

THESIS

LEGALISM RECONSIDERED: WEBERIAN PROBLEMS  
AND CONFUCIAN SOLUTIONS IN THE *HAN FEIZI*

Submitted by

Jackson T. Smith

Department of Philosophy

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Master's Committee:

Advisor: Eirik Lang Harris

Andre Archie

Nathanial Blanchard

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## ABSTRACT

### LEGALISM RECONSIDERED: WEBERIAN PROBLEMS AND CONFUCIAN SOLUTIONS IN THE *HAN FEIZI*

After a thorough analysis of the political-philosophical climate of Warring States era China, I argue that Han Feizian Legalism is ultimately untenable on account of its necessarily sprawling bureaucratic apparatus which precludes adaptability and rapid response in the face of both internal and external crises. I show further that while Han Fei's criticisms of Confucianism are serious problems for the Confucian theorist, they are not vicious to generally cultivationist political theory. I go on to offer, through a synthesis of Confucian and Legalist doctrines, a solution which manages to patch the holes in both accounts and ultimately forge a broadly neo-classical approach to political organization, Legalism+, which relies on an epistemic naturalism à la Plato as the synthetic ground for Confucian and Legalist theory.

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## INTRODUCTION

Despite efforts to promote the teaching and consideration of “comparative philosophy” in Western university lecture halls, classical Chinese philosophy has yet to find substantial purchase as a curricular staple but is instead often tolerated as little more than a footnote (*pace* Confucius). I’ve found it necessary then to provide the following non-specialist’s introduction to the relevant historical and philosophical events of the pre-imperial periods of Chinese history. As with all things philosophical-historical, debates abound; noting each controversy and qualifying every judgment would accomplish little more than to obscure my aims and bore the reader. Readers with knowledge of Legalism and Chinese classical antiquity should feel comfortable moving past (I) of this introduction.

### **I. Han Fei and the Legalist School**

The third century BCE saw the emergence of a China united in empire and with the Qin (秦) dynasty at its helm. *Empire* represented the culmination of a century-spanning expansion effort undertaken by the relatively small and peripheral state of Qin around the turn of the fourth century BCE bolstered by the reforms instituted by statesman and philosopher Shang Yang (商鞅). A fief during the preceding period of the Zhou Dynasty, the Qin state grew to become one of seven autonomous states occupying the region which was to eventually become contiguous Chinese territory. The conflicts between these seven states characterized the pre-imperial period, and it is therefore known as the period of the Warring States. It is the state

philosophy of the pre-imperial Qin, the so-called “school of law” or “Legalism” (法家, *fajia*) which we are interested to examine here.

Legalism, in classical Chinese, is represented by two characters, *fa* 法 and *jia* 家; *fa* is loosely representative of law, while *jia* is often translated as “school.” In this context “tradition” may be a more apt rendering as there was no *school* of Legalism akin to, for instance, the concurrently operating Lyceum in Athens. Rather, the “school of law” refers to a group of thinkers spanning a few generations in and around the state of Qin who treated politics independently of other philosophical subjects, viz., politics, to the legalists, was not just an extension of ethics but a distinct problematic in its own right. The legalist roster typically includes four names: Shang Yang, Shen Buhai, Shen Dao, and Han Fei (韓非). Of these, Han Fei typically receives the most attention as his manuscript, the *Han Feizi* (韓非子, literally, *Master Han Fei*) contains the most systematic and influential exposition of the legalist position, and, due to its relatively late arrival on the scene, it amounts to a synthesis of the forgoing legalist thought. For these reasons, I will treat Han Fei as the face of the legalist school, and when I refer to Legalism below, I refer to its patently Han Feizian exposition. In addition to the Legalists themselves, I will also make occasional reference to a group of rulers known as “sage kings” in the English language scholarship. These rulers, foremost among whom were Yao and Shun, served as the models for most of foregoing thinkers of the Classical period, Legalists included. These peerless rulers are often contrasted with Jie and Zhou, two of the most notorious tyrants in recorded Chinese history.

Han Fei himself was born into the royal family of the state of Han in 280 BCE, and this aristocratic upbringing allowed him to study and cultivate his political-philosophical ideas. Though he allegedly contended with a strong speech impediment, his writings were widely disseminated and eventually caught the attention of the king of the neighboring state of Qin. As a result, Han Fei was dispatched to the Qin court as an official emissary of the state of Han. Han Fei's appointment proved, in an ironic turn, inauspicious, as he was shortly thereafter the victim of a plot on his life organized by conniving members at the Qin court. Han Fei was imprisoned under suspicion of plotting against the Qin monarch and took poison before he could be executed.

The irony of Han Fei's death emerges in that one of the two major impetuses of Legalist thought is an analysis of effective behaviors and strategies for survival at court. The *Han Feizi* itself reads as a manual for effective governance the target audience of which is the ruler of some given state. Han Fei paints a picture of the Chinese court in which the ministers and ruler are engaged in a constant and clandestine struggle for power. The ministers attempt to exert influence beyond their appointed stations, hoping to curry favor with their colleagues, the common people, and of course the ruler himself. Their ultimate goal is to supplant the ruler through some manner of Byzantine dealings. Han Fei cautions the ruler to protect himself from the power-hungry ministers by secreting himself away within the palace and pitting the ministers against one another. Concretely, Han Fei instructs the ruler to deal with his ministers in a rule-governed manner, that is, by distributing rewards and punishments, the so-called "two handles," according to a publicized and iron-clad rubric. In this way, the ruler is protected from the

manipulative tactics which were typically employed at court. The irony of Han Fei's death then lies in his depth of knowledge regarding the dangers of court life and yet failing to protect himself from the very same.

The underlying assumption of the *Han Feizi* concerns human nature—namely that it is fundamentally bad. Short-term self-interest appears to be the default psychological orientation in the vast majority of individuals, an observation born out no less evidently in the common people than in the ministerial character described above. The second impetus of the *Han Feizi* pertains to advantageous methods of governing the common people, precisely by correcting this short-term self-interested behavior. Fundamentally, the directives differ little from those intended to corral the ministers—the ruler should, via his ministers, create and disseminate a legal codex which is sufficiently simple such that it can be widely understood throughout the state. The code of law should include a description of appropriate rewards and punishments with the caveat that the punishments ought to be sufficiently severe so as to deter lawlessness by even the slightest possibility of their implementation. The ultimate effect of such a regime should be to bend and reorient the self-interestedness of the people into alignment with the long-term interests of the state.

Han Fei's death is recorded in the year 233 BCE nearly within a decade of the most significant event in Chinese history prior to the 20<sup>th</sup> century, the consolidation of the Chinese territory under the banner of China's first imperial dynasty—the Qin. The Qin dynasty lasted only a brief fifteen years before dissolving. While it's controverted, some claim that the ultimate failure of the Qin dynasty was the result of the political model by which it had successfully

consolidated its massive territory—the result of the legalist political model. The prescribed punishments were apparently unnecessarily draconian, and the ensuing brutality ultimately engendered widespread dissatisfaction and popular revolt. Much more will be said of the character and the history of the Qin dynasty below, and it suffices for now to have conveyed the broad strokes of the legalist model, to have mapped the trajectory of its implementation, and to have introduced a few notable persons.

## **II. On the Following**

The following paper is divided neatly into two chapters. The first, “Legalism Reconsidered,” presents a somewhat elaborate case against, ultimately, the practical consistency of the legalist framework such that, given certain observations made by Han Fei himself, we find Legalism to be, in practice, self-defeating. To accomplish this, I present first the basic argument for Legalism, which I expect to be uncontroversial. I go on to show that not only are there political states of affairs which plausibly destabilize the legalist state but also that, by Han Fei’s own analysis of the historical record, these conditions arise with sufficient regularity so as to preclude any pretension to regime continuity proposed by the legalist theorist; below, I’ve called this “the bell-curve consideration.”

According to my analysis of the *Han Feizi*, the bell-curve consideration is not vicious to Legalism. There exist subtextual resources which safeguard the Legalist state against the emergent political states of affairs which account for the teeth of the bell-curve consideration; below, I’ve called this defense “the scale consideration.” An upshot of the bell-curve/scale

consideration dialectic is a better equipped and plausibly more successful Legalism than is typically attributed to Han Fei or the Legalist school at large.

After a brief detour through Kafka's *The Castle*, I present the final moment of the case against Legalism. I show that the evolved formulation of Legalism necessitated by the bell-curve consideration exposes the model to a critical practical concern: a striking loss of political flexibility and dynamism; below, I've called this "the adaptability consideration." It is at this point that I conclude that Legalism, granted only those resources proper to it, is internally inconsistent and not fit for practical implementation.

Ideologically and historically, Legalism found itself consistently opposed by and compared with Confucianism. Han Fei spills more ink in the *Han Feizi* decrying Confucianism than any other political-philosophical alternative. In chapter two, "Synthesis and Solution," I attempt to supplement Legalism with a Confucian-esque cultivation component. Below, I call the resultant view "Legalism+." To effect this synthesis, I consider the three objections to Confucian political thought asserted in the *Han Feizi* before going on to provide corresponding defenses of Confucian-style cultivation. Having reintroduced elements of Confucian thought now free from Han Fei's doubts, I argue that implementing a broad plan for popular cultivation among the common people in an attempt to inspire an identification between the short-term interests of the common people and the long-term interests of the state may provide an indirect solution to the adaptability consideration. In short, Legalism+ apparently has only slight advantage over traditional Legalism in terms of adaptability, but, on account of its increased emphasis on long-

term state-focused decision making, it mitigates against future crises, an avenue of political strategy that Han Fei leaves largely to chance.

Ultimately, I conclude that Han Feizian Legalism is irredeemably fraught though may be treated as the skeleton for a modernized and viable political framework, Legalism+, which emphasizes long-term decision making at every stratum of civil life.

## CHAPTER ONE: LEGALISM RECONSIDERED

The Legalist school of political thought, designed to deal with the emergent political geography of the Warring States period, arose in China as a radical alternative to Confucian political thought.<sup>1</sup> As large hegemonic states began to replace alliances of regional powers, a trend culminating in the ultimate dominance of the Qin empire in third century BCE, Legalism purported to facilitate long-term stability through law-based rule rather than a reliance on the virtuousness, achieved through arduous cultivation, of the ruler, his ministers, and the common people as was more typical. Despite the positive contemporary attention enjoyed by Legalism, I'll argue here that Han Feizian Legalism is ultimately untenable on account of its necessarily sprawling bureaucratic apparatus which precludes adaptability and rapid response in the face both internal and external crises. I will first reproduce the basic argument for Legalism before providing a stronger, nuanced account by introducing the *scale consideration* which addresses a core failing of the basic argument. I will then show that even this nuanced account conceals a potentially vicious inconsistency, the *adaptability consideration*, which represents a serious problem for not only the Legalist of Classical antiquity but for the contemporary Legalist theorist as well.

### **I. The Basic Argument for Legalism**

In abstraction from the contingent practical political concerns of the Warring States period, Legalism is designed to resolve a tension identified by Han Fei extant between human nature and the goals of the state. Han Fei's account of human nature is due in large part to his

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<sup>1</sup> Watson, *Han Feizi: Basic Writings*, 8.

The reader will observe that I rely on a number of different translations of the *Han Feizi* since there is no complete and widely accepted English language translation of the manuscript.

alleged teacher Xunzi, one of the most celebrated Confucian theorists of the period. Xunzi is renowned for his controversial thesis that “people’s nature is bad;”<sup>2</sup> human nature, for Xunzi, could be considered “bad” because in an environment of material scarcity, a theme of Warring States life,<sup>3</sup> humans could be counted on to act out of an overriding short-term self-interest which in turn gave rise to out-and-out conflict.<sup>4</sup> While Han Fei neglects to give such an explicit statement of his position on human nature, it is not controversial to treat this Xunzian thesis as an implicit primitive of the Han Feizian Legalist framework.<sup>5</sup> It is not difficult to identify a similarity between the political consequences of the Xunzian/Han Feizian account of human nature and Hobbes’ ‘war of all against all.’ For both traditions, this pre-political conflictual

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<sup>2</sup> Xunzi & Hutton, *Xunzi: The Complete Text*, 23.1, 248.

<sup>3</sup> “This insight reflects an appreciation of the harsh meteorological, topographic, and soil environments of China, environments that make the legend of a Johnny Appleseed seem no less incredible than the awesome dragons that fly into and out of Chinese folk tales...without large-scale cooperative public works the recalcitrant East Asian earth will not surrender a bounty sufficient to nurture the population” (Kline et al., *Virtue, Nature, and Moral Agency in the Xunzi*, 2).

Han Fei himself notes as much in chapter 49 of the *Han Feizi*: The people were few while material resources were abundant, and so the people did not fight [among themselves]. Therefore, magnanimous rewards were not handed out, and strict punishments were not employed, and yet the people were well-ordered of themselves (Harris, *Readings in Classical Chinese Philosophy*, 2023, 358).

<sup>4</sup> Alejandro Bárcenas, in “Xunzi and Han Fei on Human Nature,” is right to note a substantial difference between Han Fei’s account of human nature and that of his mentor Xunzi; namely, Xunzi considers, in typical Confucian fashion, the “bad[ness]” of human nature to carry moral weight. Han Fei on the other hand considers human nature to be bad only inasmuch as it is inimical to the flourishing to the state.

<sup>5</sup> In the following passage, Han Fei discusses this conception of human nature with regard to the ministers: “the assembled ministers will discard the law, in their actions they will treat their private interests as important while treating public laws as unimportant. They will repeatedly attend the gates of ‘the capable’ while not once attending their ruler’s court. They will consider their own private families’ benefit a hundred times while not once making plans for their ruler’s state” Harris, 8.

See also, “Did Xunzi’s Theory of Human Nature Provide the Foundation for the Political Thought of Han Fei?” from Masayuki Sato in *Dao Companion to the Philosophy of Han Fei* 2013.

condition inspires “the first political question,” that is, “the securing of order, protection, safety, trust, and the conditions of cooperation.”<sup>6</sup> Agreement on the primacy of this question for Classical Chinese political philosophy is widespread,<sup>7</sup> and I will not depart from that consensus here. While Hobbes and much of the Western tradition propose a social contractarian solution to this problem, Han Fei, constrained by the unquestionable institution of an hereditary monarchism, proposes to resolve this tension by directing the short-term interest of the people and of the ruler to support the interests of the state through the consistent application of law.<sup>8</sup> Thus, Legalism's directive is to resolve this tension between the short-term self-interest of the people and the flourishing of the state.

In the basic account of Legalism above, despite my claim to abstract from the concrete political particulars of Classical China, I nevertheless referred to Han Fei's assumed monarchism. This should not be construed as a mere cultural artifact; Legalism includes a binary ontology of political actors—the ruler and the people (‘the people’ includes the group of ministers as well as the ‘common people’).<sup>9</sup> The distinction between these two groups is evidenced by the distinct sets of security measures proposed by Han Fei to deal with each group: the ruler is constrained by *shu* (術) “techniques,” while the people are constrained by *fa* (法)

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<sup>6</sup> Williams & Hawthorne, *In the Beginning Was the Deed Realism and Moralism in Political Argument*, 3.

Henry Rosemont Jr., whose quotation appears in footnote 3, held a convincing and notably contrary view (elaborated in the same essay cited above) to that proposed here.

<sup>7</sup> Watson, pg. 5; Harris’ “Han Fei on the Problem of Morality,” 9, in *Dao Companion to the Philosophy of Han Fei* 2013; Ivanhoe & Van Norden, 312.

<sup>8</sup> In this paper, I will refer to this process of manipulating the short-term self-interest of the ruler and the people so that it aligns with state goals by “constraint” and its various inflected forms.

