the *Han Fei Zi* in terms of where Han Fei stands in the natural law-legal positivist debate. For one, Western scholars who engage in this debate tend to display a very crude understanding of the difference between legal positivism and natural law. To better understand this difference, let me quote Hart at length:

There are many different types of relation between law and morals and there is nothing which can be profitably singled out as *the* relation between them. Instead it is important to distinguish some of the many different things which may be meant by the assertion or denial that law and morals are related. Sometimes what is asserted is a kind of connexion which few if ever have denied; but its indisputable existence may be wrongly accepted as a sign of some more dubious connexion, or even mistaken for it. Thus it cannot be seriously disputed that the development of law, at all times and places, has in fact been profoundly influenced both by the conventional morality and ideals of particular social groups, and also by forms of enlightened moral criticism urged by individuals, whose moral horizon has transcended the morality currently accepted. But it is possible to take this truth illicitly, as a warrant for a different proposition: namely, that a legal system *must* exhibit some specific conformity with morality or justice, or *must* rest on a widely diffused conviction that there is a moral obligation to obey it. Again, though this proposition may, in some sense, be true, it does not follow from it that the criteria of legal

validity of particular laws used in a legal system must include, tacitly if not explicitly, a reference to morality or justice.¹⁰²

According to Hart, legal positivists do not deny that laws can and often do reflect moral considerations. The crux of their disagreement with natural law theorists is that laws *must* conform to certain moral standards in order to be *legally valid*. He would argue that it is pointless to assert, as Augustine and Aquinas have variously done, that “an unjust law is no law at all.”¹⁰³ Withholding legal recognition from iniquitous rules may, on the contrary, “grossly oversimplify the variety of moral issues to which they give rise.”¹⁰⁴ Critics of Han Fei who label him a legal positivist, however, use this term very crudely to imply that he was totally unconcerned with morality. Peerenboom, for instance, writes to justify his claim that Han Fei “shares [Hart’s] belief that morality and the law need not coincide:” “Han Fei is wholly unimpressed with virtue for virtue’s sake.”¹⁰⁵ For Hart, however, this would be a gross misunderstanding of his minimum separation thesis. On this thesis, Han Fei could well be interested in virtue for virtue’s sake; he could even be a staunch defender of moral values, and yet still be a legal positivist. He would only cease to be one if he held that morality sets the standard for legal validity, or put more simply, that unjust or immoral laws are invalid laws. So it is utterly unhelpful to think about how law and morality are related by asking the question of whether Han Fei is a natural law theorist or legal positivist.

This approach is also wrongheaded in a different way. We thought that by showing Han Fei to be a genuine Daoist, and therefore a natural law theorist on

¹⁰² H. L. A. Hart, *The Concept of Law*, Oxford University Press, 1961, p. 181.

¹⁰³ Quoted in Peerenboom’s *Law and Morality*, op. cit., p. 20.

¹⁰⁴ Hart, *The Concept of Law*, op. cit., p. 206.

¹⁰⁵ Peerenboom, *Law and Morality*, op. cit., p. 143.

Peerenboom's account, we would have succeeded in establishing a necessary connection between law and morality in his writings. It would then be wrong to assert, as many critics do, that Han Fei accords the ruler vast powers to create laws without any regard for morality. However, this argument is problematised by the fact some scholars regard Daoism as 'amoral,'¹⁰⁶ or as a "non-ethics."¹⁰⁷ If Daoism were indeed 'amoral,' then even if we show Han Fei to be a genuine Daoist, we would still not have established any relation between law and morality in his writings.

What we need to do instead is to specify the type of relation between law and morality that we are interested in. I suggest that, basically, we want to answer the questions: Is Han Fei the defender of despots that critics make him out to be? Is there some implicit morality in his system, one that is admittedly different to the conventional morality espoused by the Confucians? These questions are better answered by exploring Han Fei's goal for government, and testing the commonly held belief that he sought first and foremost to benefit the ruler at the people's expense. This will be our task in the next chapter.

¹⁰⁶ I think such a criticism came about because of statements in the *Lao Zi* and *Zhuang Zi* exhorting people to forget about *ren* (仁) and *yi* (义), and Zhuang Zi's saying that even robbers have their own *dao*.

¹⁰⁷ Li You-Zheng, *The Structure of the Chinese Ethical Archetype: the archetype of Chinese ethics and academic ideology: a hermeneutico-semiotic study*, Peter Lang, 1997. See sections titled "Taoist Ethical Nihilism" and "The Taoist Challenge to Epistemology of Confucian Ethics," pp. 258-284.

Chapter Two: Han Fei – a closet Confucian?

We began this study with the question: What is the relationship between law and morality in the *Han Fei Zi*? Is Han Fei advocating a complete break between law and morality in a bid to secure absolute power for the ruler? In Chapter One, we tried to answer the question by exploring the Daoist influence on Han Fei. We thought that if it could be shown that his laws are somehow constrained by the *Dao*, then he cannot be said to be “amoral.” However, by the end of the chapter, we saw that the textual evidence was inconclusive since both the positivist and natural law readings seem equally plausible. Furthermore, even if we could prove Han Fei to be a genuine Daoist, if it turns out that the *Dao* itself is amoral, as some claim, then our investigation into his relationship with Daoism would be futile. In this next chapter, I will attempt to answer the question by, instead, trying to understand the *raison d’être* of government for Han Fei. I will argue that politics are tied to moral considerations in Han Fei’s scheme because in spite of his disagreement with the Confucians over the *means* to benefit the people (*li min*: 利民), he shares their fundamental belief that this is the ultimate *end* of government.

2.1 Government for the ruler or for the people?

The standard view of Han Fei is that he is a defender of despots. Vitaly Rubin is certainly thinking of Han Fei when he makes the more general charge, that “Legalist law was intended to serve the despot, not to limit him.”¹ James Landers, who wrote his doctoral dissertation on “The Political Thought of Han Fei,” compares Han Fei with his Confucian teacher, Xun Zi, and observes: “Hsun-tzu’s objective was to have a state which considered only the welfare of the people while Han Fei wanted a citizenry whose

¹ Vitaly A. Rubin, *Individual and State in Ancient China – essays on four Chinese philosophers*, trans. Steven I. Levine, Columbia University Press, New York, 1976, p. 70.

only concern was for the welfare of the state.”² Watson expresses this same view in the introduction to his translation of Han Fei’s basic writings: “[Legalism] addressed itself exclusively to the rulers, taking no interest in private individuals or their lives except to the extent that they affected the interests of the ruling class.”³ In short, the standard view sums up Han Fei’s political philosophy in the aphorism: “government of the ruler, by the ruler, for the ruler.”⁴

I think a closer examination of Han Fei’s writings in fact shows him to be more aligned with his Confucian adversaries than he would care to admit. Before examining his writings, however, we need to clarify exactly what is meant by the term “*li min*.” For this, it might be helpful to refer to Roger Ames’ study of “The Art of Rulership,”⁵ where a whole chapter is devoted to explaining “*li min*,” and comparing the various schools’ commitment to it. In this chapter, Ames argues that “throughout *The Art of Rulership*, there is a sustained attempt to subordinate the interests of the ruler to the welfare of the people. This theme [is] notably the converse of traditional Legalist doctrine.”⁶ He writes further on: “...This theme of giving primacy to the welfare of the people can be characterised as ‘benefiting the people’ (*li min*).”⁷ Ames qualifies that in *The Art of Rulership*, as in most early texts, “*li* is applied socially to represent the positive meaning of ‘benefit,’ and applied personally with the pejorative sense of ‘self-interest’.”⁸ He then

² Throughout the *Han Fei Zi*, Han Fei conflates the interests of the state with the interests of the ruler. James Russell Landers, “The Political Thought of Han Fei,” Indiana University, Ph. D., 1972.

³ Burton Watson, *Han Fei Tzu: Basic Writings*, Columbia University Press, 1964, pp. 6-7.

⁴ Roger Ames, *The Art of Rulership*, University of Hawaii Press, 1983, p. 50.

⁵ This is book nine of the *Huai Nan Tzu*. According to Roger Ames, this text, which takes its name from the prince of Huai Nan, Liu An, is a Han Dynasty anthology that discusses many of the basic ideas and beliefs that had evolved during the period of the ‘Hundred Schools.’ See Ames’ preface to *The Art of Rulership*, *ibid.*, especially p. 5.

⁶ *Ibid.*, p. 153.

⁷ *Ibid.*, p. 154.

⁸ *Ibid.*, p. 155.

argues that *The Art of Rulership* fuses “the basically Legalist notion of manipulating the natural human devotion to self-interest with the Confucian-Mohist principle of *li min* – benefiting the people.”⁹ According to Ames, *The Art of Rulership* differs “substantially” from Legalism by asserting that the ruler’s interests coincide with those of his people.¹⁰ In contrast, “the Legalist thinkers ... were adamant that the sole purpose of government is to serve the ruler’s interests. If benefiting the people is conducive to this end, Legalist doctrine says benefit them, but where the interests of the ruler and the people are at cross purposes, there is no question whose interests must be served.”¹¹

I disagree with Ames’ reading of Han Fei because a close study of the *Han Fei Zi* reveals that Han Fei, like the Confucians, was primarily concerned with the people’s welfare. In “Asking T’ien: Two Dialogues (问田),” Han Fei responds to T’ang-ch’i Kung, who warns him against propounding principles of law and tact, lest he suffers the same fate as Wu Ch’i and Lord Shang, who met violent deaths because their proposals were too radical for their times and rulers. Han Fei replies:

Indeed, the exercise of the ruling authority of All-under-Heaven and the unification of the regulation of the masses is not an easy task. Nevertheless, the reason why thy servant has given up your honourable teachings [or the teachings of the former kings]¹² and is practising his own creeds is that thy servant personally regards the formulation of the principles of law and tact and the establishment of the standards of regulations and measures as the right way to benefit the masses of people (*li min*). Therefore, not to fear the threat and outrage of the violent sovereign and stupid superior but to scheme

⁹ Ames, *The Art of Rulership*, op. cit., p. 155.

¹⁰ Ibid., p. 156.

¹¹ Ibid., p. 157.

¹² Note in brackets mine. The Chinese reads, “废先王之教,” which literally means, “discarding the teachings of the former kings.” Liao follows Wang Wei’s proposal to translate “先生” instead of “先王.” See Liao’s footnote 1 in W. K. Liao, *The Complete Works of Han Fei Tzū*, vol. 2, p. 211.

definitely for the advantages of unifying the people, is an act of benevolence and wisdom (仁智); whereas to fear the threat and outrage of the violent sovereign and stupid superior and thereby evade the calamity of death, is a clear understanding of personal advantages, and to ignore the public benefit of the masses, is an act of greed and meanness. Since thy servant cannot bear entertaining the act of greed and meanness and dare not destroy the act of benevolence and wisdom, though Master has the kind intention to make thy servant happy, yet in fact it will be detrimental to thy servant.¹³

What emerges from this passage is the picture of a man who was attuned to the harsh realities of his day and who firmly believed that the only way to benefit the people in those chaotic times was to discard the ancients' prescription for order, and instead, uphold the principles of law and tact. Han Fei found himself thrust onto the political stage during the turbulent Warring States period (480-221 B.C.), which as its name suggests, was marked by incessant interstate wars. This situation of internecine strife also coincided with the breakdown of the feudal order in China, which completely overturned social norms and left the people in a state of utter confusion, on top of having to suffer the consequences of war. Han Fei was convinced that his Legalist programme was the cure to the prevailing political disorder and was prepared to forego any personal advantage, even face the threat of death, in order to *li min* or benefit the people. He believed that his, rather than the Confucians' theory of benevolent government, was the truly benevolent and wise way to govern. For us who have the benefit of hindsight, the dramatic irony in the above passage is glaring as it eerily foreshadows Han Fei's eventual death as decreed by the King of Qin in 233 B.C.

¹³ Liao, vol. 2, pp. 210-211.

We get another glimpse of Han Fei's ultimate goal for government in this following passage from "Ministers Apt to Betray, Molest, or Murder Ruler (奸劫弑臣)." In this chapter, Han Fei berates the "stupid scholars of the world," who are oblivious to the actual conditions of chaos and insist on chanting "hackneyed old books" which are no cure to the present disorder. The sage, however, acts differently:

... [W]hen governing the state he rectifies laws clearly and establishes penalties severely in order to rescue all living beings from chaos, rid All-under-Heaven of misfortune, prohibit the strong from exploiting the weak and the many from oppressing the few, enable the old and the infirm to die in peace and the young and the orphan to grow freely, and see to it that the frontiers be not invaded, that ruler and minister be intimate with each other, that father and son support each other, and that there be no worry about being killed in war or taken prisoner.¹⁴

Again, we see that a deep concern for the people lies at the heart of Han Fei's political programme. What is striking about this passage is its uncanny resemblance to descriptions of the ideal Confucian state. A typical portrait of the Confucian state is painted for us in *Mencius* IA7, where Mencius instructs King Hsüan of Ch'i on how to practice benevolent government. He argues that first and foremost, the ruler must ensure that the people have the means to support themselves. Only when their basic material needs are met can they have constant hearts to practice self-cultivation. He says:

"Hence when determining what means of support the people should have, a clear-sighted ruler ensures that these are sufficient, on the one hand, for the care of parents, and on the other, for the support of wife and children, so that the people always have sufficient food in good years and escape starvation in bad; only then does he drive them towards

¹⁴ Liao, vol.1, p. 124.

goodness; in this way the people find it easy to follow him ... If you wish to put this into practice, why not go back to fundamentals? If the mulberry is planted in every homestead of five *mu* of land, then those who are fifty can wear silk; if chickens, pigs and dogs do not miss their breeding season, then those who are seventy can eat meat; if each lot of five hundred *mu* is not deprived of labour during the busy seasons, then families with several mouths to feed will not go hungry. Exercise due care over the education provided by village schools, and discipline the people by teaching them duties proper to sons and younger brothers, and those whose heads have turned grey will not be carrying loads on the roads. When the aged wear silk and eat meat and the masses are neither cold nor hungry, it is impossible for their prince not to be a true King.”¹⁵

This passage is similar to the earlier one quoted from the *Han Fei Zi* in its insistence that government is for the people. Both Han Fei and Mencius agree that it is the ruler’s prerogative to “rescue all living beings from chaos” and restore peace in the land so that the people can grow freely and support themselves. In both their descriptions of the ideal state, peace prevails; there is “no worry about being killed in war or taken prisoner,” and men are not whisked from the fields to fight. The weakest and most vulnerable members of society – the orphan and the infirm, the young and the old, are also cared for and not left hungry and cold. In such a condition of peace, the people relate to one another harmoniously; ruler and ministers are intimate with each other and fathers and sons support each other. In contrast to Han Fei, however, Mencius believed that government for the people could not stop at merely providing for their material well-being. Restoring peace to the state and ensuring that the people had a constant means of support was only a precondition for ultimately driving the people towards goodness. That Han Fei did not

¹⁵ Mencius, trans. D. C. Lau, Penguin Books 1970, pp. 58-59.

see this as a proper end of government is largely due to his bleak understanding of human nature. He did not share the Confucian's optimism in the innate goodness of man. As such, he regarded their goal of educating the people in virtue as naive and impracticable.

More fundamentally, Han Fei disagreed with the Confucians on *how* to restore peace to the empire. Han Fei lived in an age of incessant inter-state warfare. The social norms that governed human interactions had all but broken down, leaving "the strong to exploit the weak and the many to oppress the few." He was convinced that the only way to cure such disorder and benefit the people was to "rectify laws clearly" and "establish penalties severely." Mencius, on the other hand, believed that order could be restored internally through education, by teaching the people "the duties proper to sons and younger brothers." We see then that the crux of Han Fei's quarrel with the Confucians is their disagreement over the *means* to secure benefit for the people, and not the *end* of government.

Someone would object, surely it is not enough to just cite a few passages from the *Han Fei Zi* to establish the claim that Han Fei espouses government for the people. How can we be sure that Han Fei is not simply paying lip service to this ideal in order to win support for or justify his draconian policies? I think the first thing to be said against such an objection is that the doctrine of absolute despotism does not need popular support. If Han Fei were pitching his Legalist programme to a despot, there would be no need to even pretend that he is concerned with the people's welfare. On the contrary, Han Fei would need to convince the despot why it is in his interests to govern for the people. That said, however, critics find it extremely difficult to square Han Fei's apparent concern for the people with his draconian policies, which appear to benefit the ruler at the people's

expense. From the passage quoted above, for example, how are severe penalties compatible with his goal to “rescue all living beings from chaos” and enable all to live in peace? Surely the harsh and merciless penalties that Han Fei prescribes terrorise the people rather than bring about the harmony and serenity that is described! The question really is how we can reconcile Han Fei’s avowed goal of benefiting the people with the preponderance of textual evidence that suggests otherwise – that he in fact defends government for the ruler. For besides advocating harsh penalties (even for small crimes), Han Fei also recommends getting rid of scholars and dissenters, a heavy-handed treatment of ministers and a “totalitarian” control over the empire. He tops this all off by publicly renouncing conventional morality.

