Han Fei on the Problem of Morality

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In order to fully appreciate the contributions that Han Fei made to political philosophy, it is important to understand the dramatic way in which he differed from the political theorists of his time. In the vast majority of pre-Qin philosophy, political thought seems to be, in a sense, applied ethics. The political theory is justified insofar as it accords with a moral theory that is accepted.[1] Although Laozi, Mozi, and Xunzi, to name a few, have radically different political theories, they are all similar in that the justification for these theories is to be found in their according with their moral theories. I argue that Han Fei, on the other hand, wishes to completely jettison *any* talk of morality from discussions in the political realm, and takes relying on morality in politics as necessarily detrimental to the flourishing of the state. The problem that concerns Han Fei, as we shall see, is that those things that people ought to do as individuals (whether they be the self cultivation of the Confucians aimed at the flourishing life, the impartial caring of the Mohists, or any other view about the normative grounding of individual action) have no necessary relationship to those things that ought to be done if the state is to flourish. Indeed, these actions in many instances, will be inimical, or even disastrous, to the flourishing of the state.

I would like to thank Paul R. Goldin, Eric L. Hutton, Philip J. Ivanhoe, Elijah Millgram, Chandran Kukathas, Cynthia Stark, and Bryan W. Van Norden for their comments on various versions of this chapter as well as two anonymous reviewers from Springer.

[1] Indeed, this is a trend that has continued to this day in political thought East and West. Of course, John Rawls's *Political Liberalism*, is an important exception. However, even on this account, political organization must at least be consistent with a diverse set of moral views, even though, as he says, "accepting a political conception does not require accepting any particular religious, philosophical or moral doctrine" (Rawls 1988: 252).

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P.R. Goldin (ed.), *Dao Companion to the Philosophy of Han Fei*,
Dao Companions to Chinese Philosophy, DOI 10.1007/978-94-007-4318-2_6,

This may be an extreme view, but in this paper I shall endeavor to lay out not only why Han Fei took this position but also why much of what he says should still resonate with us today. While the focus of this chapter will be Han Fei, he is perhaps best understood in relation to those whom he sees as his targets. After all, he was not building a theory from scratch, but was in many ways responding to what he saw as vital holes in the work of the political thinkers he was familiar with. Thus, I shall be laying out certain ideas found in Confucian political thought, and in particular the thought of Xunzi, in an attempt not only to clarify Han Fei's position, but also to show why he was interested in the particular issues he raises and how he avoids certain problems found in Confucian political thought.

Now, before dismissing Han Fei as an immoral, power-hungry minister and his political thought as uninteresting or unimportant, let us begin to think about the relationship between morality and politics. Think, for example, of the goals of moral and political theory, respectively. Many moral theorists hold that a moral theory need not necessarily benefit the individual in order for it to be right. Deontological ethical theories, for example, argue that questions of rightness are completely separate from questions of benefit. And, while the consequences of actions are where consequentialist ethical theories look for their moral grounding, these theories focus on *overall* consequences, and not the consequences to any particular individual.

However, when we move to political theory, there seems to be something very strange about saying that the question of whether individuals benefit under a particular political scheme is separate from the justification of that political scheme, as has been noticed by Western political thinkers as far back as the early Greeks.[2] If this is the case, then we should at the least be open to the possibility that the ultimate justification for the political state is not (and perhaps cannot be) simply derived from morality. This view, I argue, is what underlies Han Fei's political thought, and he marshals numerous arguments, the strongest of which can be seen as direct attacks on the Confucian attempt to expand virtue ethics into the political realm.[3]

Han Fei would, I believe, agree with Nicholas Southwood, who argues that "*whatever* it is, the kind of normativity that constitutes political justified-ness is not equivalent to or even ultimately derived from, moral normativity" (Southwood 2003: 261).[4] Such an understanding of the relationship between politics and morality

[2] See, for example, *The Republic* 419a-421c (Cooper 1997: 1052–1054). Indeed, this seems to be a presupposition of modern social contract theory.

[3] Here, I am using the term 'virtue ethics' in the broad sense of an ethical theory that provides an account of human flourishing, an account of those things (virtues) that allow us to achieve this flourishing, and an account of how it is that we are able to acquire these virtues. As I read Confucius, Mencius, and Xunzi, they find the role of virtue to be essential in both ethics and politics. For work reading the early Confucians as virtue ethicists, see Yu (1998), Gier (2001), Hutton (2001), Slingerland (2001), Sim (2007), and Van Norden (2007); for a dissenting view, see Yuli Liu (2004).

[4] Here, Southwood does not offer a positive program, and does not provide us with a political normativity that is not derivable from moral normativity, but simply tries to persuade us that such a normativity must exist.

can also be seen in at least one strand of Machiavelli scholarship, which argues that Machiavelli discovered "the necessity and autonomy of politics, of politics which is beyond or, rather, below moral good and evil, which has its own laws against which it is useless to rebel, politics that cannot be exorcised and driven from the world with holy water" (Croce 1945: 59).[5] For Han Fei, political theory is justified insofar as it preserves order within the state, allowing the ruler to solve problems that threaten, to some degree at least, the order of the state.

Indeed, we perhaps can see in Han Fei a nascent version of David Gauthier's idea that begins his *Morals by Agreement*:

> Why appeal to right or wrong, to good or evil, to obligation or to duty, if instead we may appeal to desire or aversion, to benefit or cost, to interest or to advantage? An appeal to morals takes its point from the failure of these latter considerations as sufficient guides to what we ought to do. (Gauthier 1986: 1)

In his attacks on his opponents' use of morality for grounding their political philosophies, Han Fei can be seen as saying that, at the political level at least, the considerations of desire or aversion, benefit or cost, and interest or advantage *are* both necessary and sufficient to the task of ordering the state, as we shall see.

What we see in the *Han Feizi* is a naturalization of the law and of politics in general in a non-moral dimension. Han Fei provides us with naturalized moral and political theories insofar as he believes that there are natural facts that constrain and provide conditions for an ordered state. However, while Han Fei argues that there are natural facts that restrict how the state can be successfully organized, he nowhere argues that there are restricting moral facts. That is, he does not say that there are moral facts that should lead human beings to act in particular ways. Rather, Han Fei simply argues that, if order is desired, there is a particular way to go about attaining it, one that takes into account natural facts. Therefore, while naturalistic, Han Fei's legal and political philosophy does not find its basis in morality. Rather, what we see is an analysis of the way the world is, along with human nature, and how taking these things into consideration leads to a particular set of methods for achieving order within the state (Harris 2011).

As we begin to investigate Han Fei's antipathy toward morality in politics, we need to scrutinize in further detail his justification of the state as well as his conception of order. It seems that problem-solving is the basis for political justification, as we can begin to see by looking at "The Five Vermin":

> In the age of upper antiquity, human beings were few and animals were numerous, so the people could not prevail against the birds, beasts, insects, and serpents. Then there appeared a sage who taught the people how to build nests out of wood so they could escape all harm. The people were pleased by this and made the man king of the entire world, giving him the name "The Nester." The people ate fruits, melons, mussels, and clams, but they were putrid and foul smelling and hurt the people's stomachs so that they often became sick and ill. Then there appeared a sage who taught the people how to start a fire by drilling dry kindling

[5] Other scholars who come to similar conclusions include Federico Chabod and the Friedrich Meinecke (Chabod 1965; Meinecke 1957).