<sup>9</sup> Some contingent evidence of the universality (as opposed to cultural specificity) of this binary ontology can be found in contemporary applications of Legalism to the corporate sphere in which we find distinctions between the CEO and non-CEO corporate actors reified by analogous doctrines of positional power. See Harris’ “Han Fei and Ethics in the Corporate Realm” in *Adventures in Chinese Realism: Classic Philosophy Applied to Contemporary Issues* 2022.

“rules.”<sup>10</sup> *Fa* constitute a set of laws which, when consistently and transparently applied through the impartial distribution of rewards and severe punishments (which Han Fei refers to as “the two handles”<sup>11</sup>), function to constrain the self-interestedness of the people. *Shu*, on the other hand, reflect the special extra-legal character of the ruler’s position, and superficially appear as pieces of good-natured advice for the ruler, e.g., don’t let your ministers get too close lest they discover your weaknesses. The *Han Feizi* was written explicitly to provide the ruler with just this sort of guidance, though ultimately the image produced of the Legalist ruler is hardly what one would expect for the life of an absolute monarch. He would appear to be nearly confined to his personal chambers, forbidden from any close consorts, and constantly impelled to strictly limit his desires. In the fulness of the work, it becomes clear that Han Fei’s good-natured advice is smuggling in a great many implicit restrictions to be placed on the ruler. These prescriptions for the ruler’s behavior, restrictions in disguise, are called *shu* and are the functional analogs of the *fa* discussed above.

The great emphasis placed on *shu* is due to the fact that the ruler, on account of the power of his position, *shi* (勢), constitutes a greater threat to state success than do the people.<sup>12</sup> Han Fei

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<sup>10</sup> The reader will note that it is for this reason that I include the ministers and the population in a single category—the people. Further, Han Fei also discusses aspects of ministerial strategy and life in terms of *shu*, the minister however, on a properly implemented legalist framework, should be primarily influenced by the ruler’s two handles. For this reason, one should think that the ministers’ political-ontological status is determined under the popular aspect.

<sup>11</sup> “The enlightened ruler controls his ministers by means of two handles alone. The two handles are punishment and favor” Watson, 29.

<sup>12</sup> “Now, when the Tyrants Jie and Zhou faced south and ruled over all the world, employing the awe-inspiring might of the Son of Heaven as their clouds and mists, all the world could not avoid chaos; the was because the abilities of Jie and Zhou were meagre” (*Readings in Classical Chinese Philosophy*, third edition, 321). Here, it should be (uncontroversially, I think,) understood that “clouds and mists” refer to the power latent in the position of ruler. Despite the meager abilities of Jie and Zhou, the impact of their rule was enormous precisely because of the power of the seat.

discusses this threat in section eight, “A Critique of the Doctrine of the Power of Position,” writing:

If a Yao or a Shun is born into a superior position, then even if there are ten Jies or ten Zhous they cannot cause disorder, because the differences in power and status are well ordered. On the other hand, if a Jie or a Zhou is born into a superior position, then even if there are ten Yaos or ten Shuns they cannot bring about good order, because the differences in power and status are disordered.<sup>13</sup>

Han Fei reaches this conclusion after arguing in defense of Shen Dao that, historically, order and disorder have been wrought often according to actions taken by the ruler irrespective of their personal abilities. The true power is localized in the seat of the ruler rather than in the ruler himself.

The problem represented by the ruler is compounded by the fact that the ruler is exempt from law, which is, unfortunately in this case, Legalism’s central innovation and most powerful asset for ensuring state success. *Shu* attempts to constrain the ruler and mitigate his influence by instilling in him a sense of caution, even fear.<sup>14</sup> Constantly concerned with the threats of ministerial coups, assassinations, and popular revolutions, the ruler is expected to seclude himself and rule the state from the shadows, carefully concealing his proclivities and playing his ministers against one another. Succinctly then, Legalism acknowledges a tension extant between

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<sup>13</sup> Ivanhoe & Van Norden, 330. *The Book of Documents* and *The Book of Odes*, chronicles of pre-Confucian history, point up Yao and Shun as exemplary rulers and decry Jie and Zhou as archetypes of the most base.

<sup>14</sup> Strangely, both Watson in his introduction his translation of the *Han Feizi* and Yuri Pines in 5.1 and 5.2 of his comprehensive treatment of the *Han Feizi* in his article “Legalism and Chinese Philosophy” (2018) fail to identify this relatively straightforward subtextual drive of Han Fei’s commentary on the ministers. Given the fact that the frequency of ministerial plots had decreased dramatically by the end of the Warring States period, Han Fei’s incessant warnings of ministerial treachery ought to strike the reader as anachronistic or downright unreasonable. Keeping Han Fei’s pedigree and tactics in mind, the reasonable inference is rather that Han Fei hopes to create something of a bogeyman in the ministers and thereby force reliance on *shu*—a set of technique designed to reduce the visibility, vulnerability (and impact) of the ruler.

the success conditions of the state and the short-term self-interest of two political entities, the ruler and the people. Legalism is designed to resolve this tension by constraining the interests of the ruler and the people by *shu* and *fa* respectively.

## II. The Bell-Curve Consideration

I will call *shu* and *fa* “explicit security measures.” Having laid out the basic motivation and features of Legalism, I will now preliminarily argue that these explicit security measures are insufficient to ensure the success of the state. Han Fei himself indicates that *shu* represent a point of critical failure for the legalist regime:

Now if one abandons the power of position, turns one’s back on the law, and waits for a Yao or Shun, then when a Yao or Shun arrives there will indeed be order, but it will only be one generation of order in a thousand generations of disorder. On the other hand, if one holds to the law, relies on the power of position, and waits for a Jie or Zhou, then when a Jie or Zhou comes there will indeed be disorder, but it will only be one generation of disorder in a thousand generations of order.<sup>15</sup>

Here, Han Fei gives two cases: in the first, he considers a Confucian political framework, and we see that it succeeds in ordering the state only in the historically rare instances in which a sage obtains great political power; in the second, he considers Legalism which effectively constrains both the people and the ruler in the vast majority of cases, failing to maintain order only in the, again historically rare, cases in which an incredibly inept ruler occupies the throne. This passage in the main represents an obvious argument for Legalism such that, given the historical picture,

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<sup>15</sup> Ivanhoe & Van Norden, 331.

Further, Pines in 5.2 of *Legalism and Chinese Philosophy* (2018) agrees that the ruler represents a point of weakness in the legalist framework: “The monarch is the most revered individual but also the weakest chain in the government apparatus. He can be duped by his underlings, is prone to misjudge them, and his actions may frequently endanger the very foundations of political order that he is supposed to safeguard. Hence, the thinker repeatedly urges the ruler to refrain from any personal activities, any reliance on personal knowledge, and any manifestation of personal likes and dislikes.”

the odds of legalist success are far greater than the odds of Confucian success. Implicit here, however, is an acknowledgement that there is a certain case-type which can be expected to disrupt a legalist state. This is the admission that the character of the ruler, in extreme cases, has the potential to break the restraints imposed by *shu*.

The position of the ruler is such that as just one man alone, left to his own devices, he is capable of destabilizing the state; it is also true though, that the people, left to their own devices are similarly capable of destabilizing the state. Han Fei, however, makes no special concession with regard to the people akin to that which we find in the above excerpt with regard to the ruler. The most obvious explanation for this asymmetry is that *fa* is not fraught in the same way as is *shu*. Han Fei thinks that *fa* is in all reasonable cases sufficient for ordering the people, while there are some cases in which *shu* can be expected to fail to constrain the ruler.<sup>16</sup> It is of special interest here that Han Fei identifies and admits a failure of Legalism, but, on account of his historical analysis, he considers this case-type to occur with sufficient irregularity that his system is still preferable to the alternative.<sup>17</sup>

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<sup>16</sup> One exceptional anecdote does, however, come to mind. In section thirteen, “Mr. He,” Han Fei describes the case of Duke Xiao and Lord Shang. Xiao cleverly implemented *fa* by creating small groups of citizens for the purpose of neighbor-neighbor surveillance. While the policy was effective during Xiao’s time, upon his death, his successor Lord Shang was killed in a popular revolt. This is precisely the sort of scenario that the implementation of *fa* is supposed to prevent. Interestingly, Han Fei affirms the rationality of Xiao’s security measure, and instead accuses the people of “hating orderly government” (Watson, 84). The upshot of this anecdote for our purposes is that it reinforces a realist reading of the *Han Feizi* by indicating that Han Fei’s objective is not to provide a set of inviolable principle of governance, but to provide a political framework that can be relied upon given common conditions. Put simply, it’s unreasonable to expect a set of political prescriptions to be effective in *every* case, rather one can only hope to provide guidance for those conditions that regularly obtain.

<sup>17</sup> As an historical artefact, it is interesting to consider whether Legalism was really a stronger alternative mode of political organization than Confucianism as Han Fei claimed. As a living theory, however, it is at least equally interesting to consider the success of Legalism in its own right. To be clear, in this paper I argue primarily that Legalism is unsuccessful full-stop, though

At this point then, we have established that *shu* represents a potential point of failure for Legalism, but, on Han Fei's admission, its rate of failure falls within an acceptable margin.<sup>18</sup> It is this "acceptable margin" which has thus far escaped critical examination. A survey of the *Han Feizi* yields at least nine occurrences of the case-type which circumvent the explicit security measures.<sup>19</sup> These nine instances occur between the years 2255BCE and 1122BCE a period of roughly 1000 years, which mark the timeframe of historical analysis undertaken by Han Fei himself in the manuscript. Han Fei, despite his language of "one generation of disorder in a thousand generations of order,"<sup>20</sup> appears to affirm as acceptable a scenario in which nine instances of the relevant case-type occur in a single thousand-year interval.<sup>21</sup> To treat each calendar year of the specified millennium as an independent datum we find, aggregating according to the success of *shu*, that a normal distribution (bell-curve) results. Under the 'bell'

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there is an argument to be made that Legalism should be considered unsuccessful even in comparison to its historical rival Confucianism. I will sketch this argument in footnote 23.

<sup>18</sup> Pines (see "Legalism in Chinese Philosophy") and others are content to refer to Han Fei as a "political realist," so such an approach should be unsurprising.

<sup>19</sup> Watson, pg. xi-xii: Yao, Shun, Yu, Jie, Tang, Zhou, Wen, Wu, and Cheng. The reader will note that of these only Jie and Zhou are case-types of the sort Han Fei describes. The other instances are sage kings and, though they predate Confucius by a considerable margin, their development to the level of sage king can without a doubt be retroactively called Confucian in nature. The production of Confucian-type sages is antithetical to the method of order production and maintenance employed by Han Fei (Harris, *Han Fei and the Problem of Morality*, pg. 119 and following). For this reason, I argue they ought to be included in the case-type identified by Han Fei as flaws for Legalism. In practice, the effect is delayed; for Jie, the decline of the state occurs during his regime and as a direct result of his actions, but for a Yao or a Shun, on Legalism, by ruling by the lights of cultivation, they create a vacuum of adequate political judgement upon death. A similar situation occurs in Han Fei's account of Duke Xiao and Lord Shang. The repercussions of Xiao's poor rule were effected only after his death and resulted in the drawing and quartering of Lord Shang (Watson, 83).

<sup>20</sup> Ivanhoe & Van Norden, 331.

<sup>21</sup> While it's true that one should expect the regimes of these nine rulers to, in most cases, last longer than a single year, for the purposes of my argument, I am happy to reduce the average regime duration to a single year for ease of demonstration—prolonging the duration to a more realistic average would only further substantiate my argument. I am confident that even with an unrealistically short duration, the force of my argument will be relatively undiminished.

we find the vast majority of calendar years—years in which the ruler is constrained by *shu* (>99% of the data set). In the ‘tails’ of the bell-curve, we find the nine cases of *shu* failure (<1%); I will refer to these as “tails-level cases.” When analyzed on this aggregation model, Legalism looks *highly* effective. On even a weak realist account, a >99% success rate over a millennium is incontrovertibly excellent.

In the same breath in which Han Fei accepts this characteristic of Legalism, he obliquely alludes to an emergent concern when he writes that, “[f]urthermore, even if a Yao, Shun, Jie, or Zhou only emerged once in every thousand generations, *it would still seem like they were born bumping shoulders and treading on each other’s heels.*”<sup>22</sup> In this observation, Han Fei makes reference to the essentially temporal nature of political projects. States and, perhaps more fundamentally, peoples have identities, values, histories, and cherished institutions. The reverberations of a single tails-level case with respect to these elements of a polity will be felt many generations hence; as Han Fei notes in the above passage, the reverberations will be felt even up until the next tails-level case occurs, i.e., the offenders bumping shoulder across generations. This consideration indicates the central short-coming of the bell-curve aggregation model—its abstraction from the chronological indexes of the members of its data set. The >99% success rate of *shu* appears attractive when considered as a single contiguous era, but this ignores the historical (and statistical) fact that these tails-level cases tend to appear at relatively even intervals. Given nine tails-level cases in a millennium, assuming they occur at regular intervals, we can expect *shu* (and therefore Legalism as well) to fail every century.<sup>23</sup> It is true that a

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<sup>22</sup> Ivanhoe & Van Norden, 330 [italics mine].

<sup>23</sup> I am now in a position to sketch the argument mention in footnote seventeen above. Assume that one privileges a set of traditionally privileged political values like institutional continuity and national identity. Given such a set of political values, it’s not clear that Legalism *ever*

century of relative success and growth of a state is still no small thing. With luck, the state will recover from the tails-level case and continue to re-stabilize and grow for another century until the next collapse. Unfortunately, international relations is hardly a game of luck; neighboring states are distinctly unwilling to wait patiently for a rival state to recover from internal disruptions before exerting external pressures.

We are fortunate to have in the Qin empire access to an historical record of what is often credited as the single historical implementation of Han Feizian Legalism. The Qin emperor, allegedly overly severe with his punishments, agitated his population to the point of revolution; the Qin emperor was executed, and the empire split into eighteen parts.<sup>24</sup> So much for the economic, legislative, cultural, and institutional continuity of the Qin empire.

### **III. The Scale Consideration & Weber's Legal Rule**

As mentioned above, Han Fei lived at a point of epochal transition; the highly volatile period of small warring states was coming to an end, replaced by relatively stable hegemonic states aiming for consistent dynastic rule. I have provided at least some indication that Han Fei was aware of these new political expectations of long-term stability and continuity. One might think it strange that Han Fei would be so satisfied with only a century of success on average—

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succeeds. A major collapse every century allows scarcely sufficient time for wreckage to clear and a new state to be established before the tremors of the next failed ruler begin to manifest. On the Confucian model, however, we see moderate states, possessed of (relatively recently established) institutions and identities, reach the heights of political organization under Confucian sages. While Han Fei is correct that these sages appear with especial rarity, they are significantly likely to come to power, govern successfully and allow for at least the short-term success of their successor. So, one might be entirely reasonable in thinking that, say, 200 contiguous years of Confucian opulence and success in a given millennium, outweigh 1000 years of discrete Legalism “success”—as its lack of continuity can hardly be considered “success” on our assumed set of political values.

<sup>24</sup> See Derk Bodde's *The State and Empire of Ch'in* (2008) in *The Cambridge History of China*.

this would be a mistake. Along with the transition from relatively small to relatively large states came a significant increase in the complexity of the states' administrative needs.<sup>25</sup> The scope of issues and the sheer size of the territories themselves precluded the ruler from involving himself in every decision or even many of the decisions. The task for political theorists became increasingly focused on suggesting methods for the reliable direction of the ministers rather than on political judgement itself. This change roughly characterizes the break between Confucianism and Legalism; Confucian thought purported to create a ruler capable of reliable political judgement while Legalism sought merely to organize and direct ministers who possessed knowledge and abilities specific to their assigned domains. To neglect this change in political climate would be to ignore the realist element of the *Han Feizi*. A strong reading of the *Han Feizi* will expect Han Fei to take advantage of the historical peculiarities of his age. This strong reading includes not only the explicit security measures discussed above, but also an implicit security measure, the *scale consideration*.