In the following section, I will examine some of this evidence and try to show that it is not incompatible with Han Fei’s genuine commitment to *li min*.

2.2 A defence of Han Fei

K.K. Lee writes, “The Legalists showed the inadequacy and even irrelevance of moral notions to political philosophy. They were fully aware that law and morality are distinct, although overlapping in some areas.”¹⁶ I will argue in this section that in spite of Han Fei’s call to harshness and deceit in politics, law and morality are not two distinct, and accidentally “overlapping” spheres in his scheme. Contrarily, law and morality in the *Han Fei Zi* are intrinsically linked because Han Fei’s entire political edifice is fundamentally constrained by his moral concern to benefit the people.

¹⁶ K.K. Lee, “The Legalist School and Legal Positivism,” *Journal of Chinese Philosophy* 3, 1975, p. 27.

2.2.1 Harsh penalties benefit the people?

Macabre as it sounds, Han Fei argues precisely that harsh penalties benefit the people. Consider this passage from “Surmising the Mentality of the People: A Psychological Analysis of Politics (心度):”¹⁷

The sage in governing the people considers their springs of action, never tolerates their wicked desires, but *seeks only for the people’s benefit (li min)*. Therefore, the penalty he inflicts is not due to any hatred for the people, but to his motive of *loving the people*. If penalty triumphs, the people are quiet; if reward over-flows, culprits appear. Therefore the triumph of penalty is the beginning of order; the overflow of reward, the origin of chaos.¹⁸ [Italics mine]

In this passage, Han Fei explicitly ties the people’s benefit to their being inflicted with severe penalties. Moreover, he makes the astonishing claim that visiting these harsh punishments on the people is in fact a display of the ruler’s love for them! Han Fei makes this same claim later on in the chapter when he writes, “penalty is the beginning of love.”¹⁹

How is meting out harsh punishments tantamount to loving the people or benefiting them? According to Han Fei, this makes sense once we understand human psychology. Looking around him, Han Fei drew two conclusions about human nature. First, human beings have a natural propensity to do bad. Second, one of the main motivations of human behaviour is the fear of punishment. Hence, he believed that only the most severe and brutal penalties could deter people from committing crimes, and in

¹⁷ I quite like Liao’s translation of “*xin du*” because it aptly captures what Han Fei does in this chapter, which is to show how his government measures derive from an understanding of human psychology.

¹⁸ Liao, vol. 2, p. 326.

¹⁹ Liao, vol. 2, p. 327.

this way escape punishment altogether. In “Ministers Apt to Betray, Molest, or Murder Ruler,” for example, Han Fei writes:

Indeed, severe penalty is what the people fear, heavy punishment is what the people hate. Accordingly, the wise man promulgates what they fear in order to forbid the practice of wickedness and establishes what they hate in order to prevent villainous acts.²⁰

The point is made even clearer in “Six Contrarities (六反),” where Han Fei defends himself against critics who were charging that heavy penalties injure the people. According to these critics, since light penalties suffice to suppress villainy, it is totally unnecessary to resort to the harsh punitive measures that Han Fei was recommending. In his defence, Han Fei writes:

To be sure, what is stopped by heavy penalties is not necessarily stopped by light penalties; but what is stopped by light penalties is always stopped by heavy penalties. For this reason, where the superior sets up heavy penalties, there all culprits disappear. If all culprits disappear, how can the application of heavy penalties be detrimental to the people? In the light of the so-called ‘harsh penalties,’ what the culprits gain is slight, but what the superior inflicts, is great. As the people never venture a big penalty for a small gain, malefactions will eventually disappear. In the face of the so-called ‘light penalties,’ however, what the culprits gain, is great, but what the superior inflicts, is slight. As the people long for the profit and ignore the slight punishment, malefactions never will disappear. Thus, the early sages had a proverb, saying: “Nobody stumbles against a mountain, but everybody trips over an ant-hill.” The mountain being large, everyone takes notice of it; the ant-hill being small, everyone disregards it. Now supposing penalties were light, people would disregard them ... For this reason, the policy of light

²⁰ Liao, vol. 1, p. 128.

punishment would either plunge the state into confusion or *set traps for the people*. Such a policy may thus be said to be detrimental to the people.²¹ [Italics mine]

In the light of man's natural tendency to seek profit and avoid loss or harm, Han Fei argues that the harm inflicted by penalties must exceed the benefit to the person of committing a crime. Thus, the ruler ought to lay down the severest penalties, in order to make the cost of committing crime so high that no one would risk it. In this way, the ruler in fact benefits the people by his harshness, since he thereby spares them the fate of punishment altogether.

Interestingly, in this passage, Han Fei echoes the Confucian belief that laws trap the people. Mencius had argued that it is important for rulers to provide the people with a constant means of support because, otherwise, they will lack constant hearts and “lacking constant hearts, they will go astray and get into excesses, stopping at nothing. To punish them after they have fallen foul of the law is to *set a trap for the people*,” which a benevolent man in authority surely cannot allow himself to do.²² Mencius points out plainly that if the people's basic material needs are not met, they cannot concentrate on cultivating their virtue. This will result in them going astray and even falling into crime. To not pre-empt the problem by providing for the people's needs, but instead, to punish them only after they have fallen afoul of the law is, Mencius argues, tantamount to setting a trap for the people. The logic here is that by not first supplying the people with the means to survive, the ruler is in effect *driving* them to transgress the law and, thereafter, to face sure punishment. For Han Fei, however, it is not the law per se with its attendant penalties that traps the people. Instead, it is “the policy of light punishment” that traps the

²¹ Liao, vol. 2, p. 244.

²² *Mencius* IIIA3, trans. D. C. Lau, op. cit., p. 97.

people. According to Han Fei, setting up light penalties would result in people disregarding the risk of punishment and venturing to transgress the law. Inevitably, in his proposed system of tight and constant surveillance, they would get caught in the dragnet of the law, and face inescapable punishment. Han Fei illustrates this by making apt use of an old proverb. He compares the laying down of light penalties to putting “ant-hills” in the people’s paths; both cause them to trip and stumble. Such a policy is therefore detrimental to the people.

Borrowing from Shang Yang,²³ Han Fei summarises his policy of heavy punishment in the principle, “abolishing penalties by means of penalties (以刑去刑),” which he explains in “Making Orders Trim (饬令)”: “In inflicting penalties light offences should be punished severely; if light offences do not appear, heavy offences will not come. This is said to be to abolish penalties by means of penalties.”²⁴ Here, it is worth noting the extent of the application of this principle. Han Fei is not merely advocating heavy penalties for major offences; he is advocating heavy penalties for even *minor* infractions. This runs counter to Western theories of justice, which typically require that punishments be proportionate to the crime. For Han Fei, however, the most effective way to benefit the people is for the ruler to enable them to avoid punishment altogether, and this by severely punishing even minor crimes.

Although he attributes his theory of punishment ultimately to Shang Yang, Han Fei also appears to be influenced by the Daoist idea of tackling a problem at its root. Consider this passage from “Surmising the Mentality of the People:”

²³ In “Inner Congeries of Sayings, The Upper Series: Seven Tacts (内储说上七术),” Han Fei attributes this principle to Shang Yang. See Liao, vol. 1, p. 295.

²⁴ Liao, vol. 2, p. 325.

Indeed, it is the people's nature to delight in disorder and detach themselves from legal restraints. Therefore, when the intelligent sovereign governs the state, if he makes rewards clear, the people will be encouraged to render meritorious services; if he makes penalties severe, the people will attach themselves to the law. If they are encouraged to render meritorious services, public affairs will not be obstructed; if they attach themselves to the law, culprits will not appear. Therefore, he who governs the people should *nip the evil in the bud*.²⁵ [Italics mine]

We see the Daoist influence on Han Fei even more clearly in “Criticisms of the Ancients, Series Three (难三),” where he quotes directly from Chapter Sixty-Three of the *Lao Zi* to justify punishing a crime in its infancy:

The enlightened ruler sees an evil in the bud, wherefore the people cannot plot any large-scale rebellion. As he inflicts small punishments [when the evil is still in its bud]²⁶, the people cannot cause any serious disturbance. This means to “contemplate a difficulty when it is easy and manage a great thing when it is small.”²⁷

As we have concluded in Chapter One, it is impossible to know Han Fei's real motives for borrowing from Daoism. Suffice it to say that if his theory of punishment is somehow generated by his observations of the *Dao*, then it is a further, albeit unnecessary, proof that he is not advocating severe penalties because of a mere fixation with power.

To summarise, in this section, I have argued that although Han Fei's policy of harsh penalties is ostensibly an instrument for enhancing the ruler's power and therefore seemingly at odds with the concept of *li min*, it is in fact motivated by Han Fei's concern to benefit the people, based on his understanding of human nature.

²⁵ Liao, vol. 2, p. 326.

²⁶ I think this is a better translation for “行小诛于细,” which Liao translates as, “As he inflicts small punishments for minor offences.”

²⁷ Liao, vol. 2, p. 178.

2.2.2 Han Fei's purges

Critics see Han Fei's purging of opponents and dissenters as further proof that he is primarily interested in government for the ruler. In "Outer Congeries of Sayings, Lower Left Series (外储说左下)," for example, Han Fei sanctions Fei Chung's recommendation to censure or kill (诛)²⁸ the Earl of the West, Ch'ang, for undermining the people's allegiance to the ruler, Chow:

Fei Chung spoke to Chow: "The Earl of the West, Ch'ang, is worthy. The hundred surnames like him. The feudal lords turn to him. He must be censured. If not ousted, he will be a menace to the Yin Dynasty." "You are speaking," said Chow, "of a righteous lord. Why should he be censured?" In reply Fei Chung said: "The crown, however worn out, is always put on the head; the shoes, though decorated with five colours, are trodden upon the ground. Now the Earl of the West, Ch'ang, is subordinate to Your Majesty. He has practiced righteousness, wherefore people turn to him. Surely, it must be Ch'ang who will eventually become a trouble to All-under-Heaven. Any minister who does not serve his master with his worthiness must be censured. Moreover, being the ruler, Your Majesty censures a guilty minister. How can there be any fault in so doing? "Indeed with benevolence and righteousness the ruler encourages the subjects. Now that Ch'ang is fond of benevolence and righteousness, it is impracticable to censure him." Though persuaded for three times, he never listened. Hence followed the fall of Yin.²⁹

To properly appreciate the extent of Han Fei's purges, I think it is apt to drop the euphemism, 'censure,' and replace it with 'kill' or 'exterminate.' Han Fei was not merely advocating the dismissal or censure of menaces in the government; he was calling for the *extermination* of ministers who threatened the ruler's position. Consider this other

²⁸ The Chinese character "诛" can be translated as "to censure" (Liao) or "to kill" (Zhang Jue).

²⁹ Liao, vol. 2, pp. 74-75.

passage from “Outer Congeries of Sayings, Upper Right Series.” Here, Han Fei is illustrating the point that a sovereign should remove those ministers who refuse to be transformed by his influence or position (*shi*).³⁰ He tells of a T'ai-kung Wang, who upon receiving rule of the country ordered the immediate execution of two retired scholars, K'uang-yü and Hua-shih. When asked by Duke Tan of Chou why he killed two worthies, T'ai-kung Wang replied:

“These two brothers had set up the principle: ‘Neither of us would minister to the Son of Heaven and make friends with the feudal lords. We would till and work and live on the crops and dig a well and drink the water. We would not ask anybody for help and receive neither title from any superior nor emolument from any ruler. We attend not to any official post but to our own physical strength.’ Their refusal to minister to the Son of Heaven forecast Wang’s inability to rule them as subjects. Their refusal to make friends with the feudal lords forecast Wang’s inability to set them to work. Their pledge to till and work and live on the crops and dig a well and drink on the water and thereby ask nobody for help forecast Wang’s inability to encourage them with reward and prohibit them with punishment ... To let them become celebrated without bearing arms and wearing armour and become famous without tilling the land and weeding the farm is not the way to give teaching to the country ... [Just like the best steed in All-under Heaven that refused to be driven] Similarly, the two brothers proclaimed themselves worthy personages of the world but would not work for any sovereign. However worthy their deeds might be, if they would not work for the ruler, they were not what the enlightened sovereign ought to take as subjects ... This was the reason why they were executed (诛).”³¹

³⁰ See Canon One. Liao, vol. 2, p. 86.

³¹ Liao, vol. 2, pp. 95-96.

These two passages seem almost like pages out of Hitler or Stalin's memoirs. Who can forget their infamous campaigns to consolidate power by purging opponents and dissenters? Their purges should not shock if we consider that several centuries earlier, Han Fei advocated a similar policy to consolidate the ruler's position. But surely, we ask, how can Han Fei claim to be benefiting the people when, as seen in the first passage, he sanctions the removal of a minister precisely in virtue of the latter's benevolence and righteousness toward the people? And how can he be said to be benefiting the people when he commends the brutal killing of two retired worthies, who simply wanted to withdraw from the public sphere to practice their private virtue?

In the first passage, Han Fei approves of Fei Chung's recommendation because he believes that a proper distinction must be maintained between a ruler and his ministers.³² Just as a crown, no matter how worn-out, is always put on the head, and shoes, no matter how beautifully decorated, are to be trodden upon the ground, so too, a minister, however worthy, must know his proper place and "serve his master with his worthiness." By, instead, vying with his ruler for the people's allegiance, the Earl of the West severely undermined the former's *shi* or power, and thus had to be removed, even killed. If we recall from Chapter One the central importance of *shi* to Han Fei's political programme, it is perhaps easier to exonerate him. For Han Fei believed that the only way to order the empire in that chaotic age was to have the ruler make use of his "august position (*shi*)" to control his ambitious ministers, who were perpetually scheming to oust him and grab power for themselves. Since the ruler had no choice but to rely on such ministers to run the innumerable affairs of government, it was crucial for him to wield his position so as

³² The cited passage is part of Han Fei's annotation to Canon Three, which states that rulers must be properly distinguished from their ministers.

to get them to serve him with their talents. If the ruler allowed his ministers to undermine his position with their talents or virtues, then like Chow, he would inevitably be overthrown and the Dynasty would see a concomitant collapse. The conflict in the empire would, in this way, never cease and the people would never enjoy peace.

In the second passage cited above, the two worthies were killed precisely because they refused to put their talents and intelligence to work for their ruler. They also posed such a grave threat to the ruler because, unlike the masses, they were not amenable to the ruler's control. For the vast majority of the population, Han Fei's ruler could rely on his two handles of reward and punishment to either entice or whip them into working for the benefit of the state. The problem with such scholars as K'uang-yü and Hua-shih was that they could not be motivated by either rank and emolument or censure and punishment. In an interesting parallel, Singapore's Deputy Prime Minister and Coordinating Minister for Security and Defence, Dr Tony Tan, recently expressed the same difficulty in dealing with terrorists. In an address to the Parliament, he declared that Singapore would not negotiate with terrorists for the release of any hostages because these terrorists "cannot be persuaded by normal human interests."³³ Han Fei was convinced that these scholars who lay outside the ambit of the ruler's control were severely undermining the ruler's *shi*, since they could not be transformed and put to work by it. Such intransigence needed to be dealt with harshly, lest the people look to their negative example and similarly refuse to serve the ruler.

Furthermore, these scholars were confusing the ruler's standards by proclaiming themselves worthy even though they neither took up arms nor tilled the land, which were

³³ Quoted in an article titled "S'pore 'won't negotiate' with terrorists," by M. Nirmala, published in *The Straits Times*, on July 21, 2004.

the two stipulated means to gain honour and reputation. If the people learnt that there was an easier route to achieving fame than to risk their lives at war or to toil at the fields, then, Han Fei argued, they would surely opt for the easier route. Consequently, the fields would lie in neglect and no one would go to war. Such a weakened state would be ready prey for its stronger neighbours, and its people would forever remain in the throes of war.

In summary, brutal as they may seem, Han Fei saw his purges as necessary for the long-term benefit of the people. To put this in context, even the most diverse thinkers of his day, from the Confucians to the Mohists, believed that the only way to benefit the people in the long-term was to put a decisive end to the warring by unifying the empire. Han Fei firmly believed that a ruler who allowed dissidents and opponents to undermine his *shi* would eventually lose all ability to control the people and channel their energies toward unification. This could only spell more prolonged suffering for the people.