> so they could transform their rancid foods. The people were pleased by this and made the man king of the entire world, giving him the name "The Kindler." In the age of middle antiquity, the world was covered by a great flood, but Gun and Yu of the Xia opened up channels to divert the waters. In the age of lower antiquity, the wicked kings Jie and Zhou governed cruelly and created disorder, but Tang of Yin and Wu of Zhou led punitive campaigns to overthrow them. (Chen Qiyou 2000: 19.49.1085)

Han Fei does not make it clear exactly what sort of relations there were between individuals in the age of upper antiquity, whether they lived as individuals or whether they were in some sort of loose social arrangement, or, indeed, whether they were already under someone's rule. However, it is clear that the motivation for the move from a pre-Nester situation to the Nester's being named king is that he has solved a basic problem for survival and thus deserves to be called king and to rule over a group of people. This does not mean that the Nester has solved all problems within his realm. Rather, the implication of the people later elevating the Kindler to a position of power is that in the Nester's time there was still a certain amount of disorder—that brought about by food-borne illnesses, for example. However, the Nester, like all the rulers mentioned in the passage above, solved pressing problems of his times.

The Nester is made king because of how he is able to benefit the people, allowing them to live longer lives. And, when Han Fei continues to discuss the Kindler, we see that this individual is given the position of ruler because he is able to solve another pressing problem. Later in history, Gun and Yu were able to justify their rule because of a solution to yet another important obstacle to social stability and flourishing.

If we look at this passage as providing at least a partial justification for government, we see that, in every case, the individuals involved justify their rule by addressing and solving current problems, providing a way for human society to improve its conditions. On this reading, we can see Han Fei as asking a series of hypothetical questions, or as running a series of thought experiments. He is asking, "What were the problems at time *t*?" and telling us that the individual capable of solving these problems is in some sense justified to rule. Therefore, the Nester's rule is justified because he has helped the people avoid dangerous animals; the Kindler's rule is justified because he has helped the people avoid the dangers of uncooked food; Gun and Yu's rules were justified because they were able to divert the floodwaters that otherwise would have engulfed the lands; and Tang and Wu's rules were justified because they were able to end the disorder that pervaded the rules of Jie and Zhou.

Now, there are problems with advocating an account such as this. It is unclear that the world was in chaos before the Nester appeared, or that the Kindler, or even Gun or Yu, were solving problems that had resulted in chaos within the state. Indeed—and this is an advance over the English philosopher Thomas Hobbes as well as someone like Xunzi—Han Fei does not believe that these rulers were justified solely because they saved people from an awful state. It was not the fact that life before Gun and Yu was, in Hobbesian terms, nasty, brutish and short that justifies Gun and Yu's rules, or government in general. As the passage tells us, during the time of Gun and Yu, the people already knew how to build homes, were safe from animals, and had safe food to eat.

Nor was it the actions of these rulers in and of themselves that made their rule justified. As Han Fei himself notes a little later in the text, were Gun and Yu to have built nests or created fire during their eras, this certainly would not have justified their rule any more than Tang and Wu's digging drainage ditches would have justified theirs. It is not that people no longer need fire or ditches, but rather that these are not the pressing problems of the day. It was the ability of these rulers to address the pressing problems of their times that justified their rule.

So, for Han Fei, order arises from and is justified because it solves important social problems of the current age. This, then, is quite different from the Confucians who saw order as necessary to allow for the moral development of the majority within the state, and who despised chaos for its inimical effect on moral cultivation.

What Han Fei seems to be arguing is that we need to be worried about not simply situations in which there is no effective government to impose order, but also situations where there is a lack of effective government action, regardless of whether they lead to actual disorder. Indeed, for Han Fei, ineffective government is at least as bad as no government at all. He is not saying that had the Kindler not come along, chaos would have ensued. Presumably sickness from unclean food was endemic and had been throughout history. And, had Gun and Yu not arrived on the scene, the flooding of the times would not necessarily have led to utter disorder and chaos, for presumably flooding would have been a regular, if not annual problem.[6] However, what these rulers did accomplish was to institute a government that effectively dealt with extremely pressing societal concerns, concerns which, left unaddressed, would have resulted in a society much less capable of effective action. The resulting society was one in which human beings have a much better chance of flourishing, though Han Fei himself might be loathe to put it in these terms.

Although Han Fei is not clear about this issue, it seems that while he takes order to arise from, and be justified because of how it solves, the pressing problems of the time, a shift is made at some point in which it is the order itself that becomes necessary to provide a framework for solving the pressing problems of the time. Indeed, this is a natural outgrowth of from Han Fei's belief that as populations increase, it is necessary to implement different means to achieve the same ends, as we will see below.[7]

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[6] Indeed, the flooding of the Yellow River in China is a problem that continues to this day. It is said to have flooded continuously for 13 years some 4,300 years ago (Bodde 1961: 398–403). More recently, in 1931, it flooded again, causing what is thought to have been the worst natural disaster ever recorded, killing between one and two million people. This followed a flood in 1887 in which at least 900,000 people are thought to have perished and over two million were left homeless (Gunn 2008: 141, 722). Even with modern knowledge and anti-flood techniques, the Yellow River still floods on a regular basis.

[7] If the population is small, and natural resources are abundant, people may very well be able to live together fairly harmoniously. However, as population increases, and competition for scarce natural resources intensifies, new methods of social control must be found. If a few people run through the streets chasing a rabbit, the resultant chaos is not going to be that terrible. However, if a hundred or a thousand are all competing, death and destruction are likely to arise, as thinkers as far back as Shen Dao 慎到 noted. (See Chapter # by Yang in this volume for a further discussion of aspects Shen Dao's thought.) The detrimental potential of chaos increases exponentially along with population.

Neither the Kindler nor the Nester seems to rely on social order to engage in his problem-solving enterprises. However, the degree to which human problems can be solved without social order is limited. By the time we reach Gun and Yu, we see the necessity of an underlying social order that allows them to engage in their large-scale civil engineering projects. The same can also be said of Tang and Wu, who need an underlying social order allowing them to lead punitive military campaigns.

In Han Fei's mind, once society develops and makes certain advances, there is nothing more that can be done to improve the lot of human beings without social order. It is here, then, that we see a shift in the basis of political justification from "How can we solve the pressing problems of the time?" to "What sort of tools will allow for order within the state?"

Han Fei believes that order is created and increased by solving the most pressing problems of the time, and these problems are not necessarily moral in nature. This is not to say, however, that it is impossible for moral questions to be, under certain circumstances, important for the furtherance of order. Indeed, Han Fei himself discusses the role of virtue in the ancient past, as we will see soon. The heart of Han Fei's disagreement with Confucians comes down to the question of whether the problems facing society are, at their foundation, moral problems. Han Fei believes that it is not necessary to have morality in politics, while Confucians believe that morality is always necessary in the political realm.

An objection is sure to arise if we accept that Han Fei is actually striving for continual improvement in order because at times (indeed, quite frequently) Han Fei talks as if the ruler has and should have absolute power to use as he likes. That is to say, the fact that a ruler does not act in a way that increases order in no way leads Han Fei to claim that his rule is unjustified. We can perhaps see Han Fei as trapped within a certain view of politics that sees a hereditary monarchy as justified either in and of itself or by Heaven's mandate. However, while he does not ever challenge the hereditary monarchy or a ruler's right to act as he wishes, when one does look for justification, it is to be found in the ruler's solving the pressing problems of the time.