The scale consideration applies when Legalism is implemented at the scale of national government, the scope for which it was designed, and constitutes an additional security measure for constraining the ruler (and to some degree his administrators) beyond *shu*: bureaucracy.<sup>26</sup> When the ruler is positioned according to the explicit dictates of Legalism, i.e. sequestered from his ministers, a shadowy figure observing the goings on of the state and ensuring that no minister is taking undue power for himself, he is nevertheless capable of (and in cases of extreme willfulness perhaps even liable to) attempt to live the life of an ordinary ruler, e.g., to lavish in

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<sup>25</sup> Watson, 8.

<sup>26</sup> It should not be thought that there is anything special about "national" government in this regard; one could easily imagine a small state that would be largely unaffected by the scale consideration. The scale consideration, rather, always applies to legalist governments but in greater or lesser degrees according to the size of the organization.

extreme luxury, to allow his ministers and attendants to pamper him, to issues dictates according to his whims, to punish and reward according to personal favor rather than law etc. Given, however, a complex bureaucratic network, we should expect the negative impact of this behavior to be diffused throughout the governmental apparatus. By diffusing the influence of poor or even tails-level rulers, Legalism provides an additional security measure which effectively controls for aberrant rulers.

An example may be illustrative here. On the superficial reading of the *Han Feizi*, it is natural to consider the state to be managed by the ruler and a small collection of ministers. The ruler is present for deliberations with regard to policy but, consistent with legalist prescriptions, remains silent until he has heard the propositions of his ministers and does his level best to conceal his true thoughts. Even assuming a largely competent ruler, after any significant amount of time spent under the observation of the ministers, the ruler's proclivities and weaknesses are liable to be discovered.<sup>27</sup> On the other hand, suppose the ruler is directly engaged in only a small minority of state decisions, or even none at all; the decisions are all handled by regional representatives and specialists meeting in dozens of locations around the empire. Meeting topics and decisions are chronicled and archived, a process that Weber considers essential and a process that was present in the Qin empire.<sup>28</sup> Not only does this dramatically limit contact between the ruler and his ministers, but, if the ruler were to try to directly intervene in state business in aberrant or otherwise destructive ways, he would, more likely than not, find himself confined to bureaucratic channels. In this way then, Legalism, when implemented at sufficiently large scales, exhibits the potential to constrain even tails-level rules and as such ensure continuity beyond a

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<sup>27</sup> Pines also concludes as much in *Legalism and Chinese Philosophy* (2018).

<sup>28</sup> See Yates (1995).

single century.<sup>29</sup> Having explained how bureaucratic administration might operate as an effective security measure for the ruler and alleviate the continuity worry indicated by the bell-curve consideration above, I will now present reasons to think that bureaucratic administration will arise on the Legalist framework.

There are at least four reasons for which we should think that Han Fei's Legalism includes an extensive bureaucratic apparatus. I will first motivate two historical reasons before presenting two theoretical reasons. Max Weber holds a privileged position among those theorizing about bureaucracy, and so in the following analysis I will rely heavily on his account of legal rule and bureaucratic administration provided in chapter three of part I of *Economy and Society* (1921).

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<sup>29</sup> It's worth considering and dismissing the perennial worry that a reading such as this goes unacceptably far beyond the text. Han Fei after all seems to see the interests of the ruler as identical with the state, and yet we find that the life that he outlines for the ruler falls shockingly short of our typical vision of the life of a supreme monarch (or the life that a supreme monarch would want for herself). Beyond this general concern there is a central theme of the *Han Feizi* that looks like an obstacle to the reading proposed here. It appears that Han Fei is adamant that the "two handles" of rewards and punishments be administered directly by the ruler, writing in section seven that, "[n]ow if the ruler of men does not insist upon reserving the right to dispense profit in the form of rewards and how his sternest in punishments, but instead hands them out on the advice of his ministers, the people of the state will all fear the ministers and hold the ruler in contempt, and will flock to the ministers and desert the ruler" (Watson, 29). It should immediately strike the reader that this is incongruous with the historical facts of the case; I will demonstrate below that it's not only true that bureaucratic administration follows from legal rule, but that the propagation of bureaucratic forms of administration in the final decades of the Warring States period, *prior* to Han Fei's theorizing, was a core impetus for the birth of legalist thought. And also, as noted above, the emergence of bureaucratic administration facilitated governance over increasingly large territories for which the ruler's personal influence alone proved insufficient. This, coupled with the observation that Han Fei likely does *not* have the self-identified interests of the ruler in mind, should indicate that we might benefit from the application of a hermeneutic of suspicion. That is, since Han Fei found himself in a political position that required him to market Legalism to the ruler, the ruler whom he acknowledges to be the weakest link in the legalist framework, and so he has strong reason to conceal the elements of his theory that operate to constrain the short-term self-interest of the ruler.

### III.i Historical I:

I have previewed this reason in various places above, but I give it here in full. The collapse of the Western Zhou dynasty in 771BCE gave rise the ‘Spring and Autumn’ period which was possessed of a multi-state network that privileged the intellectual sphere and eventually prepared the region to enjoy a collective Chinese identity.<sup>30</sup> The successor to the Spring and Autumn period and the era in which we find the writings of Han Fei, the Warring States period (481-221BCE), differentiated itself from its predecessor in its marked transition from discrete city-level governments to large territories organized according to the dictates of a centralized administration.<sup>31</sup> With the advent of large territories and centralized governments came a new patently bureaucratic mode of administration. We find historical evidence of this in a number of forms. First, we find a striking emphasis on record keeping and court documentation: “chronicles dated major events - battles, institutional reforms, appointments or dismissals, and interstate meetings.”<sup>32</sup> I consider this to be (alone, of course, inconclusive) indirect evidence for bureaucratic or bureaucratic-trending administration since, according to Weber’s analysis of bureaucratic administration we should expect an emphasis on documentation and record-keeping.<sup>33</sup>

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<sup>30</sup> *Cambridge History of Ancient China*, 545

<sup>31</sup> *Cambridge Companion to the History of China*, 587. This is not to say that this transition was *the only* distinguishing characteristic. Lewis develops the distinguishing characteristics of the period along a number of axes—cultural, political, intellectual, institutional etc.

<sup>32</sup> *Cambridge History of Ancient China*, 588

<sup>33</sup> This is a result the bureaucratic administrative mode of legal rule understood to be a form of “rule through knowledge.” As bureaucracies are composed of specialized officials each having her own unique area of operations, skills, and knowledge, they tend to aggregate large amounts of documentation for the purpose of future specialized use. Weber goes so far as to say that, in principle, “all administrative work is done **in writing**...even when oral discussion is the actual rule or even requirement, at least for preliminary discussion and submissions and the final decision...Together, paperwork and the continuing conduct of business by officials create the

A central feature of Weber's account of bureaucratic administration is the presence of an "administrative hierarchy."<sup>34</sup> The composition characteristic of bureaucratic administration includes a principal administrator (the "legal ruler"<sup>35</sup>) and her accompanying staff. This is not to be confused with a traditional ruler and her entourage of advisors and attendants. The crucial difference concerns the selection of the staff members; while for a traditional (non-legal<sup>36</sup>) monarchy the staff positions were filled according to hereditary succession by the local nobility, the modern bureaucratic official is appointed on account of some special qualification which she possesses.<sup>37</sup> We see clear evidence of this in Warring States political life as Lewis writes that the hereditary nobility who had comprised the administrative body throughout the Zhou dynasty were, in the Warring States period, supplanted by ministers distinct from any noble lineage and selected instead for their abilities.<sup>38</sup> This is importantly evidenced further in the *Han Feizi* itself wherein we find, from section 27 (Employing the People): "the ministers of a well-ordered state obtain administrative status on the basis of their accomplishments in service to the state, receive appointments on the basis of demonstrations of ability in their posts, and are appointed to

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**office** as the focal point of the action taken by any modern organization. *Economy and Society*, 352 and 347.

Elshad, in *Bureaucratic Tradition of Early China: Confucianism and Legalism* (pg. 139), provides additional support: "the sources display that the effectiveness was achieved through the bureaucratic procedures. For instance, grain supplies were under strict regulation; cattle and horses were constantly inspected. If government animals (horses, cattle) died, handing over the hides, horns, and bones and writing detailed reports would be required (Hulsewé, 1981, p. 18). When a request was made for any reason, it had to be submitted in writing. There were no oral requests or requests through third parties allowed. When the documents were transferred or received, the month, day and time of their receipt or dispatch had to be recorded."

<sup>34</sup> *Economy and Society*, 345

<sup>35</sup> *Economy and Society*, 343

<sup>36</sup> The relation between "legal rule" and bureaucratic administration will be developed below.

<sup>37</sup> "These officials [who compose a bureaucratic administrative staff] ...possess a specialized qualification—in the most rational case, qualified through examination and certified as such—and are **appointed** rather than **elected**" *Economy and Society*, 347.

<sup>38</sup> *Cambridge History of Ancient China*, 597-598.

important positions on the basis of having exhausted their strength in upholding objective standards.”<sup>39</sup> Not only then do we have historical evidence of a transition from hereditary administrative roles to merit-based selection, but we find that transition acknowledged and affirmed by Han Fei.

The final historical fact that I will mention that should give us reason to believe that Han Fei included something like a modern bureaucracy in his idea of Legalism is the increase in the size of the states themselves during the Warring States period in conjunction with the drive for centralized administration. Lewis writes that, “[w]hile the earlier Zhou world had been composed of a multitude of cities and hinterlands linked by kin ties, religious rites, and continuous, low-intensity warfare, the Warring States period was characterized by a small number of territorial states involved in constant diplomatic maneuvering and intermittent but frequent large-scale military conflagrations.”<sup>40</sup> It would hardly be economical to present the wealth of historical data that exists in support of Lewis’ gloss, so at this venue I will treat this as, I hope, uncontroversial, general claim as given.<sup>41</sup> During the Zhou and Spring and Autumn periods, at which time government was largely a city-level affair, it was within the scope of ability of a Confucian-style monarch and a relatively small cohort of attendants to effect administration of the entire territory.<sup>42</sup> As states expanded, however, rulers were forced to rely on more expansive networks of ministers. The first historical reason then for which one should think a bureaucratic mode of

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<sup>39</sup> Harris, 322.

<sup>40</sup> *Cambridge History of Ancient China*, 616

<sup>41</sup> An interested (or dissenting) reader will benefit from the excellent contributions of Michael Edward Lewis, Cho-yun Hsu, and Nicola di Cosmo in the *Cambridge History of Ancient China*.

<sup>42</sup> Given this picture of pre-Warring States period China, the Confucian emphasis on the emanation of *de* (德) as a crucial tool for consolidating power through virtue appears more plausible—a plausibility that wanes quickly as states expand and contact with the ruler occurs at greater and greater degrees of removal.

administration should appear along with Han Feizian Legalism is that, in virtue of the political state of affairs in which Han Fei was writing, we can be reasonably certain that a bureaucratic model, according to Weber's criteria, had already made an appearance on the scene. Han Fei, as a markedly historical thinker could not have but accounted for this development in his political theorizing.

### **III.ii Historical II:**

While controverted today, it was at one time widely accepted that the Qin empire, emerging in 221BC and marking the end of the Warring States period, constituted the first (and only) large-scale attempt to implement Legalist political doctrines. While in HI I provided an account of the salient general features of Han Fei's historical epoch that may serve to indicate some connection between Legalism and bureaucratic administration, in HII I will examine the features and extent of bureaucratic administration in the short-lived Qin empire as well as to gesture at some reasons for which the reader should think that the Qin empire could rightly be called a legalist state. It is *not* widely accepted that the imperial Qin was self-consciously Han Feizian state nor was it perfectly Legalist, if such a thing should have any meaning at all. I discuss it here as a broad implementation of Legalist thought, and, in sharing many characteristics with doctrinal Legalism (Han Feizian or that of his predecessors) we will see that it serves with reasonable certitude to inform us on those aspects of Legalist practice left implicit in the *Han Feizi*.

In HI above, I addressed three elements of Warring States political life: (1) a pronounced emphasis on documentation, (2) a transition from an administration composed of the local nobility (primarily in the Zhou period) to an administration composed of specialized, obscure (non-noble) officials who were selected for their records of meritorious service and ability, and

(3) an organization of these officials into a marked administrative hierarchy. As explained above, I follow Weber in recognizing these to be among the hallmarks of bureaucratic administration.<sup>43</sup> An analysis of imperial Qin scholarship yields evidence of development in all three of these categories over and above their Warring States era levels.

Derk Bodde, in his chapter “The State and Empire of Qin,” writes of the various areas of political life in which documentation began to become standard practice:

One significant development was the adoption of various quantitative procedures, such as the maintenance of population and taxation registers, statistics on crop returns, and the like...Another important institutional innovation was the introduction of written, codified law. Such law increasingly came to replace the traditional and largely unwritten, but tacitly accepted, rules of customary behavior... The first really clear-cut instance was the inscribing of books of punishments (*hsing shu*) on a set of bronze tripod vessels in the state of Cheng in 536. Similar steps were taken in this and other states in 513, 301, and later; in Ch'in, the major steps in legal codification took place under Duke Hsiao and his adviser Shang Yang, in the middle of the fourth century.<sup>44</sup>

Robin Yates, in *State Control of Bureaucrats Under the Qin: Techniques and Procedures*, corroborates Bodde's claims but focuses his analysis apropos Qin documentation on the

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<sup>43</sup> A critical reader might rightly wonder why I have elected for the suspiciously weak language of “hallmarks” and “characteristics,” when a properly philosophical investigation should be discussing necessary and sufficient conditions. Weber, in his tripartite typology of rule from *Economy and Society* as well as in the famous *Protestant Ethic*, is infamous for employing the concept “ideal type” with regard to the objects of his investigations. Weber is explicit that when he provides an account of, say, legal rule, he should not be thought to be claiming that such a thing was ever instantiated precisely as he described it: “[n]one of these three ideal types discussed below has ever appeared in a historically “pure” form” (*Economy and Society*, 342). Rather, his “legal rule” and other such ideal-typical constructions, “represent the course that a particular sort of human action would follow if its purposive rationality were rigorously formulated, its execution undisturbed by error and affect, and if, moreover, it were quite unambiguously oriented to one (economic) objective” (*Economy and Society*, 85). In my discussion of Warring States, Qin, and broadly legalist bureaucracy à la Weber, the precision of necessary and sufficient conditions is unavailable to me.

<sup>44</sup> *The Cambridge History of China*, vol. 1, 26.

emergent emphasis on performance evaluations<sup>45</sup> writing that, “reports submitted to superiors at the end of the year were an important method of checking the performance of local officials. These reports included population statistics, amount of land opened up, taxes collected, and information on lawsuits or cases, etc... On the basis of these documents, the central government gave commendations or ordered dismissal of the relevant officials.”<sup>46</sup> The importance of performance evaluations for ministers is itself a strong indication of the second bureaucratic characteristic, the translation from aristocratic ministers to obscure administrators.

A painstaking historical survey conducted by Cho-yun Hsu finds that the percentage of persons of obscure origin more than doubled from the one period [Spring and Autumn] to the other [Warring States]:

from 26 percent for the Spring and Autumn period to 55 percent for the age of the Warring States. During the final century or so, the ranks of the social unknowns were further swollen by men of plebeian birth, such as merchants, whose wealth enabled them to acquire land and power. In these various ways, by the late Warring States period a new class of landlords and officeholders had already come into being - the direct ancestors of that class of scholar-gentry which was to continue as the dominant elite throughout Chinese imperial history.<sup>47</sup>

This is a trend that extends into early imperial China according to Bodde: “This emphasis [on ability] marks a sharp departure from the traditional view of officeholding as based solely on good birth, and at the same time points toward the civil service system of imperial China, with its recruitment of personnel based on competitive examinations.”<sup>48</sup> To conclude this historical

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<sup>45</sup> Weber himself explicitly comments on performance evaluations as another characteristic of modern bureaucratic administration: “[administrative officials...see themselves as having a career, being promoted according to age or performance, or both, depending on their superiors’ judgement” (Weber, 347).