2.2.3 Han Fei's Orwellian state

Many doubts remain after the last section concerning Han Fei's genuine commitment to *li min*. How can Han Fei claim to be benefiting the people when in his state, the people seem to be reduced to mere cogs in a machine, having worth only insofar as they perform a useful function in the state machinery? More fundamentally, what benefit is there to the people when the ruler is allowed such extensive control over every aspect of their lives, dictating what they should do and how they should live? As Ames puts it, "In the *Han Fei Tzu*, the ruler's policy of *yung chung* – in this case, 'exploiting the people' is perhaps a better rendering – is set against the inadequacy of his reliance on

his own abilities. The point is that *the ruler's own interests* can best be served by orchestrating the collective energies of his people.”³⁴ [Italics mine]

As I have suggested in the previous section, Han Fei was not alone in thinking that the way to a lasting peace lay in the unification of the empire. Even the Confucians, who were Han Fei's most bitter opponents, saw in unification the only way to end the incessant inter-state warring. Where they disagreed was on how this unification could or should be achieved. We see evidence of this in *Mencius* IA6, which records Mencius' conversation with King Hsiang of Liang, who asked how the Empire could be settled (定):

“Through unity (一),” I [Mencius] said.

“Who can unite it?”

“One who is not fond of killing can unite it,” I said.

“Who can give it to him?”

“No one in the Empire will refuse to give it to him. Does Your Majesty not know about young rice plants? Should there be a drought in the seventh or eighth month, these plants will wilt. If clouds begin to gather in the sky and the rain comes pouring down, then the plants will spring up again. This being the case, who can stop it? Now in the Empire amongst the shepherds of men there is not one who is not fond of killing. If there is one who is not, then the people in the Empire will come crane their necks to watch for his coming. This being truly the case, the people will turn to him like water flowing downwards with a tremendous force. Who can stop it?”³⁵

The Confucians believed that the sage-king's virtue – his benevolence and righteousness – was sufficient to order the state internally, and bring the whole empire to heel

³⁴ Roger Ames, *The Art of Rulership*, op. cit., p. 154.

³⁵ Mencius, trans. D. C. Lau, op. cit., pp. 53-54.

externally. Internally, the ruler's virtue would flow downwards to transform the people, thereby establishing order in the state. Externally, enemy soldiers who hear of such a benevolent ruler would ineluctably defect from their own armies and submit willingly to his rule. In this way, the Confucian ruler would unify the empire without even having to resort to war. Han Fei dismissed such thinking as naive and totally irrelevant to his day and age. Rather than wait for the rare appearance of a sage-king, Han Fei was convinced that any ruler, however mediocre, could unify the empire simply by holding fast to his three precepts of government – *shi*, *fa* and *shu*. He recognised that the people would not, of their own accord, risk death to fight nor weary themselves in the fields. Yet agriculture and warfare were essential to prospering and strengthening the state, thereby putting it in a position to subdue weaker states and ultimately unify the empire. Because of the people's short-sightedness, Han Fei believed that the only way to get them to work for the benefit of the state, and concomitantly, for their own long-term benefit, was to have the ruler wield his position or influence (*shi*) and make the people conform to his laws or standards (*fa*). As for his rapacious ministers, the ruler would need to use statecraft (*shu*) to employ them. If any one of these three instruments of government were undermined, the goal of unifying the empire would be thwarted.

It is against this backdrop that we must read the Orwellian-type passages in the *Han Fei Zi*. In “Regulations and Distinctions (制分),” for instance, Han Fei recommends a system of mutual surveillance and implication so that the slightest hint of deviance in the land will be sniffed out and punished. He writes:

For this reason, the state at the height of order is able to take the suppression of villainy for its duty. Why? Because its law comprehends human nature and accords with the principles of government. If so, how to get rid of delicate villainy? By making the people

watch one another in their hidden affairs. Then how to make them watch one another? By implicating the people of the same hamlet in one another's crime. When everyone knows that the penalty or reward will directly affect him, if the people of the same hamlet fail to watch one another, they will fear they may not be able to escape the implication, and those who are evil-minded, will not be able to forget so many people [are] watching them. Were such the law, everybody would mind his own doings, watch everybody else, and disclose the secrets of any culprit. For, whoever denounces a criminal offence, is not held guilty but is given a reward; whoever misses any culprit, is definitely censured and given the same penalty as the culprit. Were such the law, all types of culprits would be detected. If the minutest villainy is not tolerated, it is due to the system of personal denunciation and mutual implication.³⁶

It is hard to imagine how any benefit can accrue to the people from living in such an oppressive environment, where relatives and neighbours are encouraged to forsake their kinship ties and spy on one another to protect their self-interests. The passage above brings to mind a chilling episode from Orwell's disturbing novel, *1984*, where one of the characters, Parsons – an extremely loyal party cadre who is totally incapable of sedition – is reported by his little daughter to the thought-police for sub-consciously uttering anti-party slogans in his sleep. Surely, we object, a system that encourages children to turn against their fathers cannot be one that benefits the people! Yet, such totalitarian control was deemed necessary by Han Fei because he believed that any crime left undetected and unpunished would gravely undermine the ruler's *fa*, since the people would then venture to disregard his laws and commands. As a result, the ruler would lose his ability to control or use the people, and the task of unification would be well-nigh impossible.

³⁶ Liao, vol. 2, p. 331.

It was perhaps inevitable, then, that in the lead-up to unification, everyone worked like cogs in a machine, putting their individual talents to work for the benefit of the state. It is worth noting that Han Fei, unlike Big Brother in *1984*, did not ask the people to sacrifice their personal benefit for the sake of the state. The people were certainly not to be *treated* like cogs in a machine, if this means that they were made to work for no personal gain. What Han Fei advocated was for the ruler to control the means to securing benefit, so that the people would know that the only path to profit lay in conforming to the ruler's *fa*. He wanted to inculcate in the people the principle that "if you want to benefit yourself, benefit your ruler first; if you want to benefit your family, benefit your country first."³⁷ Furthermore, it is possible to read such totalitarian control as an expedient measure to solve the immediate problems of disorder and to achieve unification. While Han Fei insists that *fa* is the corollary to *Dao* in the human realm, he also holds that the content of the ruler's *fa* changes as circumstances change. In "The Five Vermin," for example, Han Fei writes, "Circumstances change according to the age, and ways of dealing with them change with the circumstances."³⁸ Since the ruler's laws are not static, but are, instead, pegged to the circumstances of the day, it is not unreasonable to think that Han Fei would dispense with such totalitarian control when peace has been restored to the empire.

2.2.4 Machiavellian deceit to control ministers

While Han Fei stressed that the ruler's *fa* must be clear and public, he also taught that the ruler's *shu* or statecraft must, in contrast, be mysterious and invisible. In

³⁷ "Outer Congeries of Sayings, Lower Right Series," Liao, vol. 2, p. 127.

³⁸ Watson, p. 99.

“Criticism of the Ancients, Series Three,” for example, Han Fei compares these two instruments of government:

The law (*fa*) is codified in books, kept in government offices, and promulgated among the hundred surnames. The tact (*shu*) is hidden in the bosom and useful in comparing diverse motivating factors of human conduct and in manipulating the body of officials secretly. Therefore, law wants nothing more than publicity; tact abhors visibility.³⁹

Here, we learn that the ruler employs *shu* to manipulate his ministers into divulging their hidden thoughts and intentions. This passage is actually written in response to Kuan Tzû, who taught the ruler to show signs of liking a minister if he approved of the latter’s conduct, and signs of disliking him if the ruler disapproved of him. Kuan Tzû argued that if reward and punishment accord with what is seen, then the minister will dare do no wrong even in unseen places. In rebuttal, Han Fei argues that if a ruler’s approval and disapproval rest on what he observes in public places, then he will never get at the realities of things, since even the most wicked minister would labour to put on a respectful appearance in public. Instead, the ruler must use his “insight” to “illuminate distant crooks,” “discern their hidden secrets and thereby guard against them.”⁴⁰ In short, Han Fei believed that since villainy is rarely displayed visibly in public places, ‘invisible’ methods were necessary to flush it out.

What special ‘insight’ does the ruler possess to deal with distant crooks and how is he to discern their hidden secrets? The *Han Fei Zi* is replete with examples of what the ruler’s arsenal of *shu* (statecraft) comprises. What is disturbing for critics of Han Fei is

³⁹ Liao, vol. 2, p. 188.

⁴⁰ Liao, vol. 2, p. 187.

that these tactics often require the ruler to be scheming and deceitful. In “Eight Canons (八经),” for example, Han Fei writes:

Keep the detectives near by the officials and thereby know their inner conditions. Send detectives afar and thereby know outer affairs. Hold to your clear knowledge and thereby inquire into obscure objects. Give ministers false encouragements and thereby extirpate their attempts to infringe on the ruler’s rights. Invert your words and thereby try out the suspects. Use contradictory arguments and thereby find out the invisible culprits. Establish the system of espionage and thereby rectify the fraudulent people. Make appointments and dismissals and thereby observe the reactions of wicked officials. Speak explicitly and thereby persuade people to avoid faults. Humbly follow others’ speeches and thereby discriminate between earnest men and flatterers. Get information from everybody and know things you have not yet seen. Create quarrels among adherents and partisans and thereby try to disperse them.⁴¹

This passage lists several tactics that Han Fei’s ruler uses to control his ministers. First, he sends out spies among the ministers to watch them. Next, as the passage implies, the ruler shrouds himself in a mist of secrecy so that the ministers cannot guess at his intentions nor know his likes and dislikes. Being ignorant of the ruler’s true intentions and feelings, they cannot hope to fool him with false appearances. The ruler remains secretive by “inverting his words,” “using contradictory arguments,” appearing “humble” so as to detect flatterers, and listening to all alike without favouritism. He also “creates quarrels among partisans” in order to prevent powerful cliques from forming among the ministers.

⁴¹ Liao, vol. 2, pp. 266-267.

In the same chapter, Han Fei also instructs the ruler on how to control more high-ranking ministers:

Those [officials] whose posts are high and responsibilities are great, should be held under surveillance by three means of control, namely, ‘taking hostages,’ ‘holding securities,’ and ‘finding sureties.’ Relatives, wives and sons can be taken as hostages; ranks and bounties can be held as securities; and the ‘three units and basic fives’ that are implicated in any of the members’ illegal acts, can be found as sureties ... When censuring culprits, if name and fact correspond to each other, he should immediately enforce the censure. If their life is detrimental to the state affairs and their death penalty is harmful to the ruler’s name, then he should poison them through drinking or eating, otherwise send them back into the hands of their enemies. This is said to ‘eliminate invisible culprits.’⁴²

These brutal measures seem to reinforce the standard reading of Han Fei as a defender of despots. For how can Han Fei claim to be championing the people’s welfare when his ruler resorts to taking the innocent hostage, even if this is to prevent treason? Furthermore, poisoning a culprit away from the public eye in order to protect the ruler’s name chafes at our contemporary belief in the rights of a criminal to a fair and open trial. It also seems to accord Han Fei’s ruler unlimited powers to remove any thorn in his flesh without any one else ever coming to know of it. Yet, before we write Han Fei off as an advocate of tyranny, it is interesting to note that present-day Britain has just unveiled a proposal for a tough anti-terror Bill which gives the Home Secretary “the potential to put foreign and domestic terrorist suspects under indefinite house arrest on his sole authority.” Presenting this Bill before Parliament, the Home Secretary, Charles Clarke argued that “the exceptional powers are justified because Britain faces unprecedented

⁴² Liao, vol. 2, pp. 262-263.

threats.”⁴³ If the spectre of terrorism is sufficient to warrant such extreme measures from a country which prides itself on being the flagship of democracy in Europe, then perhaps it is not surprising that, given the more precarious times that Han Fei lived in, the ruler needed such “exceptional powers” to order the state.

We could argue that Han Fei’s *shu*, deceitful as it might be, benefits the masses because often, it is the ministers who exploit and oppress the people. Han Fei’s reason, then, for adopting a heavy-handed approach to the ministers would be to prevent them from harming the people. Ultimately, I think the underlying reason for Han Fei’s recommendation of such Machiavellian tactics is his conviction that ministers and rulers have differing interests (臣主异利). Han Fei had a drastically low opinion of ministers. As the title of one of his chapters suggests, he believed that most ministers were apt to betray, molest, or murder the ruler.⁴⁴ In this chapter, Han Fei analyses the governments of Kuan Chung and Lord Shang and comes to the following conclusion:

From such a viewpoint, I can see that the sage in governing the state pursues the policy of making the people inevitably do him good but never relies on their doing him good with love ... To be sure, ruler and minister have no blood kinship, if able to seek safety [or profit]⁴⁵ by following the right and straight way, the minister will apply all his strength to serve the sovereign; if unable to seek safety by following the right and straight way, he will practice selfishness (*xing si*: 行私) and thereby violate the superior.⁴⁶

Han Fei believed that all men alike are driven by profit. In this regard, the ministers of his day were no different to the ordinary man in the street. However, because of their

⁴³ “Britain unveils controversial anti-terror Bill,” published in *The Straits Times* on February 24, 2005.

⁴⁴ Liao’s translation for Chapter 14, “奸劫弑臣.”

⁴⁵ Zhang Jue proposes “profit (利)” for “safety (安).”

⁴⁶ “Ministers Apt to Betray, Molest, and Murder the Ruler,” Liao, vol. 1, p. 121.

proximity to the ruler, ministers, of all the people, had the unique opportunity to manipulate or even murder the ruler for personal gain. Since there are no kinship ties to hold the ministers under obligation to the ruler, if they can profit by following the ruler's laws, they will do so. Otherwise, they will not hesitate to use their private (*si*) means to profit at the ruler's expense. Hence, Han Fei urged the ruler not to rely on his ministers doing him good out of love, but to rely instead on their being unable to betray him.

Han Fei's clear-sighted understanding of man's profit-mindedness convinces him that the interests of the ruler and ministers are fundamentally opposed. Put another way, it is a zero-sum struggle between the two – what is in the interests of the ministers will necessarily be harmful to the ruler. This is evident in the following passage from “Inner Congeries of Sayings, The Lower Series:”

Ruler and minister differ in interest. Therefore, ministers are never loyal. As soon as the minister's interest stands up, the sovereign's interest goes to ruin. Thus wicked ministers would exterminate their opponents at home by sending for enemy troops and bewilder their lord by enumerating foreign affairs. As long as their private interest is accomplished, they never mind any disaster to the state.⁴⁷

Because their interests differ, ministers *can never be* loyal. As such, unless the ruler makes it unprofitable for them to do so, they will *definitely* seek to profit by collaborating with the enemy to undermine their rulers. Han Fei laboured to drive home the principle that rulers and ministers have antithetical or mutually incompatible interests because he had learnt from history that most accounts of regicide happened as a result of the ruler naively trusting his ministers. It is only by grasping this principle, then, that any ruler could hope to unify the empire. In “Eight Canons,” Han Fei writes:

⁴⁷ Liao, vol. 2, p. 2.

Who knows ruler and minister differ in interest, will become supreme. Who regards the difference as identity, will be intimidated. Who administers the state affairs in common with his ministers, will be killed. Therefore, the intelligent sovereign will scrutinise the distinctions between public and private interests and the relative positions of benefit and harm, so that wicked men will find no chance to act.⁴⁸

What is interesting to note from these passages is that the minister's interests are seen as "private interests," and associated with wickedness and harm, whereas the ruler's interests are identified with "public interests" and associated with benefit to the state. We see more evidence for this in this passage from "Having Regulations:"

[Previously strong states] all fell into decay, because their ministers and magistrates all followed the path to chaos and never sought for the way to order ... Therefore, at present, any ruler able to expel private crookedness (去私曲) and uphold public law (就公法), finds the people safe and the state in order; and any ruler able to expunge private action and act on public law, finds his army strong and his enemy weak.⁴⁹

Again, we see that it is the "private crookedness" of ministers that has brought about the ruin of previously strong states. Therefore, to order the state and make the people safe, the ruler must uphold public law and stop the ministers from furthering their private gain at the expense of the ruler, the state and the people. As this next passage tells us, the ruler must eradicate the selfish or private motives of his ministers and reinforce their sense of public justice:

Every minister cherishes both selfish motive (私心) and public justice (公义). To refine his personality, improve his integrity, practice public creeds, and behave unselfish in office, is the public justice of the minister. To corrupt his conduct, follow his desires,

⁴⁸ Liao, vol. 2, p. 261.