Indeed, this vision of the purpose of political organization can allow us to make sense of what may initially seem to be a convoluted and unprincipled attitude toward virtue and morality. Han Fei does argue that virtue played a role in political organization in ancient times. In "Eight Persuasions" ("Bashui"八說), we see Han Fei saying that virtue worked in the ancient past and that knowledge was useful in the middle ages:

> In ancient times, people were eager for virtue, in the middle ages, they pursued knowledge, while today they contend over strength. In ancient times, affairs were few and preparations easy; they were plain and crude and did not exhaust the people. Thus they had clamshell hoes and pushcarts. In ancient times people were few and were close to each other, material goods were numerous and so they looked lightly on profit and easily deferred to each other, and so there were cases of the empire's being handed over with polite bowing. And so the actions of polite bowing, lofty care and kindness, and the way of benevolence and generosity are all from the governments [from the time of] pushcarts. If one lives in a time when affairs are many but uses the tools of times when affairs were few, this is not the preparation

> of a knowledgeable person. If one lives in a time of great conflict but follows a course of polite bowing, this is not the order of a sage. (Chen Qiyou 2000: 18.47.1030)

What this means, given that the purpose of government is to solve problems of the time, is that virtue actually did work in the past; it was sufficient to get people to work and live together harmoniously. However, knowing that these things worked in the past is of little use to us today because the conditions that allowed them to work are no longer present. This is brought home yet again in "The Five Vermin," where Han Fei tells us:

> In ancient times men did not plow, for the fruits and grains of trees and grasses were sufficient to feed them. Women did not weave, for the skins of birds and beasts were sufficient to clothe them. Without exerting strength, there was enough to nourish one, for people were few and supplies were abundant, and thus people did not contend. Because of this, though generous rewards were not handed out and severe punishments were not utilized, the people ordered themselves. Now, people have five sons and do not consider this too many. Their sons each have five sons, and so while the grandfather is still alive, he has twenty-five grandsons. Because of this, people are numerous, while goods and supplies are few. People exhaust their strength working and yet their supplies can barely nourish them. Therefore the people contend, and even though rewards are doubled and punishments pile up, still disorder is unavoidable. (Chen Qiyou 2000: 19.49.1087–88)

In the past, natural resources were numerous and the human population was small. Therefore, there was no need to argue over ownership of natural resources. There was little to contend over, and thus order could be achieved by utilizing virtue. However, this was not because virtue had the power of laws and regulations, but rather because the strength of laws and regulations (and their attendant punishments) was not necessary, as contention over resources was not a large problem.[8]

Now, given that the power of virtue is quite slight, accompanied by the fact that the human population has increased at a Malthusian rate and thus competition over scarce resources has become a reality, it is a mistake, in Han Fei's view, to rely upon virtue. To see his point, we can imagine living beside a small stream. Occasionally, perhaps every decade or so, this stream floods and it is necessary to place a few sandbags at strategic locations to prevent the house from flooding. Now, imagine living alongside the Yellow River, which floods very regularly and with such force that thousands are killed during each flood. In the latter situation, a few sandbags (or even thousands of sandbags) simply are not going to do the trick. Rather, much more radical action needs to be taken. Ditches and channels must be dug to carry away the flood waters and dams built to hold the water back. Virtue is like a sandbag—it is sufficient when the problem is small, but is of no use whatsoever when the problem is of a much greater magnitude.

[8] A similar point may be made in slightly different terms. Given the conditions of the time, the amount and kinds of virtue necessary to achieve this harmoniously society was simply less costly, and as such, these kinds of virtue would have been more reliably present.

What Is Order?

In order to more completely understand Han Fei's theory, it may be useful to bring in a conception of order from the Confucian tradition, in particular that of Xunzi.[9] This will enable us to see not only how Han Fei diverges from at least one strand of Confucian thought, but also why morality does not play the role in his philosophy that it did for Confucians. If order must mean "moral order," as it does for Xunzi, Han Fei's alternative will not look as different and opposed as it may initially seem, because he is not talking about a moral order.

However, before going into the details of these thinkers' visions, it may be useful to think through at least some of the options available. There is, of course, moral order. This would be the order within society resulting from following certain moral dictates. We could also have a legal order, the order resulting when everyone within society follows a legal code. These are, of course, two very different sorts of order, for even if the legal code is based upon a particular moral vision, adherence to the legal code does not necessitate adherence to the moral vision.[10] It would also be possible to think of order in economic or military terms, where the state would be thought of as ordered to the extent that it was flourishing economically or had a strong military. And, of course, there is political order, which would arise when the government is able to keep order within the state and achieve its goals.

For Xunzi, the term order (*zhi* 治) refers to a "moral order" based upon ritual and *yi* 義,[11] and when he advocates the implementation of order, it is this moral order. It is impossible, on Xunzi's account, to create order by employing non-moral tactics, just as it is impossible to cultivate an individual by employing the immoral traits of that individual. First, it is necessary to remove the immoral aspects of the state; only

[9] I draw on Xunzi for several reasons. First of all, unlike the *Mencius* and the *Analects* of Confucius, which are both composed primarily of piecemeal sayings, the *Xunzi* is a collection of well-structured essays that form a remarkably coherent and consistent view of ethics and politics. In short, this text provides an explicit defense of morality in politics of the sort seen nowhere else in early Chinese philosophy. Additionally, while there are differences among the philosophies of Confucius, Mencius and Xunzi, they are, in many ways, in agreement in their political theories. The fact that Xunzi offers much more sustained discussions of the role of the ruler and how exactly moral criteria should fit into the state gives us good reason to draw upon him.

[10] And, of course, if the moral vision is to any degree uncodifiable, then adherence to the moral vision does not necessarily mean adherence to the legal code.

[11] The term *yi* in early Chinese philosophy refers to what is appropriate or proper. However, Xunzi has a particular vision of exactly what is proper or appropriate, and for him, it refers to a particular pattern of social organization (Hutton 1996).

then is it possible to order it, in much the same way that it is first necessary to remove unhealthy food from one's diet before it is possible to become healthy.[12]

This heavily normative notion of order in Xunzi is a logical extension of his normative conception of community. As he thinks that the only true and stable sources of community are ritual and *yi*, it is only natural that he turns to these two sources when discussing how to achieve order in the state.

It should come as no surprise that Han Fei disagrees with the idea that no community can be sufficiently stable and long-lasting if it is not based on ritual and *yi* just as he disagrees with the idea that order in the state requires policies based upon ritual and *yi*. The question, then, is what Han Fei means when he discusses order and how his amoral political order differs from Xunzi's moral political order. We have seen that for Han Fei the justification of the state revolves around the creation or sustenance of order, but it is not yet clear what exactly this order entails.

When Han Fei discusses order, he is not attempting to provide a complete (or even partial) *moral* order, but rather simply to provide a *political* order, a political system under which the state can be rich and strong. As such, we can see him as interested in both economic and military order. This political order is realized by instituting a detailed bureaucratic system, establishing systematic laws, employing political techniques, and utilizing the positional power of the ruler. Order, then, is the result of the tripartite system of laws (*fa* 法), techniques (*shu*術), and positional power (*shi* 勢). As Han Fei tells us in "Wiping Away Deviance" ("Shixie" 飾邪):

> Therefore, I say, if one makes clear the methods of [political] order, then even if one's state is small, it will be rich. If rewards and punishments are respected and trustworthy, then even if its population is small, one's state will be strong. If rewards and punishments are not systematic, then even if one's state is large, its army will be weak [because] its territory is not [truly] its territory and its people are not [truly] its people. Without land or people, even Yao and Shun would be incapable of being king, and the Three Dynasties would be incapable of gaining strength. (Chen Qiyou 2000: 5.19.348)

In this passage, Han Fei emphasizes the necessity of systematic rewards and punishments as a means of ordering the state. For the sake of order, it is necessary

[12] For example, Xunzi says:

> The gentleman orders what is orderly. He does not order what is chaotic. What does this mean? I say: Ritual and *yi* are called orderly. Whatever is not ritual and *yi* is called chaotic. Thus, the gentleman is one who orders [the practice] of ritual and *yi*. He does not order what is not ritual and *yi*. That being so, if the state is chaotic, will [the gentleman] not order it? I say: Bringing order to a chaotic state does not mean employing the chaos to order it. One eliminates the chaos and replaces it with order. Bringing cultivation to a corrupt person does not mean employing his corruption in order to cultivate him. One eliminates the corruption and replaces it with cultivation. Therefore, the gentleman eliminates the chaos; he does not order the chaos. He eliminates corruption; he does not cultivate corruption. The proper employment of the term "to order" is as when one says that the gentleman "does what is orderly and does not do what is chaotic, does what is cultivated and does not do what is corrupt." (Wang Xianqian 1988: 2.3.44–45)

that the government has control over its territory and its people, and the only way to achieve this, in Han Fei's mind, is to regulate the actions of people through the twin handles of reward and punishment. This emphasis is complemented by a focus on law and techniques, as Han Fei notes in "Employing People" ("Yongren" 用人):

> If one abandons law and techniques and [attempts to] order the state based on one's own ideas, in this way even Yao could not order a single state. If one discards the compass and carpenter's square and measures based on one's own rash ideas, even Xi Zhong [a lauded wheelwright] could not complete a single wheel. If one gets rid of the *chi* and *cun* measurements and tries to determine different lengths, then even Wang Er [a famous carpenter] could not find the middle. If a mediocre ruler abides by laws and techniques, or if a clumsy carpenter abides by the compass and square and the *chi* and *cun* measurements, then in ten thousand times, he will not go wrong. If the lord can discard that which the talented and clever are incapable of and abides by what the mediocre and clumsy cannot get wrong in ten thousand times, then the people's power will be used to the utmost, and [the ruler's] achievements and fame will be established. (Chen Qiyou 2000: 8.27.542)

The point here is that a *system* needs to be established rather than simply evaluating situations on a case by case basis. This system as envisioned by Han Fei is such that it can be employed by anyone as easily as one might employ a compass to draw a circle with no artistic talent whatsoever. Therefore, if political order is to be achieved, the ruler must implement the law.

However, at this point, it is open to Confucians to agree that disaster is the result of the ruler's simply following his own ideas, much as if the carpenter discards his compass and square. Indeed, insofar as Confucius, Mencius, and Xunzi all focused their energies on attempting to dissuade the rulers of their times from simply following their whims or desires and rather base their actions on ritual and *yi*, they too were well-aware that a system needs to be implemented if order is to be achieved. Thus the above passage does not succeed as an attack on a Confucian-style moral order. All that it does is provide an alternate system of achieving order, one that does not depend upon an underlying moral vision. The disagreement is going to be over what tools are actually effective at bringing about the desired results.[13]

Now, it might be thought that Han Fei advocates the construction of a political order for the sake of an authoritarian ruler, that is, to ensure that the ruler is able to act as he wishes.[14] However, this does not seem to be the case. There are also passages that may initially lead one to think that Han Fei seems to have political goals quite similar to his Confucian counterparts. We see this perhaps most clearly in "Treacherous, Larcenous, Murderous Ministers," where Han Fei tells us:

> As for the sage, he investigates the facts of right and wrong and examines the conditions of order and chaos. Therefore in ordering the state, he sets straight and clarifies the laws and sets out strict punishments in order to save the people from disorder, get rid of disasters in the world, cause the strong to not terrorize the weak, [ensure that] the numerous are not

[13] Note, that for Confucians, the tools or methods to be used in achieving order cannot simply be viewed instrumentally, insofar as they are virtue theorists.

[14] Indeed, this is a common interpretation of Han Fei and Legalism in general (e.g., Fu 1996).

> violent to the few, that the old live out their years, that children and orphans grow up, that the frontier is not invaded, that the relations between rulers and ministers are close, that fathers and sons aid each other, and that the disasters of death and capture [on the battlefield] do not occur. This is the ultimate of [political] success. Stupid people do not understand this, and on the contrary take [such rulers] to be cruel. (Chen Qiyou 2000: 4.14.287)

This passage initially seems to demonstrate that many of the goals of Han Fei's ideal ruler are in accord with the goals of the Xunzian ruler. However, when Han Fei says that the relations between rulers and ministers are close, he does not mean that there are emotional ties between them of the sort that Confucians wish to cultivate. Rather, he is simply saying that they have a close working relation.

We can notice this difference by looking at the terminology these thinkers employ when discussing relations both in the family and in the state. For Confucian thinkers, fathers and sons are supposed to be emotionally close to each other and have an intimate relationship (*qin* 親).[15] It is this intimate, natural relationship between fathers and sons that is the basis for what Confucians take to be the ideal relationship between rulers and their subjects. Ideally, the relationship between superiors and subordinates should be as close as between fathers and sons, and it is such a relationship that allows for harmony and order within the state.[16]

Han Fei, on the other hand, is skeptical about the possibility of such a scheme working, for numerous reasons. He does acknowledge that there is a close relationship between father and son, that there are feelings of *qin*. However, he does not think that these feelings hold strong sway, even at the family level. In "Treacherous, Larcenous, Murderous Ministers," for example, Han Fei tells us a story of how the slanderous words of others can easily damage the relationship between father and son, to the extent that the father will even kill his son. Han Fei's conclusion is that since this relationship between father and son is not strong enough to survive slander, and the relationship between ruler and subject can never be as strong as that between father and son, emotional closeness (*qin*) is not to be relied upon in the political realm.[17]

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[15] This term is used to denote the emotional closeness between fathers and sons in the *Analects* and the *Mencius* as well as the *Xunzi.*

[16] For example, Xunzi says:

> When a benevolent [*ren* 仁] individual serves as superior, then the people will honor him as they would Di 帝; they will be close [*qin*] to him as they are to their own parents, and they will be delighted to march out and die for him. There is no other reason for this other than that what they take to be good in him is honestly fine, what they obtain from him is honestly great, and the ways in which they benefit from him are honestly multitudinous. (Wang Xianqian 1988: 6.10.181)

See also Wang Xianqian (1988: 6.10.189–190, 7.11.220–21, and 7.11.224–25).

[17] Indeed, where Han Fei uses *qin* in a positive light, he seems to have changed its meaning from the emotional ties that surround it in Confucianism, appropriating the term, as he often does, by changing its implications.

Furthermore, for Han Fei, even the idea of mutual aid between fathers and sons seems to be focused more on the material gain that each receives, rather than on a Confucian conception of filial piety.[18] Indeed, Han Fei's choice of the term *bao* 保, "to assist, to protect" is markedly different from *qin* and does not have the same emotional content.

Finally, Han Fei does not advocate moral cultivation of either individuals or the ruler, and does not attempt to develop a substantive moral order from which political order is to be derived. However while these differences do exist, it seems clear that the ruler is not to act on his own whim, or in a fashion that might simply lead to his own benefit or fulfillment. Rather, the ruler is to act for the benefit of the state.

On Morality and Order

While it seems clear that Han Fei and Xunzi have quite different conceptions of what is necessary for order, it is still not clear where the core dispute lies. It is not simply that Xunzi desires a moral order while Han Fei desires an economic and political order. For although Xunzi certainly argues for a moral order, he sees this as both necessary and sufficient for economic and political order. On Xunzi's account, Han Fei's goals are simply unachievable without an underlying moral order. However, as far as Han Fei is concerned, an underlying moral order is disastrous for the goals of economic and political order.

We do not yet have an answer to the question of why exactly Han Fei believes morality is inimical to political order. We can begin to see some of the problems Han Fei anticipates by looking at a story from "Outer Compendium of Explanations, Lower Right" ("Wai chushuo you xia" 外儲說右下).[19] The second canon of this chapter tells us:

> Order and strength arise from the law while weakness and disorder arise from leniency. If the ruler is clear-sighted about this, he will set straight rewards and punishments and will not treat those below with benevolence. Rank and salary arise from achievement, while punishments arise from crimes. If his ministers are clear-sighted about this, they will exert

[18] In addition, the Confucian relationship between fathers and sons is a much more hierarchical relationship than the one described here.