<sup>46</sup> Yates, *State Control of Bureaucrats Under the Qin: Techniques and Procedures*, 351.

<sup>47</sup> *The Cambridge History of China*, vol. 1, 28-29. Note: this is Derk Bodde commenting on Cho-yun Hsu’s *Ancient China in Transition*, 39.

<sup>48</sup> *The Cambridge History of China*, vol. 1, 30.

survey, I'll give a brief indication of the centrality of Qin administrative hierarchy. After consolidating all of the territory "under heaven," the emperor effected

the division of the entire empire into thirty-six commanderies each subdivided in turn into an unknown number of counties. For each commandery there was an administrative triumvirate, consisting of a (civil) governor (*shou*), a (military) commander (*wei*), and an imperial inspector (*chien yü-shih*), who apparently acted as the immediate representative of the emperor on the commandery level. The counties were administered by magistrates who, depending upon the sizes of their counties, were known either as *ling* (for large counties) or *chang* (for smaller ones). All these officials were centrally appointed, with fixed salaries.<sup>49</sup> Their posts were not hereditary, and they were subject to recall at any time.<sup>50</sup>

Having suggested that Qin scholarship provides sufficient evidence for a developed bureaucratic administrative apparatus, I will conclude HII by giving some reasons for thinking the Qin empire to be "legalist."

First, it should be noted that *pre-imperial* Qin, thanks to the leadership of Shang Yang and Shen Buhai, self-consciously implemented political doctrines which would later be called "legalist" centuries before Qin's successful transition to empire. The subject of my investigation here, Han Fei, would have had access to *The Book of Lord Shang*, or some iteration of it, which

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The efficacy of this transition is evidenced by pre-imperial Qin's long tradition of employed "alien statesmen" who had proved themselves to be competent ministers. Bodde wryly notes that alien statesman employment was so pervasive that only the upper echelons of the Qin military seemed to require native Qin officials. He concludes that this enterprising talent-scout approach to political leadership likely contributed to the ultimate triumph of the Qin and the birth of empire (*The Cambridge History of China*, vol. 1, 48).

<sup>49</sup> Weber also comments explicitly on salaries as a feature of modern bureaucratic administration: "[administrative] officials are remunerated in **money** by fixed salaries for the most part with a right to a pension..." E&S 347

<sup>50</sup> *The Cambridge History of China*, vol. 1, 54.

It should be noted that, after Xunzi, the Confucians also began to include an emphasis on law in their thinking. There is, however, a crucial distinction in that the Confucians saw the implementation of a code of law as a way to improve the character of the people. The Legalists, on the other hand, emphasized the order-making quality of law even to the short-term detriment of the citizenry.

chronicles the policies enacted by Shang Yang, so it is unsurprising that they should reappear in the *Han Feizi*. The element of political life that distinguishes Legalism from alternative frameworks was, of course, its emphasis on law (*fa*), and this special emphasis is identifiable in Shang Yang's Qin: "Shang Yang emphasized law (*fa*) as the most important device for upholding the power of the state, and he further insisted that it must be made known to all... He likewise insisted that the law be applied equally to all... The purpose of his laws was to uphold a system of rewards and punishments which would serve, respectively, as incentives for meritorious conduct and deterrents for wrongdoing."<sup>51</sup> This is reflected in the "two handles" of the *Han Feizi*, rewards and punishments, discussed above. Most importantly, this emphasis on transparent and stringently enforced law appears with renewed intensity in imperial Qin: "In 221 the Ch'in law code, probably going back in essential features to Shang Yang, was made standard for the entire empire... Shang Yang's law is said to have embodied two main principles: (i) mutual responsibility for wrongdoing, especially among relatives and within the units of five and ten families into which Shang Yang divided the population; (2) severity of punishment sufficient to deter people from wrongdoing."<sup>52, 53</sup> The final piece of evidence I will provide here is the infamous book burnings and executions of scholars sponsored by Li Si. Li Si recommended that all copies of the classical Chinese texts (*Analects* of Kongzi, *The Book of Songs*, *Odes*), foundational for the Confucian factions, be burned and those who taught and studied the texts to be executed. In light of these programs, Bodde calls Li Si, "the logical culmination of Legalist totalitarian thinking,"<sup>54</sup> The sentiment expressed by Li Si is also identifiable (though implicit) in

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<sup>51</sup> *The Cambridge History of China*, vol. 1, 36.

<sup>52</sup> *The Cambridge History of China*, vol. 1, 58.

<sup>53</sup> This is again explicitly reflected in the *Han Feizi*, Cf. section six, "On Having Standards."

<sup>54</sup> *The Cambridge History of China*, vol. 1, 70.

Cf. Michael Nylan's *Five "Confucian" Classics* (2001).

the *Han Feizi*; Harris has argued convincingly that, according to Han Fei, not only should the ruler not rely on virtue to establish and maintain order in the state, but he should actively eliminate virtuous constituents and take steps to ensure against their cultivation.<sup>55</sup> This is far from an exhaustive case for a *legalist* Qin empire, but my hope is that it will provide the readers at least provisional reasoning for thinking it plausible.<sup>56</sup> In HII then I have provided historical evidence for the existence of a developed bureaucratic administrative apparatus in the Qin empire by examining developments in documentation, lineage of officials, and administrative hierarchy. I further gave reason for thinking that core Legalist doctrines were present in the Qin empire sufficient to call the Qin empire a “Legalist” state. In this way I hope to have provided a case, albeit merely contingent, for the presence of bureaucratic administration on the Legalist framework.

### **III.iii Theoretical I:**

I will now present two reasons for which one should think that Legalism includes a bureaucratic administrative apparatus relying only on theoretical considerations rather than on contingent historical facts. The first of these, TI, is an interpretive reason; I will argue that if one’s concern is to get Han Fei right, one will accept the presence of bureaucratic administration. According to the bell-curve consideration above, we can reasonably expect the legalist state to remain intact for a period of roughly a century before a tails-level ruler should be expected to emerge and destabilize the state. In section II, I provided textual evidence which suggests that Han Fei was aware of this concern, and yet he obviously thought that his political framework

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<sup>55</sup> Cf. “Han Fei and the Problem of Morality” in *The Dao Companion to the Philosophy of Han Fei*.

<sup>56</sup> For scholarship that opposes the legalist story of the Qin empire, see *The Cambridge History of China*, vol. 1, 72, and Creel’s *Origins of Chinese Statecraft and Legal Institutions and Procedures During the Chou Dynasty*.

could accommodate it. Provided that one is, with regard to interpretive historical philosophical work, motivated, by the principle of charity or otherwise, to produce the most plausible account of Han Feizian philosophy as is possible, one is *required* to cast about for some commitment capable of patching this gap. This amounts to something like an instance of inference to the best explanation. The ‘scale consideration’ constitutes my submission for the “best explanation.” TI is not in itself a reason to think that bureaucratic administration should appear on Legalism, rather it is a reason to think that the theoretical hole indicated by the bell-curve consideration can and should be filled.<sup>57</sup>

### **III.iv Theoretical II:**

The final reason I owe in large part to Max Weber. In Historical I and II above, I relied on Weber’s analysis of bureaucratic administration presented in his well-known “typology of rule” in *Economy and Society*. Beyond brute description, however, it is possible to identify an argument concealed within Weber’s largely historical comments. In TII, I will attempt to draw out Weber’s argument and apply it to the case at hand.

Weber, of course, is primarily in the business of performing an historical analysis from which he attempts to make general sociological judgements. In chapter three of part one of *Economy and Society*, “Types of Rule,” Weber develops a tripartite typology of legitimate forms of rule composed of *legal rule*, *traditional rule*, and *charismatic rule*. These distinctions follow from Weber’s account of legitimacy<sup>58</sup> and account for the three different avenues by which states

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<sup>57</sup> My commitment to the rational reconstructionist approach to historical philosophical investigation is evident here, and further it is clear that TI will only carry weight for those with similar commitments or inclinations. To the contextualist who might want to respond that this business about the “theoretical hole” is all well and good but that there is no *textual evidence* to suggest that Han Fei himself thought that the continuity worry would be solved by the administrative model, I would refer that contextualist to note 29 above!

<sup>58</sup> For Weber on legitimacy: *Economy and Society* 108.

have historically legitimized themselves: legal rule arises when a state is legitimized by, “belief in the legality of statutory orders and the right of those appointed to exercise rule to give directions;”<sup>59</sup> traditional rule arises from a, “belief in the sanctity of long-established traditions;”<sup>60</sup> and charismatic rule arises from a belief that some, “exceptional sanctity or heroic qualities or exemplary character of person”<sup>61</sup> communicate the right to rule. Importantly, for Weber, only *one* of these types is “rational,” and it will be the focus of the following analysis—legal rule.

Weber provides eight basic “categories”<sup>62</sup> of rational rule in outline form. His prose is terse, and summary here will do no favors for the reader nor for my argument. I reproduce the passage that most effectively communicates Weber’s eight categories here in a condensed format:

**(1)** the continuing rule-governed conduct of official functions within **(2)** a sphere of competence that covers *(a)* a substantive separation of duties based on a division of labor *(b)* with assignation of the required powers of command and *(c)* with definite demarcation of the means of compulsion probably required, and the conditions for their use. **(3)** The principle of administrative hierarchy and **(4)** the “rules” of procedure, which can be *(a)* technical rules, or *(b)* norms. **(5)** A principle of complete separation of the administrative staff from the means of administration and production. The officials, clerks, and workers belonging to the administrative staff do not personally own the material means of administration and production. **(6)** Where there is complete rationality there is no appropriation of the official position to its incumbent. **(7)** The principle that all administrative work is done in writing is maintained. **(8)** Legal rule can assume many different forms [though the “purest” of these is rightly called “officialdom” or the “bureaucracy.”]<sup>63</sup>

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<sup>59</sup> *Economy and Society* 341.

<sup>60</sup> *Economy and Society* 342.

<sup>61</sup> *Economy and Society* 342.

<sup>62</sup> The language of “categories” is Weber’s own here but is ambiguous and retained. From context, it is clear that he has in mind something like “criteria.” *Economy and Society* 344.

<sup>63</sup> *Economy and Society* 346.

I have reproduced these eight basic categories here to allow the reader to assign some content to the otherwise rather empty name “legal rule” and will return to these basic categories in short order to describe their instantiations in Han Fei’s framework. I am primarily concern here with the connection between legal rule and bureaucracy; Weber described this in term of rationality (*Rationalität*). Rationality is one Weber’s most notoriously opaque concepts and appears with explicitly distinct meanings across texts, within the same text, and even within the same chapter. In many cases, however, Weber’s rationality bears a marked connection with “economic orient[ation]”<sup>64</sup> and it is with striking insistence that he describes the capitalist economic model, in virtue of its profit motive, as deeply rational. Here then, with regard to political life, I will treat rationality as a commitment to economic orientation at the administrative level, viz. a state is more or less rational inasmuch as its actions are more or less justifiable in terms of the achievement of economic ends. Thus, when Weber claims legal rule to be the most rational, and so to be importantly distinct from traditional and charismatic rule, we should understand him to mean, at least in part, that legal rule exhibits in its concept a directedness to state flourishing;<sup>65</sup> and further, we should understand bureaucratic administration, as the *most* rational variant of legal rule—*pure* legal rule, to be an extension of this economic directedness. That is also to say that those actual states or theories of state which act fundamentally, according to their concepts, out of a considered economic interest will take the form of legal rule effected by a bureaucratic administration.

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<sup>64</sup> Economy and Society 97.

For an introduction to the interpretive controversy regarding Weber’s *Rationalität*, see Swedberg and Agevall’s *The Max Weber Dictionary*, 284-286.

<sup>65</sup> “Flourishing” here should be understood in a multifaceted sense and as more closely related to Aristotelian flourishing than straightforwardly capitalistic economic flourishing. Here, I’m treating that classical sense of flourishing as including with some special emphasis economic success as one of its criteria.

This brings us now to Han Fei. Above, I described Legalism as an attempt to resolve the antagonism between state success and the short-term self-interest of the state's constituents. The legalist solution to this conflict, effected through, for instance, *fa* and *shu*, amounts to a form of state consequentialism.<sup>66</sup> On the state consequentialist framework, all value is reducible to that which is valuable for the state. This accrues to a state in tangibles like wealth and population growth and in intangibles like safety and security. Legalism's state consequentialist solution to the conflict between state flourishing and the short-term self-interestedness of the state's constituents is to reorient the social actions of the constituents to align with the flourishing of the state (an alignment which Han Fei, it seems, thinks to be in the long-term best interests of both the ruler and the people in addition to the state itself). And so, we find, deep to Han Fei's political framework, a commitment to a theory of justification for social acts which privileges the economic orientation of the state to an extreme degree.

I am now in position to clearly present the argument promised above. An implication of Weber's analysis of types of legitimate rule in *Economy and Society* exhibit a conceptual connection between rationality, which for Weber in this case means an economic justification for political action, and legal rule and further between legal rule and bureaucratic administration. Thus, states or theories of state which are directed according to this economic orientation, will implement a legal rule-bureaucratic administrative state. Han Fei's state consequentialism fits the bill for a rational state according to Weber's criteria, and so we have strong reason to believe that, despite Han Fei's lack of explicit commentary on bureaucracy, bureaucratic administration will appear on Legalism. Succinctly, inasmuch as Han Fei builds an economic interest into his

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<sup>66</sup> A view corroborated by Harris: *Constraining the Ruler: On Escaping Han Fei's Criticism of Confucian Virtue Politics*.

normative framework (and he does inasmuch as he's generally concerned about state success), his state is rational; if his state is rational, it's at least liable to be bureaucratically organized—I've argued that Han Fei does in fact include such an orientation, and so we're liable to see bureaucratic organization on practical Legalism. Notably, this is true whether Han Fei realized it or not.

The approach in the previous paragraphs has been to make inferences from Han Fei's state consequentialist premises à la Weber. This argument would gain significant strength if I were to outline the wealth of textual reasons available for thinking that Han Feizian Legalism really is identifiable as an instance of Weber's legal rule ideal-type. It should be recalled that Weber never claimed that his ideal-types had been actualized at any point in history nor ever actualized according to his description. And so, it would be unreasonable to expect Legalism to fall into complete correspondence with Weber's categories listed above as well as the numerous other qualities discussed in *Economy and Society*. Nevertheless, the correspondence between the two is uncanny, a result that is likely explainable by the striking correspondence between *Rationalität* and Han Fei's state consequentialism in conjunction with Han Fei's commitment to a deductive method. While I am unable to accomplish this here, I believe it would be a profitable endeavor should a full-scale investigation be undertaken in this direction. As this paper stands, the reader is likely already in a position to identify obvious similarities between Weber's eight categories reproduced above and the text of the *Han Feizi* as well as in its actualization in the pre-imperial and imperial Qin.