⁴⁹ Liao, vol. 1, p. 39.

secure his personal interests, and benefit his own family, is the selfish motive of the minister. If the intelligent sovereign is on the Throne, every minister will discard his selfish motive and practice public justice. If the violent sovereign (乱君: or sovereign given to disorder) is on the Throne, every minister will cast public justice aside and act on his selfish motive. Thus ruler and minister have different frames of mind (臣主异心).⁵⁰ [The ruler tames the ministers by (appealing to) their calculating mind, and ministers serve the ruler with a calculating mind. The relationship between ruler and minister is based on calculation. To injure himself and benefit the state, the minister will not do it; to prosper the state and benefit the minister, the ruler will not do it. To the minister, there is no benefit in injuring himself; to the ruler, by thus injuring the state, he undermines his relationship with the people. Ruler and minister thus work together on the principle of calculation.]⁵¹

Not only do ministers and rulers have different interests, this passage reveals that they also have, literally, different minds. Left to their own devices, ministers would “follow their desires, secure their personal interests and benefit their families” without regard for the state or ruler. The only way to make them discard their selfish motives and uphold public justice is if the ruler makes it profitable for them to do so. Han Fei dismisses out of hand any romantic ideas of altruistic ministers and avers that ministers, like all men, work for the ruler purely on the principle of calculation. Contrary to what the Confucians believed then, there is no special bond between ruler and minister; they relate solely on the basis of calculation. As such, the ruler must make it unprofitable for them to act on their private motives and profitable for them to serve the public interest.

⁵⁰ “On Pretensions and Heresies”, Liao, vol. 1, pp. 167-168.

⁵¹ This is my translation of the following passage: “君以计畜臣，臣以计事君。君臣之交，计也。害身而利国，臣弗为也；富国而利臣，君不行也。臣之情，害身无利；君之情，害国无亲。君臣也者，以计合者也。”张觉，韩非子全译（上），贵州人民出版社，1990，p. 264.

In summary, then, the reason why Han Fei recommends such seemingly underhand and deceitful methods of control is because he believes that these secret or invisible methods are required to flush out hidden villainies. Han Fei was convinced that ministers and rulers have antithetical interests, and therefore, most, if not all, the ministers were secretly harbouring a plot to harm their ruler. Since they would not be wearing these evil intentions on their sleeves, the ruler had to resort to invisible methods to prevent his own ruin and thereby ensure stability in the state.

2.2.5 Han Fei's renunciation of conventional morality

Critics see Han Fei's rejection of all conventional moral values as the surest proof that he is primarily interested in "government for the ruler." Watson writes, "Unlike Confucianism and Mohism, [Legalism] made no attempt to preserve or restore the customs and moral values of the past; indeed it professed to have no use for morality whatsoever ... [Legalism's] only goal was to teach the ruler, in what it regarded as hardheaded and practical terms, how to survive and prosper in the world of the present."⁵² Indeed, it is hard to see how any ruler who renounces typically Confucian moral virtues like benevolence and righteousness, and opts instead for harsh and severe penalties coupled with merciless techniques of control, can genuinely claim to be benefiting the people.

The *Han Fei Zi* abounds with diatribes against the Confucians and their moral values. In "Ministers Apt to Betray, Molest, or Murder Ruler," Han Fei berates those present-day scholars who call on rulers to "practice nothing but benevolence, righteousness, favour, and love (仁义惠爱)."⁵³ He believed that adopting such a policy

⁵² Watson, "Introduction," p.7.

⁵³ Liao, vol. 1, p. 127.

had led to rulers ruining their states and losing their lives in serious cases, and in minor ones, seeing their territory dismembered and their ranks relegated. He explains the reason for such an assessment:

Indeed, to give alms to the poor and destitute is what the world calls a benevolent and righteous act; to take pity on the hundred surnames and hesitate to inflict censure and punishment on culprits is what the world calls an act of favour and love. To be sure, when the ruler gives alms to the poor and destitute, men of no merit will also be rewarded; when he hesitates to inflict censure and punishment upon culprits, then ruffians will never be suppressed. If men of no merit in the country are rewarded, the people will neither face enemies nor cut heads off on the battlefield nor will they devote their strength to farming and working at home...⁵⁴

Han Fei believed that granting criminals amnesty would embolden criminals and doling out rewards to the undeserving would discourage the people from the hard tasks that were essential to the strengthening of the state. Interestingly, this debate between Han Fei and the Confucians about “giving alms to the poor” is, at this time of writing, being played out in the local budget debate. Responding to the opposition’s call for a “financial guarantee” for the poor, Singapore’s Prime Minister, Lee Hsien Loong, warned that “the pressure to dole out ever more help to needy Singaporeans is very real and constant. But the Government must never yield unthinkingly, even a small step, lest it slides down the slippery slope to breed an ‘entitlement mentality’ among Singaporeans.”⁵⁵ Like PM Lee, Han Fei feared that this so-called ‘benevolent and righteous’ practice of doling out rewards to those who have not achieved merit would, in the long term, erode the people’s

⁵⁴ “Ministers Apt to Betray, Molest, or Murder Ruler,” Liao, vol. 1, pp. 127-128.

⁵⁵ Laurel Teo, “What Govt shouldn’t do – dole out more,” published in *The Straits Times* on March 3, 2005.

work ethic and cause them to avoid those loathsome tasks that were central to the preservation and strengthening of the state. It is noteworthy that while Han Fei denounces the Confucian practice of doling out rewards to the undeserving, he is not against providing for those who cannot provide for themselves. In “Eminence in Learning (显学),” Han Fei writes:

Now if men start out with equal opportunities and yet there are a few who, without the help of unusually good harvests or outside income, are able to keep themselves well supplied, it must be either due to hard work or to frugal living. If men start out with equal opportunities and yet there are a few who, *without having suffered from some calamity like famine or sickness*, still sink into poverty and destitution, it must be due either to laziness or to extravagant living. The lazy and extravagant grow poor; the diligent and frugal get rich. Now if the ruler levies money from the rich in order to give alms to the poor, he is robbing the diligent and frugal and indulging the lazy and extravagant. If he expects such means to induce the people to work industriously and spend with caution, he will be disappointed.⁵⁶ [Italics mine]

From this passage, it is clear that what Han Fei wants to avoid is benefiting those who are poor as a result of their “laziness” or “extravagant living.” He is not opposed to helping people who are stricken by some external cause over which they have no control, like “famine or sickness.”

“The Five Vermin” contains Han Fei’s main arguments for his renunciation of conventional morality. Han Fei avers at the start of the chapter that all men are driven by profit. Hence, the reason why men of ancient times made light of material goods was not because they were benevolent, but because there was a surplus of goods then.

⁵⁶ Watson, pp. 120-121.

Conversely, it is because goods today are scarce that men quarrel and snatch, and not because they are particularly vicious. In contrast to other chapters where Han Fei denounces the ambition and rapacity of villainous ministers, here, he clinically analyses their behaviour, and concludes that “when men strive for sinecures in the government, it is not because they are base, but because the power they will receive is great.”⁵⁷ This reflection on man’s profit-seeking nature thus leads him to formulate the following principle of government:

When the sage rules, he takes into consideration the quantity of things and deliberates on scarcity and plenty. Though his punishments may be light, this is not due to his compassion; though his penalties may be severe, this is not because he is cruel; he simply follows the custom appropriate to the time. Circumstances change according to the age, and ways of dealing with them change with the circumstances.⁵⁸

Han Fei’s main argument against the Confucians is that although “benevolence and righteousness served for ancient times, [they] no longer serve today.”⁵⁹ Because of the scarcity of goods, his age was one of rampant disorder, “quarrelling and snatching.” In such a critical age, “to try to use the ways of a generous and lenient government to rule the people ... is like trying to drive a runaway horse without using reins or whip.”⁶⁰ Han Fei gives two reasons why such government by love does not work. First, rulers surely cannot love the people more than parents love their children. If even parents, then, cannot prevent their children from becoming unruly by their love, how can rulers expect to bring the people to order by their lesser love! Second, Han Fei believes that “the people will

⁵⁷ Watson, p. 99.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Watson, p. 101.

bow naturally to authority (*shi*), but few of them can be moved by righteousness.”⁶¹ He justifies this by pointing to no less than Confucius himself. Although Confucius was the very paragon of benevolence and righteousness, he only managed to get seventy men to be his disciples. In contrast, Duke Ai of Lu was a mediocre ruler, yet even Confucius had to bow to him in virtue of his authority. Therefore, the certain way to success is for the ruler to wield his authority and not, as the Confucians insist, to aspire to the benevolence and righteousness of Confucius.

As opposed to love, which is not enough to make children learn what is right, the law backed by severe penalties never fails to fill people with terror and cause them to reform their conduct and change their ways.⁶² Han Fei describes what to him is the only government appropriate for his times:

[In the light of people’s profit-mindedness] the best rewards are those which are generous and predictable, so that the people may profit by them. The best penalties are those which are severe and inescapable, so that the people will fear them. The best laws are those which are uniform and inflexible, so that the people can understand them. Therefore the ruler should never delay in handing out rewards, nor be merciful in administering punishment. If praise accompanies the reward, and censure follows on the heels of punishment, then worthy and unworthy men alike will put forth their best efforts.⁶³

However, the foolish rulers of his day confuse the law by censuring or praising those things which are completely at odds with those which they reward or punish. For example, instead of punishing the man who makes certain to avenge any wrong to his brother, the ruler calls him an “upright (廉)” man. Again, although the man who joins his

⁶¹ Watson, p. 102.

⁶² Watson, p. 103.

⁶³ Watson, p. 104.

friend in attacking the perpetrator of an insult violates the law, the ruler deems him an “honourable (貞)” man. Hence, the people disregard the law and outdo each other in shows of valour, and the ruler ends up losing control of them. Another reason, then, for Han Fei’s renunciation of such conventional virtues as ‘benevolence,’ ‘righteousness,’ ‘uprightness’ and ‘honour’ is that these so-called ‘virtues’ confuse the ruler’s standards.

Furthermore, the reason why such moral virtues are not upheld by the law is because they are either of no use to the state, or worse, they are detrimental to the interests of the state. Han Fei cites as an example the man of Lu who fled battle thrice to care for his aged father. Although this man was a filial (孝) son to his father, his filial piety came at the cost of betraying his sovereign. As Han Fei writes, “The nation at peace may patronise Confucian scholars and cavaliers; but the nation in danger must call upon its fighting men.”⁶⁴ Filial piety might be the highest goal of the private individual, but in this case, it is completely at odds with the interests and goals of the state. If the ruler were to act like Confucius did and reward such a man with a post in government, then no one would risk their lives in battle to defend the state’s altars, since an easier and much more attractive route to attaining eminence and reward is available.

In sum, Han Fei argues that conventional morality is impotent to cure the disorder of the day. He also insists that the ruler’s harshness or ‘benevolence’ is not a function of his love for the people – his ‘cruelty’ or ‘compassion’ toward them – but is rather a function of the times. Because a critical age necessitates such harsh measures, the ruler who wants to benefit the people must discard the easy way of love and implement the difficult way of law and tact. Han Fei writes in “Six Contrarities:”

⁶⁴ Watson, p. 107.

Indeed, opening boils causes pain; taking drugs causes bitter taste. Yet if boils are not opened on account of pain and drugs not taken on account of bitterness, the person will not live and the disease will not stop.⁶⁵

Although going under the surgical knife causes pain, we endure the pain in order to eradicate the disease and thereby live. In the same way, although Han Fei's severe political programme causes the people pain, the wise ruler will implement it steadfastly so that order can eventually be restored in the state.

We see then that there are two distinct senses of “*ren* (仁)” in the *Han Fei Zi*: *ren* motivations and *ren* methods. D. C. Lau's following comment, I think, illuminates the difference between these two senses of *ren*:

Thus Mencius' ideal of a state can be summed up by the term 'benevolent government'. So long as the ruler is *motivated by benevolence*, the people will understand and accept whatever measure he finds it necessary to take. “If the services of the people were used with a view to sparing them hardship, they would not complain even when hard driven. If people were put to death in pursuance of a policy to keep them alive, they would die bearing no ill-will towards the man who put them to death (VIIA12).”⁶⁶ [Italics mine]

According to Lau, Mencius' theory of benevolent government focuses on the ruler having *ren* motivations, and not necessarily on him using *ren* methods. In other words, regardless of his actual measures (which might even include putting the people to death), a ruler can be said to practice benevolent government as long as he is “motivated by benevolence.” This distinction between *ren* motivations and *ren* methods is essential in helping us understand the crux of Han Fei's disagreement with the Confucians. While he criticises the latter, for instance, the doling out of rewards to the undeserving, Han Fei

⁶⁵ Liao, vol. 2, p. 239.

⁶⁶ D. C. Lau, Introduction to *Mencius*, op. cit., p. 41.

does not proscribe the former. In fact, in the passages we have examined, Han Fei insists that it is benevolence, or a love for the people, that motivates his extremely severe Legalist programme. Han Fei's public renunciation of conventional morality, then, should not be seen as evidence that he espouses government for the ruler.

2.2.6 Han Fei's perfectly just state

It is striking that although Han Fei's political system is extremely severe, even brutal, because it is also utterly fair and just, he believes that the system will not provoke resentment amongst the people. Han Fei holds his system up as the model of a "perfectly just state," where everyone gets no more and no less than what he exactly deserves, according to the law. Once the law has been ingrained in the minds of the people, they will feel no resentment against the ruler when punished for a transgression, and conversely, no gratitude to the ruler when rewarded for some merit. In the "Outer Congeries of Sayings, the Lower Left Series," Han Fei quotes the canon: "Censured for a crime, nobody feels bitter against the superior."⁶⁷ He gives as an example the man who had his feet cut off by Tzū-kao, who was the judge of a criminal court when Confucius was Premier of Wei. When the Ruler of Wei wanted to arrest Confucius and his disciples, including Tzū-kao, on the grounds of plotting a disturbance, the footless man hid Tzū-kao from the authorities when he had the chance to turn the latter in. Tzū-kao was surprised and asked him why he did not take up this opportunity for revenge. In reply the footless man said:

I had my feet cut off as my crime deserved the punishment. Nothing could be done about it. Nevertheless, when Your Excellency was about to decide on the case against thy servant, Your Excellency interpreted the ordinance in all possible ways and supplied

⁶⁷ Liao, vol. 2, p. 63.

words either before or after thy servant's pleas, being so anxious to hold thy servant innocent, which thy servant understood very well. When the case was settled and the sentence was passed, Your Excellency in excess of pity felt unpleasant as expressed in the facial colour, which thy servant saw and also understood. That was not because of Your Excellency's private favour to thy servant but because of his inborn nature and benevolent heart (仁心). This is the reason why I have felt so pleased and grateful to Your Excellency.⁶⁸

We see again in this passage that for Han Fei, a benevolent heart is not incompatible with harsh rule. Because the footless man understood that his crime deserved punishment, he felt no resentment against Tzū-kao for upholding public justice and sentencing him to have his feet cut off. Instead, he felt nothing but gratitude to the latter because he saw how it pained Tzū-kao to have had to pass the sentence.⁶⁹

Critics of Han Fei accuse him of granting the ruler excessive powers because as the creator of the law, the ruler is above the law and need not abide by it. Fu Zhengyuan, for example, writes: "These ancient Legalists proposed that the political action of the ruler should not be constrained by moral concerns and that the political power of the state must never be restricted by law."⁷⁰ While it is true that Han Fei's ruler is the author of the

⁶⁸ Liao, vol. 2, pp. 66-67.

⁶⁹ Someone might object that Han Fei's theory of human nature does not allow for man to be capable of such understanding. If man were to love profit and hate punishment to the extent that Han Fei imagines, then it is totally unrealistic to expect the footless man in the above account to react with such reason and objectivity. I will reserve the detailed account of Han Fei's theory of human nature for the next chapter. Suffice it to say here that it is precisely because man is essentially profit-loving that Han Fei expects that man, too, is reasonable (that is, he is capable of making reasoned profit calculations and to therefore accept, as in the case of the footless man, that heavy punishment is part of the ruler's plan for the people's long-term benefit.) Han Fei does concede at some points in his writings that reality does not always live up to his expectations. In a passage that I will quote later, from "Eminence in Learning," he laments that the people "do not have sense to rejoice in [the ruler's harsh yet necessary measures]." See Watson, pp. 128-129.

⁷⁰ Fu Zhengyuan, *China's Legalists*, op. cit., Introduction, p. 7.

law, it is also clear that the ruler is bound by his own standards of public justice, and cannot use the law arbitrarily for private gain.

In the *Han Fei Zi*, we see many examples of the ruler having to punish the people or his ministers for violations of the law, even though their actions are in fact in the ruler's own private interests. In "The Two Handles (二柄)," Han Fei recounts the story of how the keeper of the royal hat was punished for overstepping his duties when he covered the marquis with a robe upon seeing that the latter was cold. Explaining why the marquis ordered his punishment, Han Fei writes: "It was not that he did not dislike the cold, but he considered the trespass of one official upon the duties of another to be a greater danger than cold."⁷¹ Surely, it was not in the personal interests of the marquis to punish the keeper of the royal hat, since the latter was only acting to prevent him from catching a chill. However, in order not to undermine his public system of law and accountability, the marquis had no choice but to mete out the due punishment.