[19] Within the *Han Feizi* we find five chapters of what one might call "Compendiums of Explanations," including "Outer Compendium of Explanations, Lower Right." Comprising approximately 25 % of the total text, these chapters are all similar in that they consist of numerous "canons" (*jing* 經), or lessons and advice that Han Fei wishes to impart, followed by extremely terse references to historical events or sayings that serve as illustrations of these lessons and advice. Each of these "canons" is then associated with an "explanation" (*shuo* 說), where the terse references from the canons are explained and expanded upon. Often, several versions of a historical event are given in the "Explanation" sections.

> their strength to the point of death, but not because of loyalty to the ruler. If the ruler thoroughly understands not to be kind, and his ministers thoroughly understand not to be loyal, then he can become a true king. [For example, King] Zhaoxiang understood the proper disposition of the ruler and did not release supplies from the Five Gardens. (Chen Qiyou 2000: 14.35.803)

The claim made here is that the moral virtues of kindness, benevolence, and loyalty, highly prized by Confucians, can be disastrous for order within the state. While this may initially seem to go against the passage in which Han Fei argues that the ruler and ministers should have a close relationship, there is no true conflict. Having a close working relationship with one's superiors or subordinates does not necessitate any loyalty in the Confucian sense. Rather, the close working relationship implies that everyone within the bureaucracy does their assigned duties, and thus meshes together as finely as the gears of a carefully designed, well-oiled machine.[20]

While the above passage simply makes a claim, Han Fei provides an explanation, an historical example that he takes to provide supporting evidence:

> There was a great famine in the state of Qin. The Marquis of Ying [i.e. Fan Sui, fl. 266–256 BCE] said: "As for the plants and roots of the Five Gardens, these vegetables, acorns, jujubes, and chestnuts would be sufficient to allow the people to survive. I ask that we distribute them."
>
> King Zhaoxiang said: "Our laws of the state of Qin ensure that people receive rewards only after having some achievement, and that they be punished only after committing a crime. Now, if we distribute the vegetables from the Five Gardens, this will enable those who have achievements to be rewarded along with those who lack achievements. Now if we enable those who have achievements to be rewarded along with those who lack achievements, this is the way of disorder. Distributing food from the Five Gardens and having disorder is not as good as throwing away these jujubes and vegetables and having order." (Chen Qiyou 2000: 14.35.818–19)

The problem that King Zhaoxiang identifies is that if food is released from the government storehouses, then those who did not do an iota of work and who would have starved even if the conditions were not ripe for a famine would receive aid alongside those who had worked hard in the fields and who were in danger of dying only because of conditions outside their own control. At this point, the king was incapable of determining who was deserving of aid. The worry with a system of welfare such as the Marquis of Ying advocates is well understood even in the present day. If the state provides food from its storehouses (or, in a modern equivalent, welfare payments from tax monies) without regard for the deservingness of the recipients, then there will be no incentive to work for oneself. Rather, people will begin to rely upon the government rather than their own abilities.

[20] Indeed, the conception of the state and its members as a machine, though not voiced explicitly in the *Han Feizi*, makes one think of Hobbes's "leviathan."

Now, one might wonder to what extreme Han Fei is willing to take this principle, and this is answered in a slightly different version of this story that he also quotes:

> Another source says: King Zhaoxiang replied, "Ordering the distribution of melons, vegetables, jujubes and chestnuts would be sufficient to allow the people to survive, but this would cause those who have achievements and those without achievements to struggle over getting these things. Now, keeping them alive but having disorder is not as good as letting them die but having order. May you give up this thought, Grand Minister!" (Chen Qiyou 2000: 14.35.819)

Here, the King makes it very clear that even if the only alternative to providing for the undeserving is that they, along with the deserving will die, food should still not be distributed. Only, one presumes, if it is possible to determine who is truly deserving of food should the food be distributed.

By providing us with this story, Han Fei is arguing that order is more important than life itself. Han Fei may very well allow that those who have worked and made contributions to society deserve to be fed and to live and may even accept this as a moral claim. However, the passages from "Outer Compendium of Explanations, Lower Right" demonstrate that moral desert is secondary to considerations of order within the state. The resulting chaos that would arise if the undeserving were rewarded is so detrimental to the order of the state, in Han Fei's mind, that even the lives of the innocent must be forfeit.

One might initially think that events of the sort that lead to a divergence between what is virtuous and what leads to order are few and far between, that it is only in cases of famine or the like that such a problem arises. If this were so, we might think that, in terms of real world applicability, Confucians and Han Fei might actually come to the same conclusions in the vast majority of cases. However, we are soon disabused of this notion if we take a look at "Eight Persuasions":

> As for a caring mother's relation to her infant son, her love is such that nothing comes before him. Even so, if her infant son engages in perverse actions, she makes him submit to a teacher. If he has a serious sickness, she makes him submit to a doctor. If he does not submit to a teacher, then he will fall victim to punishment, while if he does not submit to a doctor, then he will approach death. If even a caring mother's love is not beneficial for avoiding punishment or saving one who is dying, then that which preserves the child is not love.
>
> The nature of the relationship between the son and the mother is one of love. The relationship between the minister and ruler is one of power and planning. If the mother cannot use love to preserve her family, then how can the ruler use love to uphold the state? The clear-sighted ruler understands how to achieve wealth and power, and thus he can attain his desires. So, he is careful in governing, because it is the method for achieving wealth and power. He makes clear the laws and prohibitions and examines his schemes and plans. If the laws are clear, then within the state there will not be the disaster of disorder. If his plans are attained then outside the state, he will not suffer the misfortune of death or capture [on the battlefield].
>
> Therefore, what preserves the state is not benevolence [*ren* 仁] or *yi*. Those who are benevolent are loving and kind and take wealth lightly. Those who are cruel have hearts that are harsh and easily punish. If one is loving and kind, then one cannot bear to do certain things. If one takes wealth lightly, then one is fond of giving to others. If one is harsh, then a hate-filled heart will manifest itself toward subordinates. If one easily punishes, then rash executions will be applied to the people. If there are things that one cannot bear to do, then punishments will often be forgiven and waived. If one is fond of giving to others, then

> rewards in many cases will lack a corresponding achievement. If a hate-filled heart manifests itself , then those below will resent their superiors. If rash executions are instituted, then the people will rebel.
>
> So, when a benevolent individual is in power, those below will be unrestrained and think little of violating prohibitions and laws. They will look to luck and be lazy, and will hope for good things from their superior. When a cruel individual is in power, then laws and orders will be rashly applied, and the relationship between ministers and their ruler will be one of opposition. The people will be resentful and hearts bent on disorder will arise. Therefore it is said: Both those who are benevolent and those who are cruel will ruin the state. (Chen Qiyou 2000: 18.47.1037–38)

This passage is interesting for several reasons. Not only does Han Fei argue against the ruler acting virtuously; he also defends himself against a potential attack—that by not acting virtuously he is acting viciously. In the beginning of this passage, Han Fei allies himself with both Mencius and Xunzi in acknowledging that strong familial bonds exist. However, he parts from these thinkers in that he believes that this has no relevance to governing the state. Just as a mother's love is not useful in keeping her son from traveling the wrong path or in saving him from sickness, so too is a ruler's love for his ministers and people useless for the task of ruling a state. If a child is sick, the mother needs to take it to a doctor and the child must submit to the doctor's orders if it is to recover. Love will not help the child.

Why is it that a mother has her son submit to a teacher if his actions are not acceptable? Han Fei does not directly answer this question, but his reasoning seems clear. The mother simply does not know how to go about educating her son. She has extensive love for her son, but this does not help her in educating him. Therefore she gives him to a teacher who, in addition to having the knowledge necessary to instruct him on proper conduct, is capable of punishing the child when he strays, ensuring that he will actually learn. And, for Han Fei, this punishment is vital because it is only with this threat of punishment that the son will act as he should.