At the outset of section III, I argued that Han Fei has the theoretical resources to ameliorate the continuity worry indicated by the bell-curve consideration in section II. In particular, I argued that the presence of an expansive bureaucratic administrative apparatus,

should it appear on Legalism, has the potential to diffuse the impact, for better or worse, of the monarch. The upshot of this diffusion would be to limit the damage caused by aberrant “tails-level” rulers the periodic appearance of whom is acknowledged by both the historical record and Han Fei himself. It appears then that the success of Legalism depends on whether or not a bureaucratic administrative apparatus *really does* appear on Legalism. I then argued that a bureaucratic administrative apparatus would be expected to arise on Legalism with a significant degree of certainty on account of four distinct reasons: first, because bureaucratic administration was already an ineliminable feature of the political landscape in which Han Fei found himself; second, because the Qin empire, an alleged attempt to apply Han Feizian Legalism did in fact rely on an expansive bureaucratic network; third, because, according to the principle of charity, we, as interpreters of philosophical texts ought to impute to Han Fei the strongest conceivable version of Legalism and, by inference to the best explanation, this looks to be the inclusion of a bureaucratic apparatus according to the argument I made at the outset of section III; fourth and finally, because, according to Weber’s sociological analysis, there exists a conceptual through-line connecting *Rationalität*, legal rule, and bureaucratic administration—Han Fei’s foundational state-consequentialism, from which he deduces the particular prescriptions of Legalism, corresponds strikingly with Weber’s *Rationalität*, and so we should think that Legalism will generate legal rule and further a bureaucratic mode of administration.

If you accept my above arguments, then you will believe Han Fei to be committed to effecting Legalism through bureaucratic administration lest Legalism fail on account of the continuity worry. In the following section, I will give reasons to think that the sort of expansive bureaucratic network so necessitated for Legalism's success is itself flawed and presents an even more significant obstacle for Legalism than does the continuity worry of section II.

#### IV. Han Fei's Castle: Kafka & The Adaptability Consideration

The 'adaptability consideration' is generated by an observation such that states appear to be required to adapt in order to successfully overcome obstacles that arise both internally and externally. In this section, I will fill out the relevant senses of political adaptation and consider principled reasons and historical cases which suggest its importance for political theorizing. Despite a conspicuous hole in the political realism scholarship with regard to political adaptability, it should be uncontroversial, I hope, to suppose that adaptability is a virtue of realist political projects and a potential thorn in the side of political moralist or idealist projects. I will begin by considering a pair of passages, one from the *Han Feizi* and the other from Machiavelli's *The Prince*; both thinkers have been, not uncontroversially,<sup>67</sup> conscripted into the realist camp by contemporary political realists, and their rather oblique comments on adaptability will provide us with a starting foothold.

First, in section 49 of the *Han Feizi*, "The Five Vermin," Han Fei writes that, "[T]he sage does not try to practice the ways of antiquity or to abide by a fixed standard, but examines the affairs of the age and takes what precautions are necessary."<sup>68</sup> Here, Han Fei commits himself to a method of historical analysis which emphasizes the contextual differences which distinguish one era (or one state) from the next. That is, when scholars or the ruler himself look to the feats and words of the sage kings for guidance, they must examine the principles underlying the sage king's deeds rather than the deeds themselves. This appears to be because the particular concerns faced by one state or by one ruler are bound to be importantly different from the concerns and features of another state or another epoch. Within Han Fei's contextualist methodological

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<sup>67</sup> See Allison McQueen's *Political Realism and the Realist Tradition*.

<sup>68</sup> Watson, 98.

commitment lies an acknowledgement of our preliminary task here—to exhibit the centrality of contextual change over time. Before going further, it is worth also recalling a passage from *The*

*Prince*:

It is not unknown to me that many have held and hold the opinion that worldly things are so governed by fortune and by God, that men cannot correct them with their prudence, indeed that they have no remedy at all; and on account of this they might judge that one need not sweat much over things but let oneself be governed by chance. This opinion has been believed more in our times because of the great variability of things which have been seen and are seen every day, beyond every human conjecture...I believe, further, that he is happy who adapts his mode of proceeding to the qualities of the times; and similarly, he is unhappy whose procedure is in disaccord with the times.<sup>69</sup>

In this passage Machiavelli is engaged to consider the degree of influence he assigns to *fortuna* and how it is that men should deal with the uncertainty *fortuna* brings with it. It is not *only* the influence of *fortuna* though that creates uncertainty; there is also, as he writes in the final sentence reproduced above, a changing quality of the times themselves. The changing quality of the times is, of course, influenced by *fortuna*, but, for our purposes, it is the acknowledgement that methods of rule must change to accommodate the special features of the present context that is worth special emphasis.

Han Fei and Machiavelli both then acknowledge the importance of analyzing not only historical cases, but of analyzing the occurrent context for the purposes of developing political strategies and making sound political judgements. This is corroborated by contemporary realist thinkers like William Galston, who claims that, contrary to the realist position, the political moralist has in mind something like the *end of politics*—the implicit belief that political questions can once and for all be solved.<sup>70</sup> Political realists, Han Fei and Machiavelli included,

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<sup>69</sup> Machiavelli, 98-99.

<sup>70</sup> See William Galston's *Realism in Political Theory*.

on the other hand tend to take a sober approach to the problem of context, recognizing that obstacles to political success are never wholly eliminated but are instead transformed or merely delayed. For this reason among others, realists like Raymond Geuss find overly principled solutions to political theory naive and misguided.<sup>71</sup>

I hope to have provided at least a sense of the general thought from the realist camp with regard to adaptability, viz. an acknowledgement that politics is necessarily contextual and, as mentioned in section II, necessarily temporal, the upshot of which being that a successful state must retain the capacity to adapt to changing circumstances. “Circumstances” should be understood to include general features of the political landscape (such as those unique changes of the Warring states period discussed above) as well as immediate environmental concerns like invasions, popular uprisings, famines, floods, etc.

My argument here is that the sort of bureaucratic apparatus required on Legalism to circumvent the continuity worry precludes Legalism from satisfying this realist adaptability requirement. I will begin this argument by way of a perhaps surprising detour through an analysis of Franz Kafka’s classic *The Castle*. While Kafka is widely considered to be one of modernity’s prophets and unquestionably one of the staunchest critics of modern bureaucracy, still, some remarks on my use of fiction literature to further a philosophical claim are in order. An analysis of *The Castle* has the potential to yield evidentially weighty propositions for two reasons: first, it is widely agreed that the subject of Kafka’s novels, *The Castle* in particular, is the reality of life in the Austro-Hungarian empire, and so any propositions which can be drawn out of *The Castle* should be treated as expert testimony regarding one of the paradigm cases of an expansive bureaucratic administrative network; second, the world-classic status of the novel

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<sup>71</sup> See Raymond Geuss’ *Philosophy and Real Politics*.

may serve to indicate that the propositions expressed by Kafka are corroborated by a global audience.<sup>72</sup>

*The Castle* follows “K,” a mysterious but good-natured surveyor who has just arrived in the town which serves to support the castle, the seat of regional authority. K has allegedly been commissioned to undertake some surveying work by the castle, but no one seems to have been aware of his coming nor seems to know what to do with him. As K struggles to find reliable lodging and work, he is faced by obstacle after seemingly insurmountable obstacle posed by the *impenetrable* bureaucratic network housed in the castle. For our purposes here, the castle official, Klamm, is the most illustrative representation. When Klamm is first introduced, it is apparent that the inhabitants of the castle town are terrified of the power this official wields, and Klamm shows that he himself is aware of this as he throws weight about the town. By the end of the novel, however, it begins to dawn on K (and the reader) that even the officials have severely limited power within the network—in fact, the channels are so complex and obscure that even if Klamm wanted to wield the power that is supposedly at his disposal, it begins to seem increasingly unlikely that he could accomplish anything at all. For he, like everyone else, would be required to fill out and file paperwork that doesn’t seem to exist and have meetings with

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<sup>72</sup> If pressed on the sense of “corroboration” I have in mind, I would deploy the notion of “empathetic understanding” developed by Max Weber and Karl Jaspers in both *Economy and Society* (see 80) and *General Psychopathology* respectively. In short, empathetic understanding should be understood to be analogous to rational understanding (mathematical or logical for instance); where understanding a mathematical proposition entails exerting one’s own intellectual faculties upon the proposition to ensure that the same result is achieved by a process which is self-evidently valid, empathetic understanding entails “emotionally reliving” a scenario and, in an analogous sense, obtaining the same result. The world-over classic status of *The Castle* indicates that readers *empathetically understand* the text to an uncommon degree. This should give us strong reason to suppose that *The Castle* really does track some element(s) of the human experience of modernity.

unknown parties etc. In the end, the reader is left wondering how the castle and town manage to function at all.

The castle and town *do*, however, manage to function. One salient result of the Castle's bewildering bureaucratic network is that any process beyond the day-to-day functioning of the machine is unthinkable, while regular functioning appears successful. When a powerful political actor, Klamm for instance, desires to act beyond the regular functioning of the state, it's clear that he would be unable.<sup>73</sup> This is *precisely* what I have argued, in section III, that Han Fei's Legalism is equipped to do. In just the same way as Klamm is constrained by the bureaucratic apparatus, so too will the legalist ruler find himself constrained by the complexity of his own administrative apparatus. To the degree that the castle succeeds in constraining its officials, it is clear that it fails to integrate K, who in our case represents contextual changes. The Castle's only recourse is to attempt to integrate K into already existing systems, and there is no *real* possibility, i.e., a thorough impracticability, of the creation of new functions nor the emendation of existing ones—though there is, of course, the possibility of filing a proposal with a committee to create perhaps a new department the directive of which might be to employ a surveyor in some capacity. This same problem, by analogy, should be expected to be a serious concern Legalism.

Having given the reader, in the above, at least provisional reason to think the sort of bureaucratic organization required by Han Feizian Legalism is flawed, I will now go on to present the adaptability consideration.

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<sup>73</sup> It's worth noting perhaps that there are any number of other far more dismal conclusions to be drawn from *The Castle*—forgive these unusually positive remarks!

Even a brief survey of the *Han Feizi* shows that Han Fei concentrated the extreme majority of his theoretical efforts on the internal affairs of the state to the near total exclusion of the external. This observation in itself is not immediately an indictment of Legalism, and one might on the contrary be inclined to think that Legalism has, by concerning itself almost exclusively with internal politics, set itself a realistic and achievable target.<sup>74</sup> This appears reasonable provided only that the internal political suggestions of Legalism do not disproportionately decrease the state's success potential with regard to external affairs beyond its baseline effectiveness. It seems to me, however, that given the scale consideration Legalism *does* decrease, to an unacceptable degree, state efficacy where external affairs are concerned. For, while Weber upholds bureaucracy as the hallmark of the modern state and the most efficient form of human governmental administration, he also identifies it as an instrument of domination and stultification.<sup>75</sup> In many cases, environmental and geopolitical concerns require rapid response which is often inhibited by bureaucratic organization—call this the *adaptability consideration*. This is a clear extension of my analysis of Han Fei, Machiavelli, and political realist projects generally, which I undertook at the outset of section IV.

A non-fiction example would also, I'm sure, be illustrative: despite the incredible successes of Mao's China, we might look to the Great Famine of 1958-1961 as a deeply tragic example of the cost of bureaucratization with regard to crisis response ability. There were of course a number of contributing factors which produced the famine—withdrawal of Soviet engineers, environmental catastrophes etc., but there is consensus that one of the central failures of the Maoist regime in this regard concerned communication breakdown between central

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<sup>74</sup> For a realist, this is an attractive feature. Cf. Galston's *Realism in Political Theory* (2010).

<sup>75</sup> Weber, ch. 3.

officials in the capital and regional officials in the rural prefectures.<sup>76</sup> Because the communication of peasant conditions and agricultural production reports were delayed and in many cases intentionally misreported, central officials failed to address the growing crisis until death totals had climbed into the millions.<sup>77</sup> The alleviation of the famine was eventually effected in significant part by Zhou En-Lai's "Twelve Agricultural Provisions" of 1961 which encouraged individual peasant families to engage in some measure of private agriculture for subsistence and thereby circumvent the slow response time of the state channels.<sup>78</sup>

While the ministers are pinioned by bureaucratic gridlock, one might hope that in times of crisis an exceptional citizen or even rogue minister may propose an innovative solution or go beyond his station for the good of the nation. This option is unfortunately unavailable to Han Fei on account of the two handles. One of the prime directives of the two handles is to ensure that no political actor may successfully go beyond his station. In one of the more memorable anecdotes from the *Han Feizi*, we are told of a minister of caps who has discovered the ruler dozing uncovered and, hoping to please the ruler, covers him with a cloak. When the ruler awakens, he punishes the minister of cloaks for failing in his duty *as well as* the minister of caps for the far more grievous crime of acting beyond his station. Han Fei in his discussion of this incident writes that, "[t]hose who overstep their offices are condemned to die; those whose words and actions do not tally are punished. If the ministers are made to stick to their proper duties and speak only what is just, then they will be unable to band together in cliques to work for each other's benefit."<sup>79</sup> The penalty for enterprise then appears to be so extreme that despite even dire

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<sup>76</sup> Liu, *Maoism and the Chinese Revolution: A Critical Introduction*, 63-64.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

<sup>79</sup> Watson, 32.

circumstances, no one should be willing to take the risk provided that the two handles have been consistently applied.<sup>80</sup> Considered in abstraction from my foregoing arguments, Han Fei's prescription in this case is, by my lights, reasonable; Han Fei saw that, should opportunities for advancement be presented to those who demonstrate ability or motivation to operate beyond their stations, opportunities will be used in the main for the consolidation of additional power and influence. Ultimately, challenges to the ruler's authority might precipitate. The *in abstracto* reasonableness of this prescription, however, does not prevent it from hamstringing Legalism given my arguments.

I will now address an apparent objection to the adaptability consideration. One might think that the legalist bureaucratic administration is not *doomed* to be so unwieldy as to limit all innovation and adaptability. For instance, it's certainly conceivable that emergency workarounds could be implemented or that communication technology could dramatically expedite the decision-making process, and, what's more, historically, we find accounts of states possessed of relatively tortuous political decision-making processes which, to circumvent the adaptability consideration, by included special dispensations for times of crisis. The Roman republic, for instance, is well known for its capacity to, in such cases, elect via the senate a dictator.<sup>81</sup> In modernity, the United States splits war powers between congress and the executive

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<sup>80</sup> Should the reader be unconvinced of the importance of individual-level innovation, historical cases abound. Take for instance the development of the famed AK-47 rifle which ostensibly decided WWII in favor of the Allies—Kalashnikov was by training an agricultural engineer who recognized the dire situation the Soviet Union faced and began work after hours developing plans for a new type of mass producible rifle which would later become the AK-47. On Han Fei's framework, Kalashnikov's invention would undoubtedly be seen as a dangerously ambitious attempt to curry favor with the party elites and take some measure of power for himself.

<sup>81</sup> See de Wilde's *The Dictator's Trust: Regulating and Constraining Emergency Powers in the Roman Republic*.

branch. While congress has the exclusive power to make a declaration of war, the president is able to undertake military action without any such declaration from congress.<sup>82</sup> We have seen the bureaucratic model's slow response to crises, but there are also strong examples of bureaucratic states that maintain their response abilities through special dispensations.

The Han Feizian theorist may attempt something similar by making some recourse to “xing-ming” or the doctrine of form and name. Han Fei suggests that the ruler to organize his minister in such a way that their duties and titles are in complete conformity, such that a given minister bears total responsibility for the outcomes particular to her appointment. By holding the ministers to such an exacting standard, perhaps Han Fei could demonstrate a satisfactory crisis response ability.

Unfortunately, my arguments entail that the special dispensation route, if xing-ming could be likened to this, is not available to Han Fei since it is precisely the torturous complexity of the bureaucratic apparatus which has the potential to rescue Legalism from the continuity worry exposed by the bell-curve consideration in section II. Any special dispensations would be exploitable by an aberrant ruler or a power-hungry minister. Thus, even if the bureaucratic apparatus which emerges on Han Feizian Legalism could be streamlined, it should rather be *deliberately* complicated. I have then argued that despite the dissolution of the continuity worry, the legalist bureaucratic apparatus fails to allow for essential adaptive, innovative political action at the administrative and popular levels. It now remains to consider the implications for contemporary Han Feizian theorists.