A more extreme example of the ruler's public-spiritedness is recorded in "Outer Congeries of Sayings, Lower Right Series." Here we read of King Chao of Ch'in, who punished the people for the heinous crime of praying for his own early recovery from illness! The King explained his action as follows:

To be sure, who with no order offers prayers at his pleasure, loves me, the King. Indeed, when the people love me, I will have to alter the law and bend my will to comply with their requests. In this manner, the law will not stand. If the law does not stand, it leads to chaos and ruin. Thus, the best measure is to fine the people of every village two suits of armour and restore them to order.⁷²

⁷¹ Watson, p. 32.

⁷² Liao, vol. 2, p. 124.

King Chao forsook his personal benefit to ensure that the people served him on the basis of his position and not on the basis of love. Only by so doing could he make the law stand and thus prevent chaos and ruin from befalling the people.

As Schwartz writes, then, the Legalist ruler “must be anything but an arbitrary despot, if one means by a despot a tyrant who follows all his impulses, whims, and passions. Once the systems which maintain the entire structure are in place, he must not interfere with their operation. He may use the entire system as a means to the achievement of his national and international ambitions, but to do so he must not disrupt its impersonal workings.”⁷³ In Han Fei’s perfectly just state, the people rejoice in the predictability of the law without fear of arbitrary punishments. It is precisely because of this element of predictability that the people feel no resentment toward the ruler even when they are severely punished for a crime.

Someone would object, surely the grossest injustices against humanity could be perpetrated in a perfectly just manner. If all we mean by “justice” is that people get exactly what they deserve according to the law, then under a wicked regime with wicked laws, it might very well be “just” to gas an entire race of people since this is simply what the law stipulates that they deserve. Similarly, although Han Fei’s ruler cannot use the law *arbitrarily* for personal gain, he is given inordinate powers to create an entire system that works solely for his personal gain.

What we have seen throughout this chapter, however, is that there is a deeper sense of ‘justice’ that is operative in the *Han Fei Zi*. In Han Fei’s scheme, the ruler cannot use the law, even *non-arbitrarily*, for personal gain because he is fundamentally constrained by a commitment to *li min*. He cannot justify his laws by the mere fact that

⁷³ Schwartz, *The World of Thought in Ancient China*, op. cit., p. 345.

they are his laws; he must justify them in terms of whether they benefit the people. In “Eminence in Learning,” for example, Han Fei labours to justify his harsh measures:

[The people are like the little child who yells and screams incessantly when it is having its head shaved or its boil lanced.] [They do] not understand that the little pain it suffers now will bring great benefit later. Now the ruler presses the people to till the land and open up new pastures so as to increase their means of livelihood, and yet they consider him harsh, he draws up a penal code and makes the punishments more severe in order to put a stop to evil, yet the people consider him stern. He levies taxes in cash and grain in order to fill the coffers and granaries so that there will be food for the starving and funds for the army, and yet the people consider him avaricious. He makes certain that everyone within his borders understands warfare and sees to it that there are no private exemptions from military service; he unites the strength of the state and fights fiercely in order to take its enemies captive, and yet the people consider him violent. These four types of undertaking all insure order and safety to the state, and yet the people do not have sense to rejoice in them.⁷⁴

Regardless, then, of whether or not we think his policies do in fact benefit the people, they are justified in precisely these terms. But again, the objection surely remains: how do we know that this is not Han Fei’s ploy to convince his detractors? The answer, unfortunately, is that we cannot know for sure. There is some kind of circularity involved when we try to ascertain Han Fei’s motives from what he says they are. The problem with Han Fei’s scheme is that there are no mechanisms in place to hold the ruler accountable to his claims. However, in view of the reasons that Han Fei gives for his measures, unless we decide to read him with more cynicism than we usually reserve for

⁷⁴ Watson, pp. 128-129. Refer to footnote 68.

other writers, it is difficult to see him as the defender of despots that the traditional account paints him out to be.

2.3 Conclusion

In this chapter, I have highlighted the main reasons for thinking that Han Fei espouses “government for the ruler,” and tried to show that his underlying concern is in fact to benefit the people. He recommends severe penalties for small crimes to deter profit-minded people from even venturing to commit crime. In this way, they would escape punishment altogether. He advises the ruler to purge the government of dissenters and establish totalitarian control over the state so that his *fa* and *shi* would not be undermined, and he can then harness the people’s abilities and energies to strengthen the state and ultimately unify the empire. Han Fei also teaches the ruler to use deceitful methods to control his ministers because he is convinced that ministers and rulers have antithetical interests. Since ministers harbour secret but sure plots to profit at the expense of the ruler and the people, the ruler must flush out such villainy using invisible means. And finally, the reason why Han Fei denounces conventional morality is because extolling such virtues would confuse the ruler’s standards, and furthermore, these virtues are impotent to cure the prevailing disorder. So although the *Han Fei Zi* initially reads as a treatise for the despot, it turns out that Han Fei is, in substance if not in form, a closet Confucian, since he shares their fundamental belief that government is for the people.

Chapter Three: Han Fei's blueprint for the perfect state

In the previous two chapters, we explored the relationship between law and morality in the *Han Fei Zi* with an eye to answer the question: Is Han Fei the defender of despots that critics claim he is? For as long as this standard account of Han Fei continues to hold sway, we will never seriously consider him as a legitimate and valuable voice in the perennial debate on what good government is and how it can be achieved. Now that we have established in Chapter Two that Han Fei is not an apologist for tyranny, we can finally begin, in this concluding chapter, to evaluate Han Fei's claim that his is the best government for his day. Before we can attempt such an evaluation, however, we need to first piece together Han Fei's blueprint for government, which we only caught a glimpse of in the earlier chapters. I will thus begin this chapter with a systematic presentation of his political vision, starting from the basic assumption underlying this vision. Thereafter, I will evaluate the viability of Han Fei's proposal for good government.

3.1 Han Fei's theory of human nature

All political theories derive from some theory of human nature. As Madison wrote, "What is government itself but the greatest of all reflections on human nature?"¹ In order to understand Han Fei's vision for government, then, it is inevitable that we first look to his conception of man.

It is interesting that, given its importance, the topic of human nature receives such scant attention from Han Fei. Unlike his teacher, Xunzi, who wrote an entire essay elaborating his thesis that human nature is bad (性恶), Han Fei asserts this almost matter-of-factly. The rampant disorder of his day was, perhaps, more than sufficient proof for

¹ Federalist Papers No. 51, Rossiter, 1961, p. 322. Quoted in Steven Pinker's *The Blank Slate*, Penguin Books, 2002, p. 296.

him of this thesis. Given that he does not make a systematic case for his theory of human nature, I suggest that one way of making this explicit is by looking at what Xunzi says on the topic, since Han Fei clearly inherits the latter's belief that man is by nature bad.

It is important to understand exactly what Xunzi, and by extension, Han Fei, means by the theory that human nature is "bad." They certainly do not have in mind the Christian notion of "original sin;" that man is born with a penchant for evil or malevolent acts. Xunzi believes that human nature is bad because "the nature of man is such that he is born with a love of profit," and if each person were to follow his inborn nature (性) and indulge his natural inclinations (情), "aggressiveness and greed are certain to develop."² Xunzi denies Mencius' theory that there are incipient tendencies within the heart-mind which, if developed, would set one on the path to sagehood. He states unequivocally that "man assuredly does not possess ritual principles and precepts of morality as part of his inborn nature; therefore he must study very hard when seeking them."³ By insisting that ritual principles and moral duty are creations of the sages and not anything deriving from man's original constitution, Xunzi has to bite the bullet and admit the difficulty involved in a person's self-cultivation; one needs to "study very hard" under the transforming influence of a teacher and model before he can live according to the dictates of ritual and morality. Moreover, because self-cultivation involves such a long and arduous process of learning and conscious exertion (伪), Xunzi concedes that very few people can in fact attain sagehood. He makes a distinction between what is possible (可) for man to achieve and his actual capacity (能) to achieve it:

² "Man's Nature is Evil" in *Xunzi*, trans. John Knoblock, Stanford University Press, 1988, 23.1a, p. 150.

³ *Ibid.*, 23.2b, p. 155.

Thus, although it is true that it is possible for the man in the street to become a Yu, that the man in the street has the real capacity to become a Yu is not necessarily so. Even though one is unable to become a Yu, this does not contradict the possibility of him becoming a Yu.⁴

Although Xunzi agrees with the early Confucians that all men are capable of becoming a sage, he stands out from them with his realism. He acknowledges that the theoretical possibility notwithstanding, it is practically impossible for the majority of mankind to attain the Confucian ethical ideal of sagehood.

This point was certainly not lost on Han Fei, who carried Xunzi's theory of human nature even further, arguing not only that human nature is bad, but that it is incapable of good. According to Han Fei, "to try to teach people to be benevolent and righteous is the same as saying you can make them wise and long-lived;" it is impossible.⁵ As such, it is futile for the ruler to try to cure the age through education, in the hope of thereby transforming the people. He must instead follow the way of certain success and devote himself to law and not virtue.⁶ David Wong makes an interesting comparison between Xunzi and Hobbes' solutions to the badness or egoism of human nature, which I think is illuminating in showing up where Han Fei parts with Xunzi. Wong suggests that Xunzi's solution is an advance on Hobbes' because on Xunzi's theory, human beings recognise the need not only to restrain their search for satisfaction of desire but also, positively, to transform their very characters through ritual. Hobbes' egoistic psychology, on the other hand, "allows the internalisation of no standards other

⁴ *Xunzi*, trans. Knoblock, 23.5b, p. 159.

⁵ "Eminence in Learning," Watson, pp. 126-127.

⁶ Watson, p. 125.

than that of direct concern with individual preservation and contentment.”⁷ With egoistic individuals, there must be a self-interested reason for them to comply with, and furthermore, not cheat on the rules that curb the pursuit of desire. It is left for the state, then, as the enforcer of rules, to create a risk of punishment that makes it irrational for any individual to try to cheat.

For all its merits, I think that Wong’s comparison is ultimately a moot one because the fact that Xunzi has the better solution on paper really boils down to his being more optimistic about the effects of education on man. Xunzi’s solution to the badness of human nature was simply not open to either Hobbes or Han Fei, who did not share his confidence that man’s egoistic nature could be transformed. What is more striking from Wong’s paper is how similar Han Fei’s account of man is to the Hobbesian account of the rational, self-interested individual. Han Fei, like Hobbes, believes that man is essentially self-interested and profit-minded, and will not comply with any standards other than those that directly concern his “individual preservation and contentment.” Moreover, man is “rational” insofar as he makes decisions that maximise his self-interest. In “Ministers Apt to Betray, Molest, or Murder Ruler,” Han Fei writes:

Indeed, to choose safety and profit and leave danger and trouble, this is human nature (人之情). Now, if men who, being ministers to a ruler, apply their forces to accomplish their merits and exert their wisdom to express their spirit of loyalty, eventually plunge themselves into misery, incline their families towards poverty, and entangle their fathers and sons in their own troubles, and if those who delude the sovereign for the sake of wicked profits and serve nobles and vassals with bribes of cash and commodities, always glorify themselves, enrich their families, and benefit their fathers and sons, then how can

⁷ David B. Wong, “Xunzi on moral motivation,” in *Virtue, Nature, and Moral Agency in the Xunzi*, ed. T.C. Kline III and Philip J. Ivanhoe, Hackett Publishing Company, 2000, p. 121.

people leave the way to safety and profit and choose the place of danger and trouble? Should there be such a fault in the government of the state, it is clear that it would be impossible for the superior to expect the inferior to do no wickedness and the magistrates to uphold the law.⁸

Here, Han Fei argues that government must be based upon the natural inclinations of man (人之情), which is “to choose safety and profit and leave danger and trouble.” Since man will pursue whichever course of action best promotes his self-interest, regardless of whether this involves loyalty to the ruler or betraying him, the ruler must ensure that it is profitable for the ministers to serve him and harmful for them to delude and betray him.

What makes rational, self-interested man amenable to the ruler’s control is his love for reward and his fear of punishment. In the same chapter, Han Fei continues:

Indeed, severe penalty is what the people fear, heavy punishment is what the people hate. Accordingly, the wise man promulgates what they fear in order to forbid the practice of wickedness and establishes what they hate in order to prevent villainous acts... Whoever has them [law and tact, reward and punishment] in his grip will eventually accomplish his purpose.⁹

In “Inner Congeries of Sayings, Upper Series,” Han Fei describes the other basic human motivation – man’s love for reward:

If reward and honour are great and of faith, the inferior will make light of death. The saying is based on Viscount Wên’s saying that, “The inferior turns to reward and high honour just like the wild deer going to luxuriant grass.”¹⁰

Because man essentially loves reward and hates punishment, the ruler simply needs to control the sources of reward and punishment to be able to make man conform to his *fa*.

⁸ Liao, vol. 1, p. 118.

⁹ “Ministers Apt to Betray, Molest, or Murder Ruler,” Liao, vol. 1, pp. 128-129.

¹⁰ Liao, vol. 1, p. 283.

The ruler makes it known that the only way for people to satisfy their love for profit, and conversely, to avoid harm and punishment is by such conformity. In “Outer Congeries of Sayings, Upper Left Series,” Han Fei writes:

Wherever lies profit, there people go; wherever fame is offered, there officers die. Therefore, if any meritorious service goes beyond the limits of the law and reward is bestowed therefore, then the superior cannot gain any profit from the inferior; if fame goes beyond the limits of the law and honour accompanies it, then officers will strive after their own fame but never will cultivate any fame for the ruler.¹¹

In this passage, Han Fei again makes the observation that people will always go where profit lies. Although all men naturally shudder at the prospect of death, officers will risk life and limb to cut off enemies’ heads in the battlefield if this is the sole means by which they can attain fame. Han Fei is convinced that man’s love for profit need not be, as it was for Xunzi, a problem for government. By strictly upholding his *fa* as the single route to profit, the ruler can in fact exploit man’s “badness” to his advantage, and ensure that in their pursuit of profit, the people ultimately benefit him, and concomitantly, the state. Han Fei thus warns the ruler against confusing his *fa* by rewarding and honouring men whose deeds are not deemed worthy by it, since this would encourage the people to disregard his *fa* and seek alternative means of profit.

Han Fei takes this behaviourist model of the self to its furthest extreme and argues that simply by exploiting his two handles of reward and punishment, the ruler can make the people take on whatever traits or attributes that his *fa* requires. He gives many examples of the malleability of human behaviour in “Inner Congeries of Sayings, Upper Series.” One example he gives is of Li K’uei, who, as Governor of the Upper Land under

¹¹ Liao, vol. 2, p. 29.

Marquis Wên of Wey, wanted every man to shoot well. He thus issued an order decreeing that legal disputes in the land be settled by an archery contest; those who hit the target would win the suit and those who missed it would lose the suit. The result of this decree was that “everybody started to practice archery day and night and never stopped. When they came to war with the Ch‘ins, they imposed a crushing defeat upon the enemy inasmuch as every one of them was a good archer.”¹² Underlying Han Fei’s concept of *fā*, then, is his belief that man is primarily motivated by a love for profit and a fear of punishment. Therefore, by controlling the means to profit and wielding the exclusive right to inflict punishment, the ruler can *dictate* human behaviour and put the people to work in service of state goals.

Man’s love for profit is also such that he makes “rational” decisions on the basis of profit calculations. Man’s “rational” nature is precisely what inspires Han Fei’s policy of “abolishing penalties by means of penalties.” He believes that laying down severe penalties would prevent the people from committing crime altogether because he sees crime as inherently rational: people rob and kill because that is where the money is. Therefore, the most effective way to prevent crime is to strike directly at people’s rational incentives – by making the anticipated cost of crime so high that it outstrips the potential benefits to the person of committing the crime.

It is important to understand the extent of Han Fei’s belief that man is essentially self-interested. Han Fei thinks that even the parent-child relationship, which is probably the most intimate of all interpersonal relationships, is characterised by self-interest. He writes in “Six Contrarities:”

¹² Liao, vol. 1, p. 301.

Now the relationship between superior and inferior involves no affection of father and son, if anyone wishes to rule the inferiors by practising righteousness, the relationship will certainly have cracks. Besides, parents in relation to children, when males are born, congratulate each other, and, when females are born, lessen the care of them. Equally coming out from the bosoms and lapels of the parents, why should boys receive congratulations while girls are ill-treated? Because parents consider their future conveniences and calculate their permanent benefits. Thus even parents in relation to their children use the calculating mind (计算之心) in treating them, how much more should those who have no affection of parent and child?¹³

By appealing to the common perception that sons are more valuable than daughters, Han Fei argues that the affection parents have for their children is ultimately based upon their calculated self-interest. As Han Fei sees it, how parents treat their children is a function of the child's contribution to their "future convenience" and "permanent benefit" – sons are lavished with attention because they are an asset; a potential source of labour, while daughters are ill-treated because they are a liability; they have to be fed, but are eventually married off to serve their husbands' family. If even parents relate to their children on the basis of self-interest and not on the basis of mutual love, then Han Fei argues, it is absurd to expect rulers, who have no blood ties with the people or the ministers, to relate to them on the basis of love. So for Han Fei, the overriding motivation of human behaviour, even in the most intimate context of the parent-child relationship, is self-interest.