A very similar sort of reasoning exists in the case of the sick child and the doctor. No matter how much the mother loves her child, she is incapable of curing him. She simply does not have the tools necessary. The doctor, however, because of his training and knowledge, is able to cure the child, so long as he submits to the treatment. The point is that certain tasks require certain sets of knowledge, and love, no matter how strong, is simply incapable of replacing this knowledge.

Much the same can be said for the relationship between the ruler and his people. Rulers who practice the virtue of benevolence will be loving and kind and not care about wealth. However, if this is the case, they will give away the wealth of the state to the undeserving and forgive and waive punishments for the deserving. The result of such action is that the people will no longer obey the law. Furthermore, they will no longer work hard for achievements but will rather become lazy, looking to the generosity of the ruler. The problem is that the ruler acts out of his love for his people rather than from an understanding of what is in the long-term interest of the people of the state. Just as a mother refusing to allow a painful course of treatment for her child because she cannot bear to see him hurt is actually harming the child, so too is the ruler acting from his love for his people actually harming them.

This does not mean that the ruler should act in a vicious fashion, however. Indeed, for Han Fei, acting out of both vice and virtue are certain to lead to the ruination of the state. Rather, the ruler needs to leave all emotion behind in determining how to rule the state. How is this possible? It is only through the establishment of and adherence to the law. As he tells us in "Explaining Suspicious Behavior" ("Shuoyi" 說疑):

> Therefore, the ruler who understands the Way distances himself from benevolence and *yi*, sets aside [his own] intelligence and ability and makes the people submit to the law. Because of this [the ruler's] fame will be widespread and his name will be awe-inspiring. His people will be well ordered and his state at peace. [This is a result of his] understanding the methods of employing the people. (Chen Qiyou 2000: 17.44.965)

The law is impersonal and is thus not vulnerable to change based on feelings. Rather, it is designed so that actions leading to order are rewarded while those leading away from order are punished.

In arguing against the Confucians, while Han Fei does spend time explaining why, even if the ruler possesses virtues such as benevolence and *yi*, he should not act on them, he is even more worried about actions that arise out of the baser aspects of human nature, namely private interests. Not only does the law ensure that feelings of benevolence, love, loyalty, etc. do not lead to disorder, it ensures that the private interests of individuals do not lead to disorder. As Han Fei notes in "Deluded Dispositions" ("Guishi" 詭使):

> Now, laws and orders are established in order to eliminate private interests. If laws and orders are implemented, then the way of private interests will be eliminated. Private interests disorder the law. … Thus the *Fundamental Sayings*[21] says: "The means by which to order the state is the law; the means by which to cause disorder is private interests. If the law is established, then no one can satisfy their private interests." Therefore it is said: Those who take private interests as their way create disorder while those who take the law as their way create order. When those above lack the [proper] way, then those with knowledge will engage in private speeches and those with talent will pursue private plans. When those above engage in private kindnesses,[22] then those below will go after private desires. The sages and those with knowledge will form alliances, create proposals, and make speeches in order to go against laws and measures from above. (Chen Qiyou 2000: 17.45.997–98)

On Han Fei's account of human nature, everyone acts on upon their private interests, and thus has their own private desires. If the ruler does not employ the law to order the state, then the various ministers and others will be able to pursue their own private desires, which will lead to the ruination of the state. Furthermore, it is not only the private desires of the ministers and people that Han Fei warns against. Rather he is equally concerned about the ruler's following his own private interests,

[21] *Fundamental Sayings* (*Benyan* 本言) is presumably a text extant in Han Fei's time. However, we have no further knowledge of this text.

[22] "Private kindness" may be slightly strange here, but I retain "private" as a translation of *si* 私 for consistency. The point is that kindness is practiced not for the sake of kindness, or for the sake of others, but merely because it benefits the ruler.

as he notes in "Having Standards" ("Youdu" 有度): "When the ruler abandons the law and acts according to his own private interests, the proper divisions between superior and subordinates will not exist" (Chen Qiyou 2000: 2.6.111).[23]

At this point, it may be useful to return to the point that the Confucians actually agree with Han Fei on the point that the ruler should not act on his own whim or desires. Where Han Fei wants to employ laws, a Confucian like Xunzi wishes to employ ritual and *yi*. Given this, we might think that the actual debate between Han Fei and Xunzi should be over the efficacy of Han Fei's particular legal code versus Xunzi's particular set of rituals and *yi*. Whichever of them actually leads to a more ordered state is the one that should be chosen.

However, Han Fei would likely argue that there are several problems with such a position. First off, given his conception of human nature, he would argue that rituals and *yi*, which lack the punishments associated with laws, regardless of their content, simply cannot shape and guide human action. Second, and more important, is the fact that while ritual and *yi* might very well be codified, they are only an approximation of virtue. On Xunzi's account, ritual and *yi* delineate those actions that *tend* to accord with virtue, with the understanding that there will be cases in which these rituals and *yi* could actually lead one astray. The role of the sage, then, is to provide guidance in these instances to those who have not themselves become fully virtuous and who thus lack the ability to determine when to follow ritual and *yi* and when they lead one astray.

For Han Fei, this claim of uncodifiability is very dangerous for order. By providing rulers with a reason for believing that the ritual code is insufficient in certain cases, Xunzi has provided them with a reason for acting out of their love for their people rather than by following a particular code. Take, for instance, the example of famine in the passages from "Outer Compendium of Explanations, Lower Right," translated above. There is much about the situation to give a ruler reason to think that even if the ritual code proscribed indiscriminately handing out grain from the state granaries, such action is not only permitted but actually mandated by virtue in the case of famine.[24]

This is not the only problem, however. Rather the more important worry is that the ruler will increasingly find (or believe) that particular, uncodified, actions are necessary and that he will rely less and less on the particular code because he believes that he understands what underlies the code and thus does not need to adhere to it in all situations. To the extent that there is something seen as more important underlying any particular code, there is always the potential that the code will be undermined by those who believe that they have a grasp on what underlies the code, regardless of the realities.

[23] For another account of the meaning of *si* in the *Han Feizi*, see Goldin (2005: 59) as well as Goldin's introduction to this volume.

[24] Note too that Mencius is quite explicit in 4A17 that the ritual code is merely a guide, that one must also exercise one's own power of discrimination to weigh circumstances and act accordingly, even if doing so goes against established ritual prescriptions (Jiao Xun 1998: 15.520–521).

As we saw above, Han Fei argues that the ruler must put aside his own intelligence and rely simply upon the law. If the ruler allows his own desires to cloud his judgment, to cloud his understanding of the tasks being performed by his officials, then the state will not run smoothly. The only way to ensure the smooth running of the state, one might think, is to ensure that the ruler not act on his own desires, that he step back and not *act*. Rather, by implementing a system of laws and charging his officials with their duties, he has created a system that does not need the interference of the ruler, and which does not have the costs associated with such interference. Furthermore, it should come as no surprise that Han Fei would find a preoccupation with virtue on the part of the ruler akin to a preoccupation with private desires. In each case, these distractions move the ruler away from his Way, from the remote, reactive position of the lord to a much more active and politically disastrous position.

It is for these reasons that Han Fei believes that moral considerations of the sort Xunzi advocates should play no role in determining how to govern the state. Considerations, either moral or immoral, are only inimical to the governance of the state, for they will both lead to disorder rather than order. Now, while the textual evidence above seems to clearly lead to this conclusion, there are passages that may initially seem to indicate that what Han Fei is doing is not arguing against using moral considerations such as benevolence and *yi* but rather providing a reinterpretation of these concepts and arguing that once we *really* understand what *yi* (for example) requires, we will see that Xunzi is wrong even on his own terms. It is to this question that we now turn.