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<sup>82</sup> See Brower's “The Great War Powers Debate” (1973).

## V. Preliminary Conclusions

I have argued that Han Fei's Legalism looks, on a superficial reading, to be able only to provide regime continuity for, on average, a century. Although I have not provided a case for it here, if one takes a reasonable duration of continuity to be an essential success condition for a political framework, then this looks distinctly unsatisfactory.<sup>83</sup> A stronger account of Legalism identifies an additional implicit constraining factor for the ruler that arises on account of the scale of implementation of a characteristically legal rule, *the scale consideration*. While the relatively large scale of the emergent bureaucratic apparatus diffuses any aberrant behavior on the part of the leader, it dramatically limits the crisis response ability of the governing body, the *adaptability consideration*. Since the stultifying nature of the large bureaucratic apparatus functions for Han Fei as a security measure, no special crisis dispensation can be allowed without creating a new significant vulnerability. This constitutes a significant problem for Legalism and should be considered by any scholar attempting to revitalize Han Fei's thought and implement it in a contemporary context.

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<sup>83</sup> Importantly, disagreeing on the insufficiency of a century of continuity is not enough to rescue Legalism. Even if we assume a century to be sufficient for "success," the scale consideration applies regardless—a large bureaucratic apparatus, following Weber, will arise on legal rule in a sufficiently large state, manufactured or otherwise.

## CHAPTER TWO: SYNTHESIS AND SOLUTION

In chapter one, I provided the basic argument for the Legalist political model before providing some reasons for thinking it may not be successful. I argued first that, considered historically, Legalism does not appear to be able to provide a satisfactory degree of regime continuity and runs an unacceptably high risk of collapse upon the emergence of an inept ruler. I went on to show that this is merely a *prime facie* concern which Han Fei addresses in what I called the *scale consideration*, viz., the intentional facilitation of bureaucratic bloat which functions to constrain and defuse the agency of an inept ruler. Finally, I argued that—facilitated or otherwise—this bloated bureaucratic apparatus *necessarily* arises on the legalist framework and prevents the legalist state from successfully responding to imminent threats. Crucially, since the bloated bureaucratic apparatus occupies an essential security role, emergency measures to circumvent the apparatus cannot be instituted; I have called this *ultima facie* problem the *adaptability consideration*. I do not believe that Han Fei alone has the resources to respond to the adaptability consideration, but, historically evidenced by the success of the pre-imperial Qin state, Legalism should not be wholesale abandoned. It is now my task, in chapter two, to provide a solution to this set of concerns and, ultimately, to suggest a political framework possessed of the strengths of Legalism and free from its weaknesses.

To this end, I will begin by looking to the chief ideological rival of Legalism, Confucianism, and give at least provisional reason to think that Confucian-style cultivation could supply what Legalism has been shown above to lack. I'll first consider the critical points of

divergence between Legalism and Confucianism, paying special attention to Han Fei's criticisms of the Confucian tradition. I'll go on to argue that the process of virtue cultivation, which is central to Confucianism, survives Han Fei's criticism and is the best candidate to rescue Legalism from the adaptability consideration. After providing reasons for thinking that Han Fei's criticisms are altogether too hasty, I'll rely on a Platonic analogy to guide a synthesis of Legalism and Confucianism in hopes of providing a way through the adaptability consideration. The result will be a broadly neo-classical political framework, *Legalism+*, which is ripe for practical implementation. We will find that, even though the arguments presented in chapter one remain intact, resources available on Legalism+ may be leveraged to offset the danger posed by the adaptability consideration to regime continuity, not through rapid response, but by increasing conceptual resources allotted to crisis mitigation.

### **I. Confucianism: Virtuous Cultivation and *De* 德**

In chapter one, I discussed at some length the *political* climate of the Spring and Autumn period which succeeded the Western Zhou dynasty (1045–771 BCE) and how political changes during this period laid the foundation for the ultimate success of the Qin state as it sought to transition to empire. I will now have occasion to discuss the *philosophical* climate of the Spring and Autumn period which saw the rise of China's greatest classical philosophers, first among whom was Kongzi (Latinized, Confucius). The landscape of Confucian scholarship is wide, and interpretations of the core texts are highly variable. The difficulty of producing an ecumenical summary of the central Confucian ideas of virtue and its cultivation is compounded by the doctrinal differences found in the teachings of later Confucians. My objective here is to provide

the uninitiated reader with a brief and largely noncommittal picture of Confucian virtue cultivation.

The transition from the Zhou period to Spring and Autumn saw the birth of a new class of citizen—the *shi* 士 (gentleman or knight). As aristocratic families gradually slipped from power in the unstable post-Zhou environment, their progeny—children educated in the customs and skills of the classical nobility—began to replace the traditional nobility in ministerial appointments. This generation accounts for the first members of the *shi* class—common folk, one level removed from the peasantry, who had the education of the old nobility but the practical experience of the peasantry. The new and critically important emphasis on merit in ministerial selection, which is characteristic of the Spring and Autumn period, found members of this new class extremely valuable. Their folk knowledge, e.g., soldiering or farming, paired with their noble etiquette and rhetorical abilities made them perfect candidates for newly available ministerial roles. Kongzi was the paradigm case of such an individual.

The particulars of Kongzi's life are no doubt of great interest but are for the most part irrelevant to my purpose here.<sup>84</sup> It is essential to note, however, that Kongzi was the first serious thinker to advocate that the virtues and customs of the nobility be widely taught throughout the greater Chinese population. This process is generally known as the cultivation or inculcation of virtue (*de* 德), and, for Kongzi, this process in large part consists in the observance of *li* (禮) — “ritual” practice. According to the Confucian tradition, by practicing ritual, e.g., filial piety, observation of mourning customs, etc., one will attain increasingly higher levels of virtue which

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<sup>84</sup> See for example *Confucius: The Man and the Myth*. New York: John Day Company (Creel 1949) or *Lives of Confucius: Civilization's Greatest Sage through the Ages* (Nylan 2010).

results tangibly in judiciousness and the accrual of *de*. The observation of *li* is not in itself

virtuous but rather leads to virtue; the noteworthy Confucian, Xunzi, writes:

Through steaming and bending, you can make wood as straight as an ink-line into a wheel. And after its curve conforms to the compass, even when parched under the sun it will not become straight again, because the steaming and bending have made it a certain way. Likewise, when wood comes under the ink-line, it becomes straight, and when metal is brought to the whetstone, it becomes sharp.<sup>85</sup>

In the same way that wood or metal is shaped by the application of some guide or standard, a by default corrupt human nature can be shaped by *li*.<sup>86</sup> In the early stages of a Confucian's development, she will act according to *li*, which looks much like following a set of rules. Eventually, as she internalizes the underlying rationale of those rules, she will begin to act in ways unspecified by *li* but in which the spirit of *li* is present. More will be said about the cognitive component of this process, or lack thereof, below.

Kongzi discussed the state of being wholly virtuous in terms of the concept of *ren* 仁. One who is *ren* exhibits a general sense of goodness, humaneness, responsibility and has an acute sense of fairness and justice.<sup>87</sup> The precise content of this term has, however, been controverted since the time of Kongzi himself and resulted in a bitterly fought Confucian factionalism, a topic to which I will return below.

The Confucian political vision relies heavily upon *de*, a consequence of successful virtue cultivation. *De* refers to a sense of loyalty, respect, and general good feeling inspired in others by the one possessed of *de*—this amounted though, according to the Confucians, to something like a

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<sup>85</sup> Xunzi Hutton trans ch1 lines 3-9, 1.

<sup>86</sup> Notably not all Confucians held this view.

<sup>87</sup> Tao Jiang 53; *Ren* is also treated by some scholars as a particular virtue—benevolence cf. Eric Hutton in *Character, Situationism, and Early Confucian Thought* (2006).

mystical power that such a saint had over her associates, a supernatural charisma. The highest concentrations of *de* were identified in the great sage-kings of the Zhou period, which was, on account of these most virtuous leaders, widely considered to be the golden age of classical China. Because these sage-kings had successfully cultivated virtue, they were equipped to make excellent decisions regarding the governance of their states in a variety of circumstances. In contemporary terms, this phenomenon may be likened to, or even be considered identical with, privileged epistemic access to normativity arising from successful cultivation of virtue.

I am alluding to a certain variant of virtue ethics which originates, at least explicitly, with John McDowell<sup>88</sup> in the paper “Virtue and Reason” (though, as McDowell writes, this view “flowers in Aristotle’s *Ethics*”<sup>89</sup>) in which he argues that virtue, in a general sense, constitutes a sort of knowledge by which the virtuous person is able to determine the right act in morally charged scenarios despite, more often than not, being unable to articulate (on account of being unable to cognize) the precise moral rule which she is applying. Further, we should expect this condition of right action without sufficiently justificatory cognition, since the world, and the morally charged events which occur within it, are so variable and so complex that perhaps no system of moral principles could hope to adequately prescribe the right course of action in every case without expanding to particularism, viz. that the world, with regard to moral decision-making is uncodifiable. Eirik Harris, in “Which Teacher Should I Choose? A Xunzian Approach to Distinguishing Moral Experts from Fanatics” considers this story about virtue ethics in the

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<sup>88</sup> Harris, “Which Teacher Should I Choose? A Xunzian Approach to Distinguishing Moral Experts from Fanatics.” *Journal of Religious Ethics* 45, no. 3: 463-480.

<sup>89</sup> McDowell, 1.

context of the Confucian Xunzi, and I will proceed with this understanding of Confucian virtue here—that achieving *ren* grants one privileged epistemic access to the right. In addition to this privileged epistemic access achieved by the sage-kings, regime stability and prosperity were, according to the Confucians, thought to be a function of *de*. Due to the extremely high levels of *de*, the peasantry and ministers of Zhou states exhibited a great degree of loyalty to the monarch and a personal investment in state success. The Confucians took this a step further by disseminating the rituals intended to inculcate virtue throughout the peasantry, establishing a network of *de* relations and thereby fortifying communities.

While Confucianism eventually became the most influential moral and political doctrine in the scope of Chinese ideological history, its emergence in the wake of the Zhou dynasty was anything but dominant. The Confucian approach of “trying to find ways to reconstitute such a declining, and eventually lost, order by appealing to either traditional ritual, moral inclinations or human nature, or objective standards, etc., so as to put together a coherent and cogent world,”<sup>90</sup> came to characterize intellectual discourse during the transition period and well into the Warring States period. As I discussed at length above, however, the minority school of political thought localized in the pre-imperial Qin state, ultimately brought Qin to dominate the entire region, marking a massive shift in Chinese history. We should consider what it was which kept the Qin empire organizationally distinct from their rival states, and further which characterized the legalist break from the cultivationist norm.

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<sup>90</sup> Tao Jiang, 55-56.

## II. The Legalist Break

As discussed in chapter one, one of the central changes in Warring states life was the overextension of centralized authority. As warfare became less ceremonial and significant annexation campaigns led by professional generals became the norm rather than the exception, state size became a central concern in discussions of political organizational models. In the wake of the Zhou collapse, the relatively small size of states made possible a ruler-centric administration. On such a model, of which Confucianism is the paradigm case, success was contingent upon the judicious decision making of the ruler himself, and for this reason he was party to much of the practical work of governing and policy making. As states expanded, the complexity of state economics, security, military campaigns, fortifications, and sheer distance threatened ruler-centric models with obsolescence. The state of Qin was the first of the major Warring States powers to develop small counties and “commanderies” (郡) to facilitate governance over larger territories. Since this naturally, and purposefully, stripped some amount of power from the ruler, a new organizational model had to be developed to maintain cohesion without reliance on regular contact with a cultivated headman as is required with a Confucian-style *de* concept. One resulting system was Legalism. I have discussed the history of and arguments for Legalism above, so I will now only emphasize Legalism’s crucial point of departure from Confucianism—the excision of virtue cultivation.

I will, as above, treat Han Fei as the mouthpiece of the legalist school, and, as I read the *Han Feizi*, we find posed three general objections to any political system that has as one of its aims the cultivation of virtue: first, that cultivation cannot be systematically relied upon to

maintain order and can even conflict with the well-ordering of the state; second, that it is simply very difficult to cultivate virtue—even those great historical figures who had supposedly achieved the height of cultivation were subject to lapses in judgement; third, and most serious, that there is substantial disagreement over the content of cultivation, i.e. over which virtues in particular ought to be cultivated and what it would be to be so cultivated. I will treat each of the above objections in detail before giving responses to each objection.

### **II.i. Objection One:**

As Joel Sahleen notes in the introduction to his translation of Han Fei, “Han Fei does not seem to have been the least bit interested in determining which form of government was most ethically justified. His goal was simply to determine which measures were most effective in ensuring the continued survival of the state and furthering the public interests of the ruler and his people.”<sup>91</sup> If we understand this to be Han Fei’s objective—to determine the most efficacious mode of government, where “efficacious” means something like systematically ordered, secure, and prosperous—it is unsurprising that he should be antagonistic to any component of the state apparatus which might interfere with its efficacy. The first objection follows from the systematic nature of Han Fei’s proposed ordering.

Something should be said about what is meant by “systematic.” The term is often used to describe Han Fei’s political philosophy, especially to distinguish it from other Classical Chinese traditions. It is *not*, I believe, meant in the sense in which “system” is typically used to describe a philosophical school or oeuvre, viz. one such which either contains or articulates with the major

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<sup>91</sup> Ivanhoe & Van Norden, 312.

branches of philosophical thought (metaphysics, epistemology, etc.).<sup>92</sup> This is not to say that Han Fei is not systematic in this sense, though the case may be difficult to make. Rather, “systematic” when used to describe the *Han Feizi*, means something more like ‘with provision of a guarantee.’ The *Han Feizi* is sensitive to the realities of cultural, technological, and geopolitical change and seeks to suggest a political model which *guarantees* stability over time, i.e., regime continuity. Han Fei’s approach is patently systematic in that he begins his investigation by proposing a set of success conditions for the state and orients his project such that those conditions can be achieved with something approaching a guarantee in the majority of plausible cases.

Standing in sharp contrast to Legalism’s systematic approach to state success was the patently *particularist* approach proposed by the Confucians.<sup>93</sup> A particularism about moral decision-making follows from the above discussion of McDowell’s uncodifiability thesis, so it’s hardly a surprise that we should find this in the Confucian framework. Van Norden treats this explicitly and at some length in *Han Fei and Confucianism: Toward a Synthesis*:

Confucius’s particularism is evident in many passages in the *Analects*, perhaps the most famous being 11.22. On separate occasions, two different disciples, Zilu and Ran Qiu, ask Kongzi about the maxim, “Upon learning of something that needs to be done, one should immediately take care of it.” Kongzi instructs Ran Qiu to follow the maxim, but he tells Zilu not to follow the maxim. (Zilu is advised to defer to the judgment of his father and elder brothers before pursuing what needs to be done.) A third disciple, Zihua, having heard both exchanges, asks the question that every reader will have: why did Kongzi give two different answers to the same question? Kongzi simply responds, “Ran Qiu is overly cautious, so I wished to urge him on. Zilu, on the other hand, is too impetuous, and so I sought to hold him back” (Slingerland 2003:120). This is a

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<sup>92</sup> Cf. Schwartz compares them to 19th century system builders. Schwartz, B.I. (1985) *The World of Thought in Ancient China*. Belknap Press of Harvard University Press, Cambridge, 348.