Wang and Chang would object to the above description of Han Fei's theory of human nature. In fact, they object to the suggestion that he even had such a fixed theory!

¹³ Liao, vol. 2, p. 239.

According to Wang and Chang, Han Fei does not talk of an invariable and objective “human nature.” Ruminating on what constitutes the objective basis of *fa*, they write:

[Han Fei is only committed to saying that] for ‘the present age,’ at any rate, the general tendency of human nature is toward personal welfare, that is, to be self-interested. He then argues that *fa* is objective to the extent that it is based on the general tendency of human nature in a particular historical era. For the ‘present age,’ the critical function of *fa* is to effectively regulate and channel this general tendency of human nature toward personal welfare in order to realise the principal goal of good government, namely, public interest in an orderly society ... Implicit in Han Fei’s objective relativism, however, is a suggestion that human nature is at least somewhat malleable. Different socioeconomic-political conditions in different historical eras elicited different tendencies of human nature. Thus, tendencies of human nature are likely to shift along with changes in history and time.¹⁴

To substantiate their belief that human nature, is, for Han Fei, “at least somewhat malleable,” they refer in a footnote¹⁵ to this following passage from “Five Vermin:” “Men of remote antiquity strove to be known as moral and virtuous; those of the middle age struggled to be known as wise and resourceful; and now men fight for the reputation of being vigorous and powerful.”¹⁶

The problem with Wang and Chang’s account is that they confuse human nature with its particular expression in different historical conditions. Han Fei’s point in the above passage is not that men of remote antiquity were more virtuous than men in “the present age,” who have a unique tendency to be self-interested. His point is that people

¹⁴ Wang Hsiao-Po and Leo S. Chang, *The Philosophical Foundations of Han Fei’s Political Theory*, University of Hawaii Press, 1986, pp. 49-50.

¹⁵ *Ibid.* See footnote 18, p. 183.

¹⁶ Liao, vol. 2, p. 279.

then strove *to be known* as moral and virtuous because a reputation for virtue then was the means to fame and esteem. He writes earlier in the chapter, “For the same reason, men of yore made light of goods, not because they were benevolent, but because goods were abundant; while men of today quarrel and pillage, not because they are brutish, but because goods are scarce.”¹⁷ For Han Fei, then, human nature, from antiquity to the present age, has not changed; man has always been and is still self-interested. The difference is how this self-interest is expressed in various political, socio-economic conditions: In times of yore, when material goods were in abundance, men pursued their desire for fame and honour in a benign and non-destructive manner – by making light of material goods and gaining a reputation for being virtuous. In the present age, however, because of the scarcity of goods, man’s pursuit of self-interest has led to disorder, to quarrelling and pillaging. Wang and Chang’s account of Han Fei’s “objective relativism” thus needs to be revised. Han Fei’s *fa* is objective to the extent that it is the normative and unchanging principle of good government throughout the ages. Regardless of the age, the ruler must establish clear and fixed laws or standards that the people find easy to understand and follow. These laws, backed by the promise of reward and the threat of sanction, are unambiguous statements of the means to profit and avoid harm. The ruler must thereafter entrust all matters of government, from whom to employ to who is rewarded and punished, to this plumb line and not decide on the basis of his subjective tastes and preferences. *Fa*, however, is relative insofar as its content is determined by the specific circumstances of the age. When resources are plenty and the nation is at peace, the ruler may “patronise” or reward Confucian scholars and cavaliers. When the nation is in danger and needs to “call upon its fighting men,” the ruler must fix his *fa* to reward

¹⁷ Liao, vol. 2, p. 278.

those who risk their lives in battle and to punish severely these same Confucian scholars and cavaliers whose teaching now discourages the people from the tasks that are crucial to the preservation of the state.¹⁸ Implicit in Han Fei's "objective relativism," then, is not the suggestion that human nature is malleable, but rather, that *human behaviour* is malleable. In fact, that *fa* is able to determine human behaviour is precisely because human nature is, to some extent, fixed; *fa*'s success is predicated upon the assumption that man is by nature profit-loving.

In sum, contrary to what Wang and Chang believe, Han Fei does have a theory of human nature, which states that man is essentially self-interested and profit-minded, and makes decisions based on "rational" calculations of his self-interest. For all his similarities with Hobbes, I think Han Fei differs from him in one crucial aspect: Hobbes saw the rational, self-interested individual as a problem for government, and therefore set up laws to restrain the individual's pursuit of profit. Han Fei, conversely, saw the calculating, self-interested individual as a great boon to government. Instead of acting as a restraint, his laws encourage and exploit man's love for profit to ultimately benefit the state. Interestingly, a recent article on the United Nations (UN) brings this difference between Han Fei and Hobbes into focus:

The UN and the people who gravitate towards it are products of a late-modern sensibility, which views the possibility of good as an open horizon. Thus, there should be no impediment to the project of perfecting the world. Yet the idea that the world is perfectible is a curious one. Pre-modern and even early-modern politics did not include belief in the perfectibility of man or regimes. Laws and social contracts exist to limit individual and government actions. This is precisely because man cannot be expected to

¹⁸ Han Fei Zi, "The Five Vermin," Watson, p. 107.

be moral. Instead, the late-modern project considers laws as “enabling mechanisms” for social good ... Laws are meant to engineer good ends, rather than restrict bad behaviour.¹⁹ Although Han Fei would certainly have rejected the UN’s belief (or so this article implies) that man is perfectible, he would have concurred with its belief that regimes, or states, are perfectible. While Hobbes and his fellow social contract theorists sought to “restrict bad behaviour” with laws, Han Fei, like the UN (preposterous as this comparison might seem), saw laws as “enabling mechanisms” for social good and for “perfecting” the state. His political model takes into account the imperfections of man and exploits these for good – to produce desirable outcomes in the state. In the following section, we will look at Han Fei’s blueprint for the perfect state.

3.2 Han Fei’s blueprint for the perfect state

According to Steven Pinker, Hobbes’ conception of the rational, self-interested individual became, in the twentieth century, the basis for the rational actor or “economic man” models in economics and political science, and for cost-benefit analyses of public choices.²⁰ It should come to us as no surprise, then, considering Han Fei’s affinity with Hobbes on the topic of human nature, that many scholars regard him, and more generally, Legalism, as an anticipation of modern, Western political or “managerial” science. A.C. Graham, for example, describes Legalism as “an amoral *science* of statecraft,”²¹ while Schwartz calls it “the behavioural *science*.”²²

¹⁹ Tion Kwa, “The reforms will strengthen the UN’s jurisdiction but endanger individual states’ sovereignty,” published in *The Straits Times*, April 2, 2005.

²⁰ Pinker, *The Blank Slate*, op. cit., p. 285.

²¹ A.C. Graham, *Disputers of the Tao: philosophical argument in ancient China*, Open Court Publishing Company, 1989.

²² Benjamin I. Schwartz, *The World of Thought in Ancient China*, The Belknap Press of Harvard University Press, Cambridge, Massachusetts and London, England, 1985.

I think Legalism can be described as a “science” insofar as its proponents believed that political outcomes could be fixed and were not simply random, or the product of fate. Unlike the Confucians, for whom success in government depended on the chance appearance of a sage-king, the Legalists believed that there was a “fixed formula” to achieve order, which even a mediocre ruler could apply with certain results. For Schwartz, this “formula” consists in a simple understanding of human behaviour. As long as the ruler grasps what Schwartz calls the “true science of human behaviour,”²³ which is man’s love for profit and hatred of punishment, he can move the entire society in any desired direction. Schwartz writes:

In Legalism, we will have a vision of a society in which “objective” mechanisms of “behavioural” control become automatic instruments for achieving well-defined sociopolitical goals ... [A] major aspect of Legalism [is] its dynamic goal-oriented nature. [Like Tzu-ch’an’s programme, the Legalist programme] is indeed almost “rationalistic” in the Weberian sense of instrumental rationalism (*Zwecksrationalität*). It is a “rationalism” designed to devise the means appropriate to the achievement of the goal later so clearly defined by Lord Shang: “The enrichment of the state and the strengthening of its military capacity.”²⁴

Further on in the chapter, Schwartz reveals what these “‘objective’ mechanisms of ‘behavioural’ control” are:

Penal law and rewards do play a central role in this entire program. Since the entire program is to be “set in motion” by reliance on the negative and positive incentives of a

²³ Ibid., p. 332.

²⁴ Ibid., p. 328.

universal, objective, and impersonal system of penal laws and rewards, it is this simple engine of incentives which will move all human energies in the desired directions.²⁵

It is this “simple behaviourist model of man based primarily on the elemental tropisms of pain and pleasure,”²⁶ then, that guarantees the predictability and success of the Legalist system. That is why anomalous elements of society such as righteous recluses, who are immune to the fear of pain and the attraction of pleasure, are regarded as menaces to the system and therefore ordered to be exterminated by Han Fei.²⁷

Legalism can also be seen as a “science of statecraft” to the extent that its model of government moves away from a traditional reliance on man to a reliance on laws and objective principles of government. Han Fei criticised the Confucian system because it was riddled with too many uncertainties. Its success was contingent upon the chance appearance of a sage-king or at least a critical mass of virtuous ministers, and the dubious assumption that education and ritual can and will transform enough men to ensure a general condition of peace. People in the throes of war and in dire suffering, however, do not have the luxury of waiting for fate to intervene or for their fellow men to gradually respond to the influence of ritual. The chaos of the Warring States period convinced Han Fei that there had to be a better way – order in the empire could not be left to the vagaries of fate or human emotion. Han Fei thus drafted a “perfect” system that would be free of the uncertainties that plagued the Confucian system. First, this system would be utterly predictable because it is based on what is certain about man, and not on what is liable to change in man. Second, the success of the system would be guaranteed by its laws and not by any particular ruler.

²⁵ Schwartz, *The World of Thought in Ancient China*, op. cit., p. 332.

²⁶ Ibid.

²⁷ Ibid., p. 333.

First of all then, Han Fei created a system based on what he believed was permanent and unchanging about man – his self-interested nature. The ruler must never depend on the people loving him of their own accord, or on them being trustworthy, since such emotions and attributes are fleeting and are likely to change with the circumstances. In “Precautions within the Palace (备内),” Han Fei paints a very pessimistic picture of human relationships. He warns the ruler against trusting anyone, neither his consort nor even his sons, because “when those who stand to profit by the ruler’s death are many, he is in peril.”²⁸ He writes:

It is hazardous for the ruler of men to trust others, for he who trusts others will be controlled by others. Ministers have no bonds of flesh and blood to tie them to their ruler; it is only the force of circumstance which compels them to serve him. Hence those who act as ministers never for a moment cease trying to spy into their sovereign’s mind ... If the ruler puts too much trust in his son [and consort], then evil ministers will find ways to utilise the son [and consort] for the accomplishment of their private schemes.²⁹

It is not simply the ministers, however, who scheme to oust the ruler. Han Fei believes that because of the huge profit to be gained by the ruler’s death, “it is quite likely that his consort, his concubines, or the son he has designated as heir to his throne will wish for his early death.”³⁰ Therefore, in governing the state, the ruler must never depend on people being trustworthy.

Since man is by nature profit-loving, Han Fei exhorts the ruler to govern on the basis of the calculating mind and not on the basis of love. In “Six Contrarities,” he observes that sons are generally treated better than daughters, and concludes that even

²⁸ Watson, p. 86.

²⁹ Watson, p. 84.

³⁰ Watson, p. 85.

parents who have a natural affection for their children ultimately use the calculating mind in treating them. Han Fei thus argues:

[If] even parents in relation to children use the calculating mind in treating them, how much more should those who have no affection between parent and child? The learned men of to-day, in counselling the lord of men, all persuade him to discard the profit-seeking mind (求利之心) and follow the way of mutual love. Thereby they demand more from the lord of men than from parents. Such is an immature view of human relationships: it is both deceitful and fallacious... If the ruler is not benevolent and the ministers are not loyal, hegemony [can]³¹ be attained.³²

Han Fei was vehemently opposed to the “policy of love” which the “learned men of today” were promulgating. This policy meant doing away with severe punishments and doling out rewards to the poor and starving, regardless of whether they performed any meritorious deeds. These “learned men” believed that such measures would in turn cause the people to love the ruler and do his bidding. Han Fei condemned such talk as “deceitful and fallacious” and based on an utterly “immature” view of human relationships. According to Han Fei, a simple example from common experience suffices to show that man is essentially profit-seeking, and that relationships, however close, are therefore fundamentally based on the calculating mind. He does not deny that a natural affection exists between parent and child and that parents might act out of love for their children and vice versa. His point, however, is that such love is unreliable because it will always play second fiddle to man’s primary love for profit. This explains Han Fei’s curious comment that hegemony can only be attained if the ruler is not benevolent and

³¹ Liao makes an error in translating this as, “... If the ruler is not benevolent and the ministers are not loyal, hegemony *cannot* be attained.” This would contradict what Han Fei has been saying earlier.

³² Liao, vol. 2, pp. 239-240.

the ministers, not loyal. Critics read this as proof that morality has no part to play in Han Fei's political system. I suggest that what this comment really means is that hegemony can only be attained if the ruler relies on what is certain about man – his calculating mind – and not on what is unpredictable about man – either the people's love or the ministers' loyalty.

Han Fei also wanted to create a system that would function independently of the ruler's genius or virtue. In "The Way to Maintain the State," Han Fei writes, "The right way [to maintain the state] is not to rely on Pi Kan's martyrdom in the cause of fidelity nor to count on rapacious minister's committing no deception, but to rely on the ability of the timid to subdue the tiger and to appropriate the facilities of the average sovereign to maintain the state."³³ In this passage, Han Fei highlights two main problems with the Confucian system. First, its success depends on the people doing good; on the minister's committing no deception and on his serving the ruler as loyally as Pi Kan. The other problem with the Confucian system is that it depends on the ability of the ruler to subdue and transform wicked elements in the state. In the Warring States period, however, rapacious ministers were rampant and rulers had neither the ability nor the virtue to subdue these "tigers." It was essential for Han Fei, therefore, to invent a system that enabled the timid to subdue the tiger, the average sovereign to maintain the state. He became convinced that even the mediocre rulers of his day could unify the empire as long as they followed objective principles of good government. These were, for Han Fei, the three concepts of *shi*, *shu* and *fa*. Since the ruler is fallible, he must entrust the running of the state to infallible mechanisms of government. In "On Having Standards," Han Fei writes:

³³ Liao, vol. 1, p. 268.

A truly enlightened ruler uses the law to select men for him; he does not choose them himself. He uses the law to weigh their merits; he does not attempt to judge them for himself. Hence men of true worth will not be able to hide their talents, nor spoilers to gloss over their faults. Men cannot advance on the basis of praise alone, nor be driven from court by calumny. Then there will be a clear understanding of values between the ruler and his ministers, and the state can be easily governed. But only if the ruler makes use of the law can he hope to achieve this.³⁴

Han Fei goes on to explain why the ruler must defer to the law in all matters of government:

[If] the ruler uses his eyes, his subordinates will try to prettify what he sees; if he uses his ears, they will try to embellish what he hears; and if he uses his mind, they will be at him with endless speeches. The former kings, knowing that these three faculties would not suffice, accordingly set aside their own abilities; instead they relied upon law and policy, and took care to see that rewards and punishments were carefully apportioned ... [Consequently] Even the cleverest men could find no opening for their falsehoods, the glibbest talkers no audience for their sophistries, and evil and deceit were left without a foothold.³⁵

Han Fei urges the ruler to set aside his own abilities and rely strictly on the law to make decisions in government because the law is blind to those factors that usually impair a ruler's judgement, like flattery and sophistry. A dependence on the law, then, prevents the ruler's own imperfections from sullyng the system.

To sum up, Han Fei drew up a blueprint for the "perfect" state based on his understanding of the "science of human behaviour" and his conviction that there is a

³⁴ Watson, p. 24.

³⁵ Watson, pp. 26-27.

reliable method to governing the state; there are objective principles of good government, which, if adhered to, will guarantee successful political outcomes. He was convinced that his, rather than the Confucian's, was the better proposal for government since his system would be utterly predictable and invulnerable to the caprices of fate and human emotion. Achieving order in the empire would thus no longer be a chimera but, instead, a realistic target for even the most mediocre of rulers.