A Possible Role for Morality in Governance?

The first place where we see a true advocacy of *yi* is in "Treacherous, Larcenous, Murderous Ministers," where Han Fei says:

> When the sage administers the law and the state, he is certain to go against his times and submit to the Way (*dao* 道) and its power. Those who know it go along with *yi* and go against [current] customs. Those who do not know it differ from *yi* and go along with [current] customs. When few in the world are knowledgeable then what is [truly] *yi* [will be taken to be] wrong. (Chen Qiyou 2000: 4.14.287–88)

What is initially peculiar to this passage is that it advocates following *yi*, and thus seems to stand in direct opposition to arguments elsewhere in the *Han Feizi* that following *yi* is a recipe for disaster. What, then, are we to make of this passage? There are several options available. One could argue that Han Fei is being inconsistent or that his view has changed over time, and this passage represents either an earlier or later view than the other passages. One could also argue that Han Fei was not the author of certain of these passages. However, while each of these options has reasons underlying it, they are not the best places to start. If we wish to understand the *Han Feizi* as a whole, then at least initially we need to make the assumption that

it is providing a coherent and not contradictory view.[25] If it is possible to understand the above passage in a way that fits in with the rest of what Han Fei says, then this is the preferable tack to take.

Some clarification may begin to arise when we look slightly later in "Treacherous, Larcenous, Murderous Ministers," where Han Fei complains:

> The rulers of our time praise reputations for benevolence and *yi* as beautiful and do not investigate their realities. This is why in great affairs their states are lost and they die while in small affairs their land is cut away at and the ruler is despised. How can this be made clear? Providing for the poor and hard-up is what this generation takes to be benevolent and *yi* while feeling compassion for the people and not being able to bear punishing them is what this generation takes to be generosity and love. However if one provides for the poor and hard-up, then those without achievement will receive rewards, and if one cannot bear to punish, then violence and chaos will not cease. (Chen Qiyou 2000: 4.14.293)

This passage seems to indicate that the problem lies not in advocating *yi* but rather in what it is that is truly *yi*. That is to say, there may be nothing wrong with *yi* itself. What is problematic is our understanding of *yi*. We use these names but do not understand the realities that underlie them. That is, we do not understand what really is *yi*.

This interpretation also has the advantage of not forcing Han Fei to contradict himself when, a few lines later, he speaks of benevolence and *yi* in a very negative light:

> This is how we come to clearly see that benevolence, *yi*, love, and generosity are not worth employing while severe and heavy punishments are sufficient to order the state. (Chen Qiyou 2000: *ibid*.)

Such a discrepancy within "Treacherous, Larcenous, Murderous Ministers" can be resolved if we take this passage to refer to the popular conceptions of benevolence, *yi*, love, and generosity, rather than to their realities. As commonly understood, these moral terms are useless for ordering the state. However, if we come to understand their realities, that is, if we come to understand what sorts of actions are truly benevolent and *yi*, which ones truly espouse love and generosity, then they may be useful.

There is, however, a potential cost to understanding Han Fei in this way, for it would seem to move the discussion between Xunzi and Han Fei from an argument over the role of morality in the political realm to an argument over just what is moral. No longer does it seem that Han Fei is arguing against using morality in the political realm. Rather, the argument seems to be that the Confucians do not understand what morality requires.

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[25] Of course, it is always possible that evidence will demonstrate that, for example, a portion of the text is corrupt, or an accretion from another text, or that it is from the hand of another author. The point is merely not to make such assumptions unless there is substantial reason for them. A further impetus for claiming wanting an interpretation of the *Han Feizi* that is not full of contradictions is that Han Fei himself explicitly derides people who contradict themselves. Indeed, the modern Chinese term for "contradiction" (*maodun* 矛盾, literally "spear and shield") comes from the *Han Feizi* (Chen Qiyou 2000: 15.36.847 and 17.40.945).

However, "Taking Precautions against Deviance" provides us with a way of understanding how Han Fei can use these terms and advocate being *yi* while not also advocating morality in the political realm. Here, Han Fei distinguishes between private (*si* 私) and public (*gong* 公), and, more importantly, between private *yi* and public *yi*:

> The way of an enlightened ruler is such that he is certainly clear about the difference between public interest and private interest, clarifies the system of law, and gets rid of private favors. Having orders that are of certainty implemented and having prohibitions that of certainty lead to the cessation [of certain actions], this is the public *yi* of the ruler. Implementing one's own private aims, being trustworthy to one's friends, not being encouraged by rewards and not being prevented by punishments, this is the private *yi* of ministers. If the private *yi* is implemented, then there is chaos. If the public *yi* is implemented, then there is order, and so the public and the private are distinct.
>
> Ministers have private interests and public *yi*. Cultivating themselves to be spotless and pure and implementing [what is in the] public [interest] and what is correct and occupying a governmental post without private interests, this is the public *yi* of the minister. Defiling one's actions, following one's desires, seeking personal safety, and profit for one's family, these are the private interests of the minister. If an enlightened ruler is in position above then the ministers will get rid of their private interests and implement public *yi* while if a disorderly ruler is in position above then the ministers will get rid of public *yi* and implement their private interests. (Chen Qiyou 2000: 5.19.366)

What is interesting in this passage is not simply that Han Fei distinguishes between a public-minded *yi* and a private *yi*, but how he does so. The private *yi* simply refers to what is required by the interests of ministers themselves, helping them and theirs. The public-minded *yi* is what leads to order within the state.

Therefore, we can perhaps translate *yi* here as "standard of right" or "what is right."[26] Private rightness then is what it is right to do if one takes into consideration one's own interests while what is right in terms of the public interest is what is right when one is thinking about how to benefit the state. If this is the case, though, then what we see is Han Fei appropriating this term and using it in a distinctly non-moral fashion. *Yi* in each instance refers to a non-moral sense of right. Although "right" is not often used in this sense in English, we can certainly make sense of sentences such as, "If Joey wants to win the New York City Marathon, then the right thing for him to do is to train for it." Such a statement provides no moral content but simply says that training for the marathon is something that will assist one's attaining one's goal.

Thus, it seems that the term *yi* is used in two distinct ways. In the majority of the text, *yi* is used as a moral term, much in the way that Xunzi himself uses it. However, in "Taking Precautions against Deviance" it has been appropriated by Han Fei and is used in a non-moral fashion to refer to the right course of action for achieving

[26] This sense of *yi* also seems to be quite close to an ostensibly related term, *yi* 宜, or "what is proper or appropriate." However, the following analysis would not change if we were to think of the term in this way.

one's goals. Both when used morally and when used in pursuit of one's private interests, *yi* is inimical to order in the state. However, it can be applied in the interests of the state, and when it is so employed, it is beneficial rather than detrimental to order.

If this understanding of *yi* is correct, then the argument between Xunzi and Han Fei has not moved from an argument about whether morality is useful for or inimical to order to an argument over what is truly moral. Rather, Han Fei has simply appropriated Confucian terminology for his own purpose, as he does throughout his writing.

This understanding of Han Fei thought shows him to be working with a concept that has some basic similarities to H.L.A. Hart's "minimum content of natural law." In arguing for such a minimum content, Hart claims that given the fact that in most cases humans want to continue living, along with certain conditional facts about human beings and their surroundings, such as human vulnerability, our approximate equality, a limited altruism, limited resources, and a limited strength of will, there need be a certain minimum moral content to our laws if they are to succeed at their task of organizing society.[27]

In a similar fashion, Han Fei believes that there is an overarching pattern to the universe that must be observed, understood, and followed if the state is to be effectively ordered. What is truly *yi* in terms of public interest are those things which lead to order, and these things are determined, in part at least, by the overarching pattern of the universe, the facts about our world and the type of beings that we are.