<sup>93</sup> Van Norden, *Han Fei and Confucianism: Toward a Synthesis*, 137

paradigmatic example of particularism: both the right thing to say to someone and the validity of an ethical maxim depend on the situation.<sup>94</sup>

The obvious Western parallel is Aristotle's practical wisdom discussed in *Nicomachean Ethics*, a comparison which Eric Hutton has explored in *Moral Reasoning in Aristotle and Xunzi* (2002). Political Confucianism by analogy is a particularist political model as the operations of the state are an expression of the cultivated ruler's practical wisdom.

Han Fei recognized that the success of this mode of governance depended significantly on the character of the monarch himself, namely, that his character be of high caliber. In conjunction with this observation, Han Fei notes that, according to the historical record, the character of the monarch is in any case likely to be somewhat middling:

Furthermore, even if a Yao, Shun, Jie, Zhou only emerged once in every thousand generations, it would seem like they were born bumping shoulders and treading on each other's heels. But those who actually govern each age are typically somewhere in the middle between these two extremes... These mediocre rulers, at best they do not reach the level of a Yao or a Shun, and at worst they do not behave like a Jie or Zhou.<sup>95</sup>

If the state then is only successful when an excellent monarch is in power, and excellent monarchs are only in power every "thousand generations," then the cultivationist theory of governance and theoretical grounding, despite its deep tradition, fails to satisfy Han Fei's standards. It is noteworthy that Mengzi, one of the major contributors to the Confucian canon,

makes a similar admission concerning the rarity of sage-level individuals:

Every five hundred years, there must arise a sage-king. Between them, there must be those whose names are known to a generation for their accomplishments. From the founding of the Zhou dynasty, it has already been more than seven hundred years. Numerically, this is excessive. And if one examines it in terms of the conditions of the world, then it is possible that a new sage-king will arise.<sup>96</sup>

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<sup>94</sup> Van Norden, *Han Fei and Confucianism: Toward a Synthesis*, 137.

<sup>95</sup> Ivanhoe & Van Norden, 330.

<sup>96</sup> Ivan & Van Norden, 130. Mengzi, Book II.

Mengzi then provided a range of 500-700 years between the appearance of sage-kings while those in between, “whose names are known to a generation” are average rulers. Finally, while it’s true that a talented and virtuous prime minister or advisor could compensate for the shortcomings of an uncultivated Confucian ruler, those cases still suppose the ruler to be amenable to sound advice and to be capable of selecting and retaining sufficiently talented advisors—a set of conditions which, in Kongzi’s itinerant career, obtained but rarely.

Objection one is then closely related to the *bell-curve consideration* discussed in part I. All evidence I provided there to suggest that, failing to account for the scale consideration or some functional equivalent, the available historical evidence suggests that rule by cultivationism is often successful in cases when cultivation succeeds, but cultivationism *fails to secure the success of the monarch’s cultivation in the vast majority of cases*. When Han Fei abandons cultivationism then, he turns down only the positive tails-level cases of success—a mere handful in each millennium.

The above constitutes the basic impetus for the legalist break, but Han Fei’s objection represents a problem for cultivation even within a legalist framework. An especially attractive element of Han Feizian Legalism is its predictive power. Han Fei understands humans to be fundamentally self-interested and un-reformable. Further, this self-interest expresses itself as vulgar hedonism—a constant pursuit of short-term pleasures and flight from pains. If the ruler operates with this understanding of his citizens, he will have a reasonable idea of how they will respond to new policies and crises—they will act in every case out of their own short-term self-

interest. With this knowledge, the ruler is able to manipulate his citizens by consistent

application of rewards and punishments:

The effort required to do farming is exhausting, but people will still do it because they say, "This way I can become rich." Going to war is a dangerous affair, but people will still do it because they say, "This way I can become ennobled." Now if by cultivating the arts of culture and practicing speaking and discussing, one can enjoy the fruits of wealth without the labor of farming, and have the respect of nobility without the danger of battle, who would do these things?<sup>97</sup>

The passage reproduced above is of twofold interest; not only does it exhibit the benefit to the state brought about by the consistent application of rewards and punishment, but it also shows a potential drawback of cultivationism—it upsets the efficacy of the system of punishments and rewards. Barring a cultivated population, the assumption that the people will act in ways that tend to meet with more leisure, riches, and prestige allows the ruler to outline a system of rewards and punishment which brings those desires into alignment with the interest of state success. Given a population that is not easily swayed by material gratification or fearful of physical pain, it may no longer be quite so clear what motivates or deters them.

In objection one then, I have tried to show that Han Fei sees the Confucian cultivationist mode of governance to be inimical to the ordering and flourishing of the state, and that, even supposing the legalist framework, cultivation poses a danger in that it upsets the state's predictive power and the efficacy of the system of rewards and punishments.

## **II.ii. Objection Two:**

The second objection, that the ends of cultivation are largely unachievable, is parasitic on objection one. If one relies on virtue to maintain order in the state, one will be continually

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<sup>97</sup> Ivanhoe & Van Norden, 347.

frustrated by the recalcitrance of the people. Han Fei makes this criticism in two major points: first, on account of Han Fei's view of human nature discussed above, permanently altering one's character is, in general, not possible and is certainly not systematically achievable; second, even those who have been allegedly successfully cultivated fail to make correct judgements. Han Fei exhibits both points by appeal to Kongzi:

Confucius was a great sage of the world...but those who followed him numbered only seventy men. It seems those who value benevolence are rare while those with the ability to be righteous are difficult to find. Thus, even with the vastness of the whole world, there were only seventy men who followed Kongzi, and only one man who was truly benevolent and righteous.<sup>98</sup>

And:

Tantai Ziyu had the appearance of a gentleman, so Kongzi became acquainted with him and took him on as his disciple. But after he had lived with him for some time, he found that his conduct did not measure up to his looks. Zai Yu's speech was elegant and cultured, so Kongzi became acquainted with him and took him on as his disciple. But after he had lived with him for some time, he found that his wisdom did not measure up to his eloquence. Therefore, Kongzi said, "Should one select men on the basis of their appearance? I made that mistake with Tantai Ziyu. Should one select men on the basis of their words? I made that mistake with Zai Yu." Thus, even with the wisdom of Kongzi it is still possible to mistake the facts about people.<sup>99</sup>

In the first passage, we see that, despite Kongzi's reputation as a benevolent man and wise teacher, few men could be found to follow him, and even they failed to achieve his degree of cultivation. The implication is that if even these noteworthy individuals, who dedicated their lives wholly to the pursuit of virtue, failed to achieve a high level of cultivation, there is little hope for the common people. In the second passage, we find an even more troublesome historical note; if the great Kongzi himself, despite his high level of cultivation, is still occasionally mistaken in his judgements, then it seems that even at the height of cultivation, a

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<sup>98</sup> Ivanhoe & Van Norden, 341.

<sup>99</sup> Ivanhoe & Van Norden, 354.

monarch could not be counted on to reliably order the state. More specifically, Kongzi illustrates an especially dangerous lapse of judgment in the second passage by failing to distinguish between eloquence and virtue.<sup>100</sup> Given the Warring States political climate, the ruler finds himself surrounded by enemies. His own ministers are constantly looking for ways to siphon his power and influence ultimately to precipitate a coup. If, even after a life of intense study, Kongzi is unable to avoid this mistake on occasion, a young and inexperienced ruler can hardly be expected to fair even so well.

There is yet a third point made in the *Han Feizi* in support of this objection which suggests that perhaps cultivation has never really been achieved at all. Those who are commonly thought of as great sages are perhaps just born with slightly different inclinations than the majority of people. In book 50, Han Fei writes of “an arrow shaft that was straight without having to be straightened, or a piece of wood that was round without having to be bent”<sup>101</sup> as a metaphor for a citizen whose private interests already align with the public interests without the imposition of law or cultivation and further writes that such citizens are as rare as hen’s teeth.

I have noted above that this objection is parasitic upon objection one. I understand this to be so since this objection presupposes a cultivationist *mode of governance*. It is of little consequence that only a few people can be cultivated and even then to a low degree, or that even

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<sup>100</sup> This perhaps belies a more fundamental shortcoming of the Confucian scheme such that there is an important constraint placed on the judiciousness born of cultivation. Namely, since apparently good actions can disguise wicked motivations, a sage likely requires repeated and prolonged exposure to wicked crafty individuals before they can be identified. Since the danger presented by crafty ministers is a major concern of the ruler which Legalism is designed to mitigate, this constitutes a significant failure of Confucian politics.

<sup>101</sup> Ivanhoe & Van Norden, 357.

the most cultivated are unreliable in their judgements *unless* one is counting on a cultivated citizenry for order and a cultivated ruler for guidance—as do the Confucians.

### II.iii. Objection Three:

The third objection, that the content of cultivation is highly controverted, will clearly be the most difficult to dispatch. Han Fei presents this objection in chapter 50:

Thus, after Kongzi and Mozi, the Confucians split into eight factions and the Mohists split into three. The doctrines and practices that each of these factions accept and reject are divergent and conflicting, and yet each faction claims that they are the true representatives of the Way of Kongzi or Mozi. Kongzi and Mozi cannot come back to life, so who will determine which of the current schools are the right ones?<sup>102</sup>

Han Fei presses the problem further, noting that Kongzi and Mozi themselves professed to be theorizing in the tradition of Yao and Shun, and yet there are many significant divergences in their thought. This problem of disagreement, and its skeptical conclusion, is liable to be familiar to Western moral scholars and has recently emerged as a hotly contested debate in analytic ethics and epistemology.

The presence of this disagreement is especially unfortunate for the virtue ethicist or Confucian as virtue ethics is often taken to offer a plausible solution to skepticism about the fundamental sources of value or ethical obligation. The theory of virtue ethics presented by John McDowell in *Virtue and Reason*, which maintains that the contexts in which ethical judgements are made are too complex to be described by general rules, viz. normativity is an *uncodifiable* sort of thing. The judgements of the virtuous person then provide some special epistemic access to normativity, but if it is in fact the case that even among supposedly virtuous people there is

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<sup>102</sup> Ivanhoe & Van Norden, 352.

deep-seated disagreement, then it seems that virtue ethics has lost one of its major advantages over other contending theories.

For Han Fei then, even supposing that the cultivationist is able to avoid objections one and two, she still must posit some content of cultivation and at least provide some plausible error theory for the disagreement between, for instance, Mengzi and Xunzi. This concludes our general picture of Han Fei's objections to cultivationist political theories, and I will now proceed to offer some responses.

### **III. In Defense of Cultivation**

#### **III.i. Response to Objection One:**

Recall that Han Fei objects that, (i) cultivation cannot be relied upon to consistently order the state and (ii) that cultivation is inimical to the Han Feizian Legalist mode of ordering the state inasmuch as it inhibits Legalism's predictive power.

I am prepared to grant that Han Fei is entirely correct that cultivation is incapable of consistently ordering the state for the reasons he provides; this is, however, not antagonistic to our aim of salvaging some cultivationism. Han Fei, in targeting cultivationism, is obviously targeting the Confucian tradition generally. The Confucian mode of governance relies on the cultivation of virtue to guide the state via the virtuous ruler<sup>103</sup> and, in large part, for establishing

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<sup>103</sup> I have focused my discussion on the cultivation of the ruler to bring out the comparison between the two systems, but certain Confucians, Xunzi in particular, emphasize the successful cultivation of the ministers as essential for the elevation of the sage-king: "One sort of minister is such that he can revere his lord above while also being able to care for the people below. His governmental orders and educational influence take form among his subordinates like a shadow following a body. He adapts completely to unexpected occurrences and changes as quickly as echo following a sound. He knows how to extend categories and connect types in order to handle

and maintaining order among the people. There is no apparent contradiction, at least with (i) of objection one, in accepting Legalism's theory of governance, the rule of law embodied in a monarch, while simultaneously providing for a cultivated citizenry.<sup>104</sup>

I propose to resolve (ii) by indicating another unjustified presupposition. Because Han Fei is targeting patently Confucian cultivationists, he neglects to consider non-Confucian cultivationism. Han Fei is right to note that Confucian moral values not only inhibit the predictive power of Legalism, but they have the potential to directly obfuscate the aims of the legalist state. Consider his discussion of the benevolent ruler:

Furthermore, when punishments are carried out according to the law and the ruler sheds tears because of it, this is in order to demonstrate the ruler's benevolence, and not for the sake of creating order. To shed tears and not want to punish is benevolence, but to not allow offenses not to be punished is the law. The former kings allowed their laws to prevail and did not listen to their tears, so clearly benevolence cannot be relied on to produce order.<sup>105</sup>

Here we see the content of cultivation proposed by the Confucians to be in direct contrast to the aims of the legalist state.<sup>106</sup> I am concerned here, however, not with Confucian cultivation but with cultivation generally. If we consider the *process* of cultivation but suppose some

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cases without a precedent. In every area, he brings about the phenomena of order. Such is the sagely minister" (Xunzi 13.20-27).

<sup>104</sup> There is an important caveat here—while it may be true that there is no contradiction *in principle*, some certain content of cultivation is plausibly inadmissible, e.g., the cultivation of rebelliousness, should such a characteristic come out in the wash as a virtue.

<sup>105</sup> Ivanhoe & Van Norden, 340.

<sup>106</sup> The dug-in Confucian theorist may respond here the Confucian ruler need not suspend the laws in order to express benevolence. Rather, she might recognize that implementing harsh punishments may be in the interest of treating her people, generally, with benevolence. While perhaps this is true, the absence of such cases in the Confucian literature is striking. Such a perspective also further convolutes the possible right adjudications available to the Confucian rulers—they must consider now such apparently contradictory avenues as enacting cruelty as an expression of benevolence, etc.

*indeterminate content*, the apparent conflict between the content of cultivation and the ends of the state disappears.<sup>107</sup>

All that remains is to consider the possibility of a loss of the state's predictive power if cultivation, even supposing an indeterminate content, were to be widely practiced. While it is true that widespread sporadic altruistic action in the population would all but eliminate the predictive power that the state has on Han Fei's conception of human nature, it is not clear that this is guaranteed to occur given cultivation. Provided that the content of cultivation are standardized, the ruler will have license to expect that, given any situation, a given citizen will *either* act out of self-interest *or* act in accord with the standard set of virtues. This hardly seems to lessen the state's predictive power in practice. The ruler only needs to consider this disjunction and control for both disjuncts—succeeding in this, he will have at least as much certainty in his behavioral prediction as the ruler with a wholly uncultivated population. *Importantly*, this disjunction only need be considered in cases in which an overlap of virtue and self-interest does not obtain.

### **III.ii. Response to objection two:**

Recall that Han Fei objects that not only is perfect virtue practically unachievable, but it's also quite difficult to convince common people to become cultivated at all. As I noted above, this objection is parasitic on objection one, but supposing the reader finds my response to objection one unconvincing, I'll still offer a brief response here. Since I have stipulated that I am

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<sup>107</sup> Well, that is, *may* disappear. Cultivation without any specific content is so abstract as to be practically meaningless. The alleviation of the contradiction in practice will require content of cultivation which are themselves aligned with the ends of the state. Fortunately, that is precisely my aim in what follows.

proposing merely a cultivation *component* which would operate within the legalist framework, and because the citizens need only be highly cultivated if cultivation is the order-ensuring force for the state, even if none of the state population achieved even the slightest degree of cultivation, the state would be no worse off than on standard Han Feizian Legalism.

### **III.iii. Response to objection three:**

Han Fei is apt to note that the factionalism into which the schools fell after the deaths of Kongzi and Mozi is indicative of the general failure to identify the content for cultivation. My solution to this disagreement involves a reading of Confucian thought such that the Confucians are considered moral naturalists in the sense of Aristotelian naturalism—that human beings exist in natural relations and that these relations are hierarchical, viz., that the actualization of certain relations supersedes, or constitute higher levels of being, than other relations. In Confucian thinkers generally, we can identify their naturalism in their dependence on the Dao as the ultimate source of value. It is the Dao then that describes the proper relations in which human beings can best flourish. It is true, however, that the Confucians were not alone in this naturalist approach; other thinkers, both Chinese and otherwise, began from analogous naturalist premises and yet reached dramatically different conclusions about state organization. Below, we will see how to practically navigate this issue of disagreement.