3.2.1 Perfectly ordered relationships

Han Fei also envisaged perfectly ordered relationships within the state. But surely, we object, how is such harmony possible when the entire system encourages man to be self-interested and when relationships are all based upon the calculating mind? Han Fei argues that it is precisely when each person thinks only for his self-interest that a perfectly ordered state, with all the five relationships in perfect harmony, is possible. In “Outer Congeries of Sayings, Upper Left Series,” Han Fei quotes the proverbial saying: “when one works with the other person in mind, both parties end up blaming each other; when one works for himself, the affair proceeds well.”³⁶ Han Fei illustrates this saying by pointing out that a son who does not receive good care from his parents in his childhood will grow up to resent them. In the same way, when a grown-up son provides scantily for his parents, his parents become angry and reprimand him. From this we see that although father and son share the most intimate relationship, blame and resentment set in when each party expects the other to think for his interests and work for him in mind. Han Fei's point is that such resentment and blame will not occur if relationships are conducted purely on the basis of self-interest, that is, if everyone works for himself and not for the

³⁶ 张觉, 韩非子全译 (下), 贵州人民出版社, 1990, p. 586. Liao's translation of this passage, in my opinion, does not capture the essence of what Han Fei is saying. See Liao, vol. 2, p. 27.

sake of others. This is evident, Han Fei argues, in the master-workman relationship. A master would spare no expense to feed his workmen with good food and exchange cash and cloth for a valuable currency to pay for their services, not because he loves the hired workmen, but because he wants them to “till the land deeper and pick the weed more carefully.”³⁷ The hired workmen, too, exert themselves on the fields, not because they love their master, but because by so doing, the soup will be delicious and the valuable currency will be paid to them. The reason why the master provides for the workmen as for his sons, and the workmen exert themselves for their master as for their father; the reason “their minds are well-disposed to act for each other,” is because “they cherish self-seeking motives respectively.”³⁸ Therefore, Han Fei concludes, “When men deal with each other in managing affairs and rendering services, if their motive is hope for gain (利), then even with a native from Yüeh, it will be easy to remain harmonious. If the motive is fear of [harming others], then even father and son will become estranged and show resentment toward each other.”³⁹ Contrary to the conventional wisdom which attributes the breakdown of relationships to man’s self-interest, Han Fei makes the astonishing counter claim that harmonious relationships are only possible when people relate solely on the basis of self-interest and profit! In the foregoing passage, we see that parents are sometimes slack in providing for their children, probably because love is not a constant or strong enough spur. When this happens, resentment and blame set in and strain the parent-child relationship. Self-interest, on the other hand, never fails to motivate the master to lavish care and concern on his workmen and the latter to toil and labour tirelessly for their master. In other words, Han Fei believes that if each man

³⁷ Liao, vol. 2, p. 44.

³⁸ Liao, vol. 2, p. 45.

³⁹ Ibid.

“works for himself,” he is certain to apply himself strenuously and wholeheartedly to his task. This ensures that working relationships are harmonious and the “affair proceeds well.” When a man works for the sake of other people, however, he is bound to lose interest in his task or slacken off at some point. Such behaviour irks the other party and each begins blaming the other, thus causing the relationship to break down.

Someone might again object: how can we expect the ruler-subject relationship, in particular, to be a harmonious one when the ruler makes no bones about visiting extremely severe penalties on the people? Han Fei would probably respond that in his “pure meritocracy,” there will be no discontent because each man gets exactly what is due to him. This is precisely his argument in the following passage from “Criticism of the Ancients, Series Three.” Here, Han Fei criticises Confucius for advising Tzŭ-kao that the way to deal with a people with rebellious minds is to “content the near and attract the distant.”⁴⁰ This is a policy aimed at “[encouraging] the people to cherish gratitude to the ruler for his favours.”⁴¹ Han Fei denounces Confucius’ advice as “state-ruining”⁴² advice because by rewarding men of no merit and absolving criminals of guilt, the ruler in fact ends up undermining his own law. This only serves as a further encouragement to the people in their rebellion and disregard for the law. The proper way to deal with rebellious people, Han Fei argues, is to thwart any large-scale rebellion in its bud by punishing even minor infractions of the law.⁴³ So instead of trying to win the hearts of the rebels, the ruler must quash any budding rebellion with an iron fist. Han Fei then quotes from the *Dao De Jing* to affirm that his policy will not turn the people against the ruler:

⁴⁰ Liao, vol. 2, p. 177.

⁴¹ Liao, vol. 2, p. 178.

⁴² Liao, vol. 2, p. 177.

⁴³ Liao, vol. 2, p. 178.

Now, if men of merit are always rewarded, the rewarded do not feel grateful to the ruler, because the reward is due to their effort. If men guilty of offences are always punished, the punished bear no grudge against the authorities, because the punishment is due to their misconduct. As the people understand that both punishment and reward are due to their own deeds, they will strive to harvest merits and profits in their daily work and will not hope for undue gifts from the ruler. “Of the greatest ruler, the people simply know the existence.”⁴⁴ This means that under the greatest ruler the people have no undue joy. Then where can be found people bearing gratitude to the ruler? The subjects of the greatest ruler receive neither undue profit nor undue injury.⁴⁵

Han Fei believes that in his pure meritocracy, the people will not harbour any resentment towards the ruler in spite of his draconian policies and harsh treatment of them because “the people understand that both punishment and reward are due to their own deeds.” In fact, Han Fei likens the ruler who strictly metes out punishment and reward to each as he deserves according to the law to a great Daoist sage. In Chapter XVII of the *Dao De Jing*, the “best of all rulers” is the one who, “after his task is accomplished and his work done,” leaves the people thinking, “it happened to us naturally.”⁴⁶ That is why “of the greatest ruler, the people simply know the existence;” they cannot trace his workings, and yet nothing is left undone. It is curious that Han Fei uses this chapter of the Lao Zi to justify his heavy-handed suppression of rebellion, since it is quite hard to see how inflicting harsh punishment on the people would leave them thinking that order has been restored “naturally.” Han Fei, however, interprets Lao Zi to be saying that “the subjects of the

⁴⁴ I am quoting Liao’s footnote. Lao Tzŭ’s *Tao-Teh-Ching*, Ch. XVII, I, trans. Carus.

⁴⁵ Liao, vol. 2, pp. 178-179.

⁴⁶ Lao Tzu, *Tao Te Ching*, translated by D. C. Lau, Penguin Books, 1963, p. 21.

greatest ruler receive neither undue profit nor undue injury.” Ellen Chen’s following remark, I think, helps us to understand Han Fei’s peculiar interpretation of Lao Zi:

[For Han Fei] The ideal situation obtains when law operates like Nature, impersonally, impartially, spontaneously: the ruler in meting out punishments shows no personal feelings, the subjects in being punished feel no rancour. Government becomes completely impersonal, working out the ponderous law of punishment and reward like *karma* or *moira*.⁴⁷

The Legalist ruler is like that “greatest ruler” of whom the people simply know the existence because he does not interfere in the workings of the law. He reposes in non-action and allows the “ponderous law of punishment and reward” to run its course, indicting the guilty and rewarding the deserving. Order is thereby gradually restored in the state, quite unbeknown to the people, who think, “It happened to us naturally.” The people feel no resentment against the ruler even when they are severely punished because they understand that they reap exactly what they sow. In fact, because of the completely impersonal nature of government, they *cannot* harbour any personal grudge against the ruler, who merely carries out the dictates of the law dutifully.

To summarise, Han Fei foresaw that relationships in his ideal state would be perfectly ordered since people would relate to one another purely on the basis of profit. He believed that man will spare no expense and effort in caring for another party if there is some profit to be gained by it. The profit motive thus ensures that people cooperate for mutual gain and benefit. On the other hand, relationships conducted on the basis of love are likely to turn sour because love, even that between parent and child, cannot be sustained. When love falters, blame and resentment set in and relationships break down.

⁴⁷ Ellen Marie Chen, “The Dialectic of Chih (Reason) and Tao (Nature) in the *Han Fei-Tzu*, *Journal of Chinese Philosophy*, 1975, p. 9.

Han Fei was also convinced that the ruler-subject relationship could be a harmonious one in spite of the ruler's severity because in his pure meritocracy, the people understand that they receive only what their deeds deserve.

3.3 An evaluation of Han Fei's perfect state

We have thus far been studying Han Fei's vision for good government. Contrary to what his critics believe, Han Fei did not set out to write a treatise for despots. Instead, he wrote to remedy a dire situation of internal disorder and external turmoil. He drew up a blueprint for the perfect system – one whose success would not hinge on the rare virtue or ability of exceptional men. This system was designed to enable even mediocre rulers to attain the holy grail of unification, and thereby put an end to the incessant warfare of the period. From the foregoing sections, it should be quite clear that Han Fei's system is wholly predicated on the fact that man is rationally self-interested. It is not enough to say, then, that Han Fei's theory of government derives from this conception of man. His theory of government depends on, and indeed, thrives on the fact that man is by nature self-interested. Man's pursuit of self-interest is the engine that drives the entire system towards the goal of unifying the empire. In order for this system to succeed, it demands that man be primarily, or better yet, solely motivated by a love for profit and a concomitant fear of harm or punishment. Other motivations, such as love and compassion, add too much uncertainty to the system since emotions, by their very nature, are unpredictable – they tend to be dependent on circumstances and vary in intensity across time. As such, these have to be removed from the system so as not to compromise its stability and success. The problem for critics of Han Fei, however, is whether a system that encourages man's self-seeking tendencies and deliberately sets out to discourage

moral virtues such as altruism and loyalty is, in the end, self-defeating. Is it possible to have a society that is based entirely on the self-interested individual? In this concluding section, I will attempt to answer this question and also assess the overall tenability of Han Fei's political system.

3.3.1 Is Han Fei's system tenable?

The merits and demerits of government by laws have been debated *ad nauseam* by scholars and there is no need to rehash the debate here.⁴⁸ Suffice it to say that the main problem with laws, as the critics point out, is that they tend to reinforce man's selfish tendencies and weaken the natural associations and bonds that exist between people. John Dewey, for example, argues that an increased dependence on the law to regulate social interactions weakens the moral bonds implicit in human relationships and transforms these into "abstract modes of interaction in which the feelings of shared commitment to common goals [are] effectively lost."⁴⁹ Let me explain what Dewey is saying with an example right out of my neighbourhood. The resident's committee put up a banner about a year ago requesting visitors not to park illegally, as this would obstruct residents from entering or exiting their own compounds. Instead of reading, as we might expect, "Don't park illegally because it would inconvenience others," the banner reads, "Don't park illegally because the police patrol this area frequently." While invoking the authorities and appealing to man's fear of punishment is, in the short term, admittedly a more effective deterrent than a mere appeal to man's empathy, what Dewey and others fear is

⁴⁸ Bodde and Morris give a fine summary of the main Legalist and Confucian arguments for and against government by laws respectively. See Derk Bodde and Clarence Morris, "Confucian Views of *Li* and Law" and "The Legalists and Law," in *Law in Imperial China: exemplified by 190 Ch'ing Dynasty cases, translated from the Hsing-an jui-lan*, Cambridge, Mass., Harvard University Press, 1967, pp. 19-27.

⁴⁹ John Dewey, *Individualism Old and New*, New York: Capricorn Books, p. 53. Quoted by David L. Hall and Roger T. Ames in *The Democracy of the Dead: Dewey, Confucius and the hope for democracy in China*, Open Court: Chicago, 1999, pp. 136-137.

that in the long run, laws encourage man to become even more self-centred. A person might, in the above example, refrain from parking illegally, but this only to escape a hefty fine, and not out of consideration for others. Over time, he begins to think and act increasingly in terms of his own self-interest, and his capability to empathise is gradually vitiated. So the problem with laws is that they encourage selfishness and ultimately undermine the community's social connectedness.

This problem of weakening social bonds is all the more severe in Han Fei's law-governed state because his laws systematically discourage moral virtues such as filial piety and loyalty, which at least in the Confucian system, serve as the bases for social cohesion. But surely, his critics point out, Han Fei's system is self-defeating because he removes from it the very moral constraints needed to hold societies together! It is naive for Han Fei to think that self-interest alone guarantees cooperation between two parties, for if man's self-interest were his sole concern, it might well be to his advantage to cheat another for personal gain. In his defence, Han Fei could say that there are laws in place to prevent such anti-social behaviour. He could argue that law makes morality unnecessary, since people can be made to cooperate and live with a semblance of harmony under threat of sanction. However, critics retort, if laws are all there are to prevent man from harming others in his pursuit of profit, the burden on the law, and on the state to enforce it, becomes extremely heavy. As Devlin so eloquently put it, when the community as a whole is not "deeply imbued with a sense of sin ... the law sags under a weight which it is not constructed to bear and may become permanently warped."⁵⁰ In other words, morality is necessary in order for law to be effective. If people were not "imbued with a sense of

⁵⁰ Patrick Devlin, "Morals and the Criminal Law," in *The Enforcement of Morals*, London: Oxford University Press, 1965, p. 24.

sin,” and were kept from crime solely by the law, then constant surveillance would be necessary to prevent any transgressions. The cost of running such an Orwellian system, however, is enormous and well beyond the means of most states.

Let me suggest another defence for Han Fei against the charge that self-interest necessarily undermines society. In his book, “The Great Disruption: human nature and the reconstitution of social order,” Francis Fukuyama challenges the commonly held belief that modern capitalism, by “[putting] a price on everything and [replacing] human relationships with the bottom line,” is “destined to undermine its own moral basis, and thereby bring about its own collapse.”⁵¹ He argues that there is “little evidence” to suggest that men in capitalist societies “will cease to set moral standards for themselves and seek to live up to them.”⁵² On the contrary, just as they have done so in the past, human beings will continue to produce moral rules for themselves, “partly because they are designed by nature to do so and partly *as a result of their pursuit of self-interest.*”⁵³ Fukuyama goes on to quote several Enlightenment thinkers, who argued that capitalism, far from undermining morals, actually improved them. Chief amongst these thinkers was Samuel Ricard, who, in 1704, said:

Commerce attaches [men] to one another through mutual utility.... Through commerce, man learns to deliberate, to be honest, to acquire manners, to be prudent and reserved in both talk and action. Sensing the necessity to be wise and honest in order to succeed, he flees vice, or at least his demeanour exhibits decency and seriousness so as not to arouse any adverse judgement on the part of present and future acquaintances.⁵⁴

⁵¹ Francis Fukuyama, *The Great Disruption: human nature and the reconstitution of social order*, The Free Press, 1999, p. 249.

⁵² *Ibid.*, pp. 249-250.

⁵³ *Ibid.*, p. 250.

⁵⁴ Fukuyama, *The Great Disruption*, op. cit., p. 254.

Fukuyama thus concludes that “private agents seeking their own selfish ends will tend to produce social capital⁵⁵ and the virtues associated with it, like honesty, reliability, and reciprocity.”⁵⁶ Although he concedes that capitalism is often a destructive force that breaks apart traditional loyalties and obligations, he believes that capitalism also creates order and builds new norms to replace the ones it destroyed.⁵⁷

I think Fukuyama’s argument is instructive for our purposes because it confirms Han Fei’s belief that a social order based entirely upon the self-interested individual is tenable. In their pursuit of profit, men will produce binding moral rules that make social cooperation possible. Amongst the Confucians, especially Mencius, there is a tendency to set up morality (仁) and profit (利) as antithetical terms. In *Mencius* IA1, for example, Mencius chastises King Hui of Liang for being preoccupied with “profiting” the state. He says, “What is the point of mentioning the word ‘profit’? All that matters is that there should be benevolence and rightness (仁义).”⁵⁸ Fukuyama, on the other hand, sees no incompatibility between these two terms. In fact, he believes that man’s pursuit of profit will lead him to be moral, or at least, to display those qualities that are essential for social cooperation and order. Han Fei seems to hold a similar view to Fukuyama. Hence, in spite of his open denunciation of conventional morality, there is some kind of morality at work in his system. The notion of *xin* (信: trustworthiness), for example, is very important to Han Fei. In “Outer Congeries of Sayings, Upper Left Series,” he notes the saying, “If small faith (*xin*) is well accomplished, great faith will naturally be established. Therefore, the enlightened sovereign accumulates faith. If reward and punishment are of

⁵⁵ Fukuyama defines social capital as “a set of informal values or norms shared among members of a group that permits cooperation among them.” *Ibid.*, p. 16.

⁵⁶ *Ibid.*, p. 255.

⁵⁷ *Ibid.*, p. 253.