Therefore, while there is a fact of the matter about what is truly right in terms of what will create order, and there is a fact of the matter about what accords with the Way (*dao*) and pattern of the universe, these are not imbued with any morality or normativity. Han Fei never tells us that we ought to act from *yi simpliciter*. Rather, he defines the different senses of *yi* and explains what goals following each would allow one to achieve. He himself advocates following a public *yi* but on his own terms he is never capable of saying, nor does he wish to say, that these actions are what we ought to do because of a moral obligation.

Therefore, what initially seems to be an importation of morality into Han Fei's system turns out to simply be an importation of terminology from which all vestiges of morality have been jettisoned. Indeed, it is these vestiges of morality (or what is taken to be moral) that make these terms problematic in the first place, according to Han Fei.

[27] We can, of course, see stark differences in the actual content of this concept. Nowhere do we see Han Fei advocating "the laws of equality and justice." However, Hart wishes to argue that because there are certain conditional facts about human beings and their surroundings, there needs to be a certain minimum content to laws if they are to succeed in their task of organizing society (Hart 1994: 191–200). Han Fei too believes that there are certain facts about human beings and the external world that need to be taken into account when developing laws.

On the Notion of Desert

Another problem that Han Fei has with morality as he sees it is that it leads to a devaluation of desert. Now, this might initially come as a surprise, given how the notion of desert is tied into many theories of Western morality. However, once we understand Han Fei's vision of desert and how it is justified, it becomes clear that a Xunzian virtue ethic cannot be held by someone who holds the desert theory of Han Fei.

One of the pioneers in the study of desert in the West has been Joel Feinberg, who has argued for three claims: (1) desert is conceptually and morally prior to social institutions and can thus be used to evaluate such institutions, (2) desert requires an individual to be in possession of some characteristic or prior activity in virtue of which something is deserved, and (3) responsive attitudes like disgust or gratitude are primarily what is deserved, and rewards and punishments are deserved only insofar as they are an expression of these responsive attitudes (Feinberg 1963).

If we accept these three claims as necessary components of desert, then it must be said that Han Fei lacks a conception of desert. After all, he would not concede that desert is conceptually and morally prior to the state.[28] Nor would he agree that it is the responsive attitudes that are primarily what is deserved. However, Han Fei would agree with Feinberg's second claim, that in order to deserve something one must have engaged in a prior activity (or refrained from a prior activity). Indeed, this comes out very clearly in an example from "The Two Handles" ("Erbing" 二柄):

> In the past, Marquis Zhao of Han became drunk and fell asleep. The keeper of caps saw that his ruler was cold and thereupon placed clothing over him. When he woke up, he was pleased and asked his attendants, "Who placed clothing over me?"
>
> The attendants replied, "The keeper of caps." The lord therefore punished both the keeper of caps and the keeper of clothing. His punishing of the keeper of clothing was because he took him to have failed his task, and he punished the keeper of caps because he had exceeded his duty. It was not that he did not fear the cold; it was that he considered the harm of invading [other ministers'] positions to be greater than the cold. (Chen Qiyou 2000: 2.7.126)

It would be very difficult to justify a claim that the keeper of caps deserved to be punished if we were to look outside the social institution in which he was placed. Certainly, few would want to argue that morality is involved in this case. If we wish to say that the keeper of caps deserved to be punished for covering his Marquis, it can only be in virtue of his action's relation to the rules and regulations governing his position.[29] Indeed, this can be seen if we look at the explanation immediately preceding this example in "The Two Handles":

> If the ruler desires to get rid of treachery, then he examines the correspondence between achievements and claims and whether what was said differs from what was done. Those

[28] Or, at the very least, Han Fei would deny that any notion of desert prior to the state is a basis for organizing behavior within the state.

[29] We might say that this only makes sense normatively once the individual has been interpellated into this way of seeing the world.

> who act as ministers lay out proposals and the ruler on the basis of their words assigns tasks to them. And it is exclusively by means of the achievement of their tasks that they are held accountable. If achievements accord with their tasks and tasks accord with their proposals, then they are rewarded. If achievements do not accord with tasks or tasks do not accord with proposals, then they are punished. Therefore, if among the assembled ministers there is one whose proposals are grand while his achievements are small, then he will be punished. It is not because his achievements are small that he is punished, but rather he is punished because his achievements did not match his proposal. If among the assembled ministers there is one whose proposals are small while his achievements are grand, he will also be punished. It is not the case that the ruler is not pleased by these grand achievements, but rather because he takes the harm of achievements not matching proposals to outweigh the good of great achievements, and thus he punishes. (Chen Qiyou 2000: *ibid*.)

If we are to say that ministers whose proposals do not match their achievements are to be punished, it is because of the disorder that arises within the state, not for any moral reason. If order is the desired result, and a system is put in place to help ensure that order, then actions that violate that system are deserving of punishment. Not only are questions of morality not present, what is deserved in these instances is not disgust but rather punishment. Feelings are immaterial to the question.

Furthermore, for Han Fei, the desert in the case is not simply a *pro tanto* reason for punishment. It is also an all things considered reason for punishment. The reason for this is that any violation of the system that has been put in place is a much greater disaster than any good that could possibly arise from "breaking the rules" in any particular case.

It is here again that Han Fei would worry that any system that Xunzi could offer would not only rely upon a prior conception of morality but would allow for exceptions. Xunzi would, Han Fei is likely to worry, follow Confucius's example. In *Analects* 13.18, we see the following exchange:

> The Duke of She said to Confucius, "Among my people there is one called 'Upright Gong'. His father stole a goat and he testified [against his father]."
>
> Confucius replied: "Among my people our conception of 'upright' is different from this. Fathers cover up for their sons and sons cover up for their fathers. In this is where uprightness is to be found." (Cheng Shude 1997: 27.922–24)

The idea seems to be that the relationship between father and son is more important than the theft of a sheep. And, while Xunzi himself does not repeat this story, he does take the relationship between father and son to be more important than that between ruler and subject. The problem here is explained by Han Fei in "The Five Vermin":

> In the state of Chu there was one called "Upright Gong." His father stole a sheep and [Upright Gong] reported this to an official. The magistrate said "Kill him," taking him to be upright with respect to his lord but crooked with respect to his father. [The magistrate] had [Upright Gong] arrested and charged. From this case it can be seen that one who is an upright subject to his lord can at the same time be a reckless son to his father. (Chen Qiyou 2000: 19.49.1104)

While there may be many times when one can at the same time be an upright subject and an upright son, there is no necessity that the obligations of the two roles will be united. Indeed, conflict between the two roles is bound to occur, and if

anything is given priority over uprightness to the ruler, then disorder within the state will arise. By allowing individuals to appeal to standards outside of those set up by the ruler to ensure order, Xunzi's moral and political theory necessarily results in political disaster.

What we have seen in this chapter is a strong argument against virtue playing a role in the political realm. Han Fei is not simply worried about whether a Confucian political theory can practically be implemented. He is also concerned with the results of basing political decisions on substantial moral considerations even if it were possible. In Han Fei's view, so long as order within the state is the goal, virtue (and morality more generally) can have no important role. If morality is in any way distinct from the conditions leading to order within the state, then there will be times when it conflicts with ordering the state, and, if not, then it is not morality in a true sense. In neither case, however, will it play a positive role in political theory. If it has a role, it is an accidental one, one determined by circumstances, rather than the nature of government itself. At best it is like trying to stop the flooding of the Yellow River with a few sandbags, while at worst it causes problems in and of itself. Especially in a time when the problems of society are not linked to morality, any solution that bestows pride of place on virtue will have no hope of success.

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