⁵⁸ *Mencius*, trans. D. C. Lau, Penguin books, 1970, p. 49.

no faith, then prohibitions and orders cannot prevail.” In his annotations to this saying, Han Fei gives the historical example of Duke Wên of Chin, who forsook a military advantage in Yüan so as to honour his word to his men. Responding to remonstrations from his ministers and attendants to continue hostilities in Yüan, the Duke said, “I set the time limit to my men at ten days for the expedition. If I do not leave, I will violate faith with my men. Taking Yüan and thereby breaking faith, I cannot bear.”⁵⁹ Instead of condemning Duke Wên for passing up on a sure victory, Han Fei extols him as an example that rulers ought to emulate. This reveals the importance of *xin* to Han Fei’s political system. If the ruler is not true to his written word, which is the law, if he lets the guilty go unpunished and neglects to reward the deserving, then “prohibitions and orders cannot prevail,” and the state will go to ruin. In order to safeguard his own interests and to make the law work, then, the ruler must be trustworthy.

Therefore, we have no reason to doubt the tenability of Han Fei’s system, which, like modern capitalism, simultaneously appeals to and reinforces man’s self-interest. Just as modern capitalism has successfully created new norms to replace the ones it destroyed, we have every reason to expect that Han Fei’s system, too, will produce those moral constraints that are essential to hold any society together.

There is a second reason for doubting that Han Fei’s system is tenable. Critics have pointed out that his behaviourist model of the self, upon which his whole blueprint for government rests, is too simplistic. Schwartz, for example, writes:

Whatever one’s attitude to the Confucian belief in the transformation of society through the virtue of ethical elites, it is nevertheless a belief which also posits a certain potential for moral and intellectual initiative in human beings. It thus, in effect, may be essentially

⁵⁹ Liao, vol. 2, p. 59.

more “realistic” than the simple behaviourist model so clearly enunciated by the Legalists. Despite its moralism, or because of it, it is able to take into account the role of human sentiment, ingenuity, cunning, and resourcefulness in frustrating and evading all institutional devices.⁶⁰

Schwartz’s point is that “the dream of a Legalist ‘utopia’ completely controlled by impersonal mechanisms of law, ‘technique,’ and the mystery of authority – a society in which the incalculable forces of private passions, sentiments, values, and convictions will have been eliminated,”⁶¹ is, in the end, just that – a dream. In his effort to construct a perfect system that would run like clockwork, Han Fei disregarded the fact that man is a complex being. He reduced man to a mere animal much like the dog in Pavlov’s experiment, whose behaviour is altogether conditioned by the use of positive and negative reinforcements. As a result, the system he designed cannot cope with man’s ingenuity and resourcefulness in circumventing the law. Nor can it cope with man’s “private passions, sentiments, values, and convictions,” which extend beyond a mere love for profit and fear of harm. As Schwartz asks rhetorically, “Can private sentiments and passions ever be ruled out? ... When the mass of men see no relationship between penal law and their own life interests will they not, in the end, prove extraordinarily ingenious in evading it?”⁶²

In his defence, Han Fei would probably argue that it is only a small minority that possesses the ingenuity to evade the law. Government, he would say, is to govern the majority and not the rare genius. And most people, besides lacking the cunning to circumvent the law, are primarily motivated positively by reward and negatively by

⁶⁰ Schwartz, *The World of Thought in Ancient China*, op. cit., p. 347.

⁶¹ Ibid., p. 349.

⁶² Ibid., p. 347.

punishment, however unfortunate the comparison with the Pavlovian dog might seem. In “Loyalty and Filial Piety: A Memorial,” Han Fei responds to critics who object to his policy of encouraging the people with rewards and terrifying them with punishments. He writes:

[People] of this age all say: “As Hsü Yu declined the rule over All-under-Heaven, mere reward would not be sufficient to encourage worthies. As Robber Chê purposely transgressed the penal law and bravely underwent the consequent disaster, punishment would not be sufficient to prevent culprits.” In response thy servant would say: “... The two persons were extremes. The right way of governing the state and employing the people should not take these rare persons as standards. For government is to govern the ordinary persons; its true path is to lead the ordinary persons; wherefore extreme things and eccentric words are detrimental to political order. The highest man of the world cannot be encouraged with reward; nor can the lowest man of the world be restrained by penalty. However, if on account of the highest man reward is not established, and on account of the lowest man punishment is not established, the right way of governing the state and employing the people will be missed.”⁶³

The reason why Han Fei sticks to a simple, behaviourist model of the self, then, is because he believes that this model accounts for the majority of mankind. Even if we concede that human beings are complex creatures who cannot be characterised solely in terms of their love for profit and a corresponding fear of harm, we must admit that these are two of the strongest human motivations. Most people are terrified by severe penalties and are encouraged by generous rewards. In Han Fei’s state, where the ruler wields exclusive control over the means to profit and avoid harm, it is quite likely that most people would put aside their private convictions and passions, and seek safety with the

⁶³ Liao, vol. 2, p. 317.

ruler. This is even more likely given the fact that Han Fei's ruler is not a ruthless and cruel tyrant who oppresses the people and uses them as mere tools to achieve his private ambitions. As we established in Chapter Two, Han Fei's ruler works ultimately for the benefit of the people, to rescue them from the throes of war and suffering. In fact, contrary to what Schwartz thinks, Han Fei expects the people to see "a relationship between penal law and their own life interests." In "How to Use Men," Han Fei writes:

The intelligent sovereign offers rewards that may be earned and establishes punishments that [can]⁶⁴ be avoided. Accordingly, worthies are encouraged by rewards and never meet Tzŭ-hsü's disaster; unworthy people commit few crimes and never see the humpback being cut open; blind people walk on the plain and never come across any deep ravine; stupid people keep silent and never fall into hazards. Should such be the case, the affection between superior and inferior will be well founded [上下之恩结].⁶⁵

The only way for any affection to exist between superior and inferior in such a harsh system is if the people "rationally" agree to be subject to it. In other words, the people willingly submit to the ruler because they understand that his harsh laws are drafted in their best interests; to prevent them from falling into a "deep ravine" or any harm.

In summary, to those critics who accuse him of relying on an over-simplistic model of man, Han Fei's reply is that this model accounts for most "ordinary persons." He concedes that his system cannot cope with "eccentricities" or anomalous elements in society, like high-minded scholars and hardened criminals, who cannot be motivated by either reward or punishment. However, government must be designed to "lead the ordinary persons," and not the "extremes" in society.

⁶⁴ I think this is a better translation for "可避之罰", which Liao translates as, "punishments that [should] be avoided."

⁶⁵ Liao, vol. 1, pp. 270-271.

There is a third reason to doubt the tenability of Han Fei's system, which, I think, is potentially more damaging than the ones we have considered. While scholars have criticised Han Fei for underestimating man and his complexity, I think that Han Fei's fatal mistake is in *overestimating* the capability of a mediocre ruler to head his system. First, the Machiavellian cunning and deceit that Han Fei expects of his ruler seems to me to be beyond the capability of the average person. Han Fei's ruler is required to master a whole repertoire of techniques to control his ministers. He must, for instance, "invert his words" and "use contradictory arguments" to trick them into revealing their secret plots. He must also be able to perceive the ministers' hidden intentions from their reactions and facial expressions.⁶⁶ The ruler must furthermore discard all emotion so that no one can know his thoughts and use this knowledge to manipulate him. He must also be absolutely impartial and not treat even his sons and consort preferentially; otherwise, evil ministers will make use of them to influence him. Such impartiality and clever wile are the preserve of a handful and clearly are not typical of the average man. If it turns out that the wily Legalist ruler is as rare as the virtuous Confucian sage-king, however, then Han Fei's claim that his form of government is more reliable than the Confucian system for restoring order is thoroughly debunked.

Second, although it is quite clear from the preceding chapters that Han Fei never meant for his ruler to be a tyrannical despot, but instead, imagined him to be a benevolent ruler who is genuinely committed to the people's welfare, it is not at all clear how Han Fei could expect so much from any ruler given his theory of human nature. If even parents seek ultimately to profit from their children, how can Han Fei expect the ruler, who has no blood ties with the people, to put the people's welfare first or to *li min*?

⁶⁶ See section 2.2.4, "Machiavellian deceit to control ministers," pp. 57-65. See in particular pp. 58-59.

Someone might try to defend Han Fei by arguing that he does not in fact expect such altruism from the ruler. It is Han Fei himself who is personally committed to *li min* and makes this the basis of his entire Legalist programme. Han Fei is not being inconsistent because his theory of human nature only commits him to saying that most or practically all men are profit-minded; it does not preclude exceptions like Han Fei himself, who risked life and limb to persuade rulers to act on his proposal for government change. Such a defence would continue, a mediocre ruler, who is self-interested and profit-minded, can and will implement Han Fei's political programme because it would be in his own interests to benefit the people; with unification, the ruler would have all the resources of the empire at his disposal.

The problem with this defence is that while it is conceivable that the ruler's immediate interests coincided with those of the people – the unification of the empire was key to securing benefit for the people and the ruler alike, it is not clear that for Han Fei, their interests were always co-extensive. This is unlike in *The Art of Rulership*, where according to Ames, in order to reinforce the strength and stability of the government, the ruler “finds himself in the position of having to accommodate his government to the inclinations of the people and of being governed himself by what the people in general find agreeable.”⁶⁷ Han Fei, on the other hand, put great store in the notion of *shi* (power or authority) and did not see popular support as at all necessary for the viability of the state. A self-interested ruler would thus not seek to benefit the people when his interests are at cross purposes with theirs.

Furthermore, to argue that for Han Fei, *li min* is a means to achieve the ruler's paramount self-interest would be to disregard all the passages in the *Han Fei Zi* which

⁶⁷ Roger Ames, *The Art of Rulership*, University of Hawaii Press, 1983, p. 154.

insist that the ultimate goal of government is to benefit the people. As we saw earlier in Chapter Two, Han Fei labours to justify his draconian measures in terms of the benefit they bring to the people, not to the ruler. There seems little reason, then, to believe that Han Fei considered *li min* as a means to achieving benefit for the ruler, and not an end.

If Han Fei's political system does not require popular support to be viable, and if man were truly self-interested to the extent that Han Fei believes he is, then when it no longer serves the ruler's interests to benefit the people, he would surely cast aside their benefit to pursue his own gain. And there is nothing within Han Fei's system to prevent the ruler from using his inordinate powers to pursue his private gain at the people's expense. We learnt from the previous chapters that Han Fei accords the ruler extensive powers over the people. On top of having full autonomy to create the law, the ruler is also given exclusive control over the system of reward and punishment that enforces the law. In contemporary terms, Han Fei's ruler has full control over both the legislative and executive arms of government. There are no checks and balances on the ruler within this system because Han Fei believed that if the ruler were to share power with his ministers, he would end up being controlled by them. Once the ruler's power (*shi*) is undermined, he would lose all ability to lead the people, and the state would go to ruin. By not imposing a system of controls on the ruler that would keep him accountable for his use of power, Han Fei did not rule out the possibility that a ruler might, one day, abuse the system, and turn out to be that very despot that Han Fei so dreads. To quote James Madison again, "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be

necessary.”⁶⁸ Precisely because rulers, like all men, are not angels, Han Fei had to create a system of checks and balances that would make it impossible for rulers to become despots.

If we accept Chapter Two’s thesis that Han Fei is genuinely committed to *li min*, then the only way to explain the lack of checks and balances within his system is that he failed to apply his theory of human nature to the ruler. Han Fei’s fatal mistake – one that, I think, compromises his entire political system – is that he did not carry his theory of human nature to its logical end to include the ruler. He overlooked the fact that rulers, like all men, are self-interested and profit-minded. Consequently, he neglected to put in place an accountability system that would guarantee the integrity of his system and ensure that it achieves the goal he intended for it to, which is ultimately, to benefit the people.

3.4 Conclusion

This chapter has been a presentation and assessment of Han Fei’s contribution to the debate on good government. Han Fei was convinced that the way of love which the Confucians promulgated was no cure for the prevailing disorder. Furthermore, the Confucian system depended on too many variables – on the rare appearance of a sage-king, and the people reciprocating the ruler’s love. A better and more predictable way to restore order was needed. Han Fei saw that man’s profit-loving nature was the one constant that could serve as the linchpin of his entire political system. He thus designed a system that exploits man’s love of profit to move the state towards its desired goals. Unlike the Confucian system, Han Fei’s “scientifically-designed” system would be invulnerable to the caprices of fate or human emotion. It would run on laws and objective

⁶⁸ Federalist Papers No. 51, Rossiter, 1961, p. 322. Quoted by Pinker in *The Blank Slate*, op. cit., p. 297.

principles of government, which even the average rulers of his day could implement with success. Han Fei imagined that relationships in the state would be perfectly ordered since these would be conducted purely on the basis of self-interest. Even the ruler-subject relationship, which we expect to be hostile because of the ruler's severity, would be harmonious since the people understand that in a pure meritocracy, they are rewarded or punished exactly as their deeds deserve. Once order has been restored internally, the ruler can then set about to unify the empire. We concluded this chapter by assessing the tenability of Han Fei's political system. While it is possible to conceive of a society based entirely on the self-interested individual and to also defend Han Fei against the charge that his account of the self is too simplistic, I argued that there remains a flaw in his system that threatens to completely undermine it. This is his unquestioning belief that the ruler will always work to advance the people's interests.

Conclusion

Let me conclude by briefly summarising the main argument as it unfolds in the three chapters. In the first two chapters, we set out to answer the question: Is Han Fei advocating a complete break between law and morality in a bid to secure absolute power for the ruler? In the first chapter, we tried to answer the question by exploring the Daoist influence on Han Fei. We thought that if we could show him to be a genuine adherent of the *Dao* and so a natural law theorist on Peerenboom's account, we would have proven a necessary connection between law and morality in his political thought. Han Fei cannot then be said to be an advocate of despotism, since, contrary to what his critics claim, his ruler *does not* have unlimited power to create the law. Contrarily, the ruler's *fa* is informed by the *Dao* and therefore also constrained by it. Unfortunately, by the end of the first chapter, we concluded that both the positivist and natural law readings of the *Han Fei Zi* are equally plausible. Furthermore, we realised that even if we could prove that Han Fei is a genuine Daoist, we would be none the wiser as to how law and morality are related in his thought, since some have labelled Daoism an 'amoral' philosophy.

In Chapter Two, we changed tack and sought to answer our initial question by studying the *raison d'être* of government for Han Fei. A close reading of the *Han Fei Zi* revealed that Han Fei does not espouse "government for the ruler," but instead, "government for the people." I argued that in spite of his condemnation of Confucians, Han Fei shares their fundamental belief that the primary task of government is to care for the welfare of the people or *li min* (to benefit the people). We also considered those aspects of Han Fei's philosophy that lend weight to the traditional account of him as a defender of despots. These include his recommendation of severe penalties for even small

crimes, his use of deceit to control ministers and his removal of political dissidents. We saw that these apparently despotic measures are, in fact, justified in terms of the benefit they bring to the people. As such, they are altogether compatible with a genuine commitment to *li min*.

In the third chapter, we studied Han Fei's overall blueprint for government, beginning with his account of man, to understand why he regards his as the best government for a critical age. Han Fei was convinced that human nature is bad, and furthermore, that it is incapable of good. As such, the Confucian attempt to transform man's profit-loving nature through education and ritual was doomed to fail. What Han Fei proposed instead was to exploit this immutable fact about man, his "badness," for good – to perfect the state and benefit the people. What was a bane to all governments – man's insatiable appetite for profit – Han Fei saw as a great boon to his system. If the people could be made to see that the only means to profit lies with the ruler, then they would surely seek to profit by conforming to his *fa*. In this way, the ruler can channel the people's love for profit towards the realisation of state goals.

Han Fei was also convinced that good government cannot wait for the rare appearance of men of exceptional virtue or ability. He wanted, instead, a "fixed formula" to achieve good government, which any ruler, however mediocre, could grasp and put into effect. In this regard, he can be seen as one of the earliest political scientists. His system would not only exploit the "science of human behaviour" – man's love for profit and corresponding fear of harm – but would also run on laws and objective principles of government.

Han Fei believed that his was the best government for his times because on top of being the most *effective* means to restore order in the empire, his system is also *desirable* to the extent that all the five relationships are in perfect harmony. Han Fei argued that a social order based entirely on the self-interested individual is not only viable, but also, extremely reliable because self-interest alone guarantees cooperation amongst people. Even the ruler-subject relationship, which we expect to be strained because of the ruler's severity, is a harmonious one as the people understand that in a meritocracy, they are rewarded or punished according to their deeds.

I concluded the chapter with an assessment of whether such a perfect system is ultimately tenable. There, I argued that the one fatal flaw in Han Fei's system is his failure to put in place institutional checks on the ruler, which would have prevented the ruler from becoming that much-dreaded despot that critics accuse Han Fei of defending.

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