Now, insofar as I have presented general cultivationism as Confucian virtue cultivation with an indeterminate content, this naturalist ground is to be retained. In solving the problem of the content of cultivation, I will assume a similarly naturalistic source—I will continue to call it the Dao, but this is of little consequence. It is of little consequence because Han Fei's concern is

one of epistemic access. The Confucian factionalism is compelling evidence that the mode of access to the Dao proposed by the Confucians is deeply flawed. One plausible explanation of this flaw is that the Confucian account is question-begging. When the Confucians inquired into the content for cultivation, they looked to those who appeared to them to be the most cultivated—the sage kings. That is, in order to select their epistemic guide to cultivation, the Confucians were forced to presuppose the content for cultivation (the very object of their inquiry) as they perused the historical record in search of the most virtuous. By relying on their immediate perceptions and inclinations about virtue to guide their selection of virtuous individuals, they managed only to obscure the true, i.e. naturally grounded, content of virtue cultivation. To succeed where the Confucians failed, we must instead seek the content for cultivation in some entity that does not itself admit of cultivation. Only in this way can we avoid bringing our uncritical presuppositions about virtue to bear on the selection of our epistemic guide.

To accomplish this, I propose a Platonic move: “we should adopt the method of investigation that we’d use if, lacking keen eyesight, we were told to read small letters from a distance and then noticed that the same letters existed elsewhere in a larger size and on a larger surface.”<sup>108</sup> For Plato and for us, the state will serve as the large set of letters – our epistemic guide to the source of naturalistic value. Since this form of naturalism supposes that the relations that obtain between individuals are grounded in the Dao, then we should expect that the Dao-suggested relations, and the states which represent complexes of those relations, will persevere beyond those which are not grounded in the Dao.

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<sup>108</sup> Plato, 368d.

The distinctively Han Feizian element here will be Han Fei's basic assumptions about the directives of the state which lead to state consequentialism—systematically achieving the order, security, and prosperity of the state.<sup>109</sup> As in Plato's Kallipolis, on our naturalist assumption the composition of the state suggests the content of cultivation best suited to the citizens' role as constituents of the state. These ideas will be developed in the subsequent section the upshot of which will be a clear set of content for cultivation for our broadly neoclassical political synthesis.

#### IV. A Chinese Kallipolis

In this section, beginning with a brief detour through Plato's *Republic*, I will endeavor to posit and provide support for an original solution to the problem of the content of virtue cultivation. If I am successful, then Han Fei's third and final objection to cultivationism should be considered settled.

Recall the following analogical argument presented by Socrates in Book II of the *Republic*:

The investigation we're undertaking is not an easy one but requires keen eyesight. Therefore, since we aren't clever people, we should adopt the method of investigation that we'd use if, lacking keen eyesight, we were told to read small letters from a distance and then noticed that the same letters existed elsewhere in a larger size and on a larger surface. We'd consider it a godsend, I think, to be allowed to examine the smaller ones, to see whether they really are the same.<sup>110</sup>

Recall also that the primary pursuit of the investigators in the *Republic* is to understand the nature of justice. Socrates' "small letters" obliquely refer to the justice of a single man, while the

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<sup>109</sup> There is a minority camp of Confucian scholarship which attempts to read the Confucians also as consequentialists of a certain stripe. To paint with broad strokes, the majority position sees the Confucians to consider the state to be a vehicle which assists in the moral cultivation of people—not that their moral cultivation serves its ends a state consequentialist might maintain. Cf. oetz, Heiner. 1993. *Confucian Ethics of the Axial Age: A Reconstruction Under the Aspect of the Breakthrough Toward Postconventional Thinking*. Albany: SUNY Press.

<sup>110</sup> Plato, 368d.

“large letters” refer to the justice of a whole city. He is proposing here that the investigators assume an analogical relation between the two species of justice, an assumption which will be evaluated once these two species of justice have been sufficiently delineated. It is by this segue that Plato is able to transform the sterile question of justice into an extrapolation of his political theory.

The above is, to my mind, the preeminent philosophical-historical case of some use of an *epistemic guide* as I have employed the term. Socrates, unsure of how to safely, i.e., validly, pursue the general question of justice, instead seeks solid ground in political theory—importantly, a venue in which justice arises but is not the primary object. When we speak of a “just state” we mean a state the citizens of which are handled justly or by whom justice is done. Justice then is *found* in the state but is not itself *just* in the same sense as an individual or a pair of individuals is just.<sup>111</sup> Socrates then goes on to describe three cities in search of a sufficiently realistic model in which political justice may be identified. The point of this Platonic detour is now perhaps clear; the factionalism objection requires that we identify the constituents of individual virtue (the “small letters”) and, in order to accurately identify them, we might try to examine virtue in the context of the political (the “large letters”) to guide us.

The Confucian political model is obviously unsuited to serve as the “large letters” since its character and success depends entirely on a precise apprehension of virtue, which is itself the object of our investigation. The Han Feizian political theory, on the other hand, does not at all depend upon individual virtue but is rather constructed to achieve certain ends. The clarity with

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<sup>111</sup> Note that this last is in fact not at all how I read Plato to understand justice. I mean only to loosely assert that this is how I perceive the common-language picture.

which Han Fei establishes the success conditions of the state already puts us far ahead of Plato for whom the success conditions of the Kallipolis were an open question at the project's outset. As I've mentioned numerous times above, the *Han Feizi* describes a mode of political organization designed to optimize the safety security and prosperity of the state; we should now look at the determinate characteristics of Han Fei's practical politics in order to eventually pose the question, "what are the attributes of the citizens who possibilize the legalist state?"

As mentioned in part I, Legalism includes a binary ontology of political actors: the ruler and the people. I presented the distinction between the two groups as pointed up by the explicit security measure appropriate to each, *shu* and *fa* respectively. These security measures also indicate, by formal analog to transcendental inference, the characteristics of the two group, viz. *what must the ruler and the people be like in order to be most effectively constrained by shu and fa?*

As I argued in part I, however, *shu* alone is relatively ineffective and cannot be relied upon to keep the ruler in check, and yet there is still an ideal type of ruler who can be relied upon to respond to *shu* constraints as expected. Such a ruler will have a (i) heightened sense of self-preservation, (ii) a deep distrust of his advisors, (iii) limited pretension, and (iiii) an intellectualized sense of self-interest. *Shu qua* security measure avails itself of the natural levels of these characteristics which occur in the majority of well-adapted individuals. *Shu* fails when a ruler arises who possesses these characteristics in insufficient measure.

Both the minsters and the common people are included under the name "the people" and are both constrained by *fa*. *Fa*, in practice, is much more concrete than *shu* but is to be organized

according to “the two handles” of rewards and punishments. We should expect then that the citizen best suited to be constrained by *fa* will have (i) a rational balance of risk aversion and profit motive as well as (ii) an intellect of sufficient power so as to understand the publicly available code of law.

This is the general picture of virtues suggested by the legalist model but is still only half of the story. Han Fei’s political model like all great political systems is schematized—none of its components depends upon historically contingent facts, and so it can be profitably considered outside of its immediate context. In the context of the Warring States period, legalist political organization suggests a set of secondary virtues which correspond, apropos the people, to the determinate content of *fa*. If, for instance, a reward is offered for producing a harvest of some certain size, then the model citizen may be one in whom judicious analysis of diligent response to seasonal change is be cultivated.

This observation is hardly specific to Legalism as it seems plausible that any polity, in virtue of its mode of organization and its historical contingency, will suggest a model citizen who is best to suited to succeed in her environment. Legalism, however, is distinguished from other political modalities in this regard by the degree to and ease with which cultivation can be systematically achieved. The modern United States is an excellent example of a political model in which it’s not clear that such a set of virtues is suggested. There are many salient factors here, but the most obvious is the path to power one must take in the US. Since success in the campaign process, especially at the municipal level, is tied to (and predicted by) personal wealth, it is the accumulation of wealth that more often than not decides the constitution of the governing parties;

since wealth accumulation results from a number of sources (heritable, lobby, nepotism), many individuals, regardless of their level of cultivation can predicably come to hold significant power.

This looks unfortunately to be self-defeating; if the mode of political organization rewards those who do not necessarily demonstrate relevant ability in equivalent measure, then the state is unlikely to achieve its success conditions. And yet, the US is certainly prosperous, as well as relatively safe, and secure. This is due to at least one other group of US citizens—producers, who from lack of resources and lack of state support, are forced to study and work with increased vigor to achieve a comfortable station. This broad distribution of labor has met with increasing dissatisfaction in the US for, as Han Fei warned, there is disorder when rewards are not distributed with regularity and according to a palpable logic. There are then at least two kinds of people who meet with success in the US—those who are born into a network of powerful individuals, and those who cultivate virtues appropriate to their political context. In this case, since the majority of cultivated people do *not* receive rewards proportional to their efforts, we are predicably seeing a rise in underemployment and general lack of achievement. These trends are consistent across most Western nations in the 21<sup>st</sup> century. Thus, I hope to have indicated that this feature of Legalism is more than just a basic feature common to all political modalities.

The Legalist model then, due to its prescription to apply the two handles in equal measure to both the ministers and the common people, stands to gain inordinately from the integration of a cultivation component. Since not only punishment, but also rewards are distributed according to demonstrated ability, not only is there clear individual incentive to cultivate the relevant

virtues, but the virtues themselves will be clear. I'll go on to provide a concrete historical case to illustrate the above considerations.

The early Chinese communist state has been convincingly compared to Han Feizian Legalism with its heavy emphasis on punishments and rewards, a large bureaucratic apparatus, stringent laws etc., and will serve as a more modern example of what cultivation might look like on a legalist framework since early Chinese communism importantly differed from Qin-era Legalism in its emphasis on the cultivation of its party members. Liu Shaoqi, the former president of the Chinese Communist Party, writes, in *On the Ethical Cultivation of Communist Party Members (or How to be a Good Communist)*, that “[r]evolutionary firmness and courage in the struggle are precious qualities which every communist must possess. Besides these qualities, communists must have the ability to find the right way to conduct the revolution and carry on the struggle in different historical periods and under different conditions of struggle, if they are to win the victory for the revolution and realize the highest ideal of communism.”<sup>112</sup> Liu goes on to pick out “Ilyich” Lenin as one who is exemplary of the set of virtues suggested by the composition of the communist state in much the same way the Confucians indicate Yao and Shun.

Above, I indicated that this historical selection of virtuous models is question-begging; Liu avoids this error despite making an apparently analogous historical selection. Liu relies on the characteristics of the emergent Chinese communist state itself to dictate values such as those in the selection reproduced above. Instead of selecting an exemplar based on his *prima facie*

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<sup>112</sup> Liu, Part III, “The Self-Cultivation of Communists and the Revolutionary Practice of the Masses.”

sense of virtue, Liu looked to the values suggested by the organization of the state to make an historical selection e.g., Lenin, who instantiated the suggested values. For Liu then, the character of Lenin himself is not the epistemic guide as Yao and Shun are for the Confucians. Rather, the state (or the state philosophy) acts as the epistemic guide to the content of cultivation, while the character of Lenin serves in primarily edifying and exemplifying capacities.

Now that the general idea is clear, it's worth noting that this does little violence to the Confucian understanding of virtue and virtue cultivation. Xunzi, writes of the sage-kings that, "this is the way a sage king operates: He observes Heaven above, and applies this knowledge on Earth below. He arranges completely everything between Heaven and Earth and spreads beneficence over the myriad things...He has spirit-like powers of intelligence that are broad and vast yet work by the utmost restraint. Thus, it is said: the person who by even the slightest movements always does what is right is called a sage."<sup>113</sup> Thus, what characterizes those who have achieved high levels of virtue cultivation is not the demonstration of a concrete set of abilities but instead the possession of flexible set of qualities which allows them to act judiciously in their immediate context. The heavily contextualized form of cultivation which I am suggesting here would be amenable, I think, to the Confucian theorist as well as the Han Feizian looking to adapt Legalism for modern-day application.

The critical departure from Confucian cultivation theory is, as has been mentioned, the implementation of an epistemic guide which is itself not a candidate for cultivation, e.g., the state. It is this addition that is likely to raise a concern for the Confucian theorist such that if we

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<sup>113</sup> Xunzi, 77.

abstract the Confucian cultivation method from its distinctly Confucian content, we may have little reason to believe that a cultivation component will improve our situation rather than worsen it. Take any sufficiently delusional cult—NXIVM (“Nexium”), for example. NXIVM professed to instruct and shape its members through an interminable series of educational videos and workshops. Their espoused mission was to create free and critical thinking individuals capable of bringing about an egalitarian and environmentally conscious world. In reality, the purveyors and exemplars of the NXIVM cultivation process were found guilty of sexual abuse, coercion, and a number of other felony offences. Examples abound—David Koresh of the branch Davidians, the Church of Jesus Christ of Latter-day Saints, Bhagwan Shree Rajneesh all orchestrated comprehensive cultivation campaigns which resulted in abuse at the highest levels of the organizations. If we believe, and there isn’t much evidence to the contrary, that these movements were undertaken in good faith, then one should be exceedingly wary about implementing a new cultivation model. In principle, there is nothing that should allow the Confucian model to succeed where the above organizations failed; what the Confucians do have is a grand tradition rooted in the ability and virtue of the golden-age sage-kings. So, the Confucian might reasonably worry that any departure from the Confucian tradition opens one up to the dangers of abuse and extremism that plague many cultivation movements.

My response is two-fold: first, NXIVM and other such organizations who profess a vested interest in cultivating their members have failed to hit on the natural content of cultivation (this is hardly surprising as they neglect the political epistemic guide). Unfortunately, this alone is unlikely to convince the dedicated Confucian theorist, for one might think that there are

examples in which an ultimately corrupt attempt at cultivation was deeply tied to a political model—the paradigm case being Germany’s Third Reich. It is not at all obvious that the Reich’s political organizational theory preceded and guided the formation of its national character (rather the opposite, that the Nazi state was organized to accommodate Hitler’s supremacist vision, is more likely), but it’s hardly inconceivable. While this scenario is among the possible outcomes, recall that Han Fei has argued convincingly that the Confucian model is a failure. The rise of the Third Reich is an anomaly, while the fall of a Confucian state after the passing of its sage-king is a near certainty.

I would like to consider a further preliminary objection to my discussion of virtues. The virtue theorist, be she Confucian, Aristotelian, or liberal, will no doubt respond with indignation that what I have called virtue cultivation looks much more like indoctrination and that my proposed “virtues” are liable to more closely resemble attributes of nationalism or, at best, skills than what we tend to think of as virtue, e.g., righteousness, benevolence, etc. Classical virtue theoretic frameworks like that of the Confucians and Aristotelians are committed to a virtue theory on which propositions about virtue are factive. There are just the virtues that there are, and these virtues *are*, for the Confucian because they are grounded in the Dao, and for the Aristotelian because of something like the nature of substance. Even on a vogue relativistic theory, those attributes which can rightly be called virtues arise organically as cultural artifact; I might expect that the sort of dramatic social engineering project that I’m recommending may not, at first glance, be considered favorably by such a theorist.

Recall, however, the Platonic analogy that sent us down this path—the state, as our epistemic guide to virtue. For Plato, this was effective only because (or only supposing) that he had identified the formally real state. The situation is no different on my account. I am prepared to admit that were this scheme to be broadly employed, it's likely that in a majority of cases, the state cultivation program *would* result in something much more like nationalistic indoctrination than any true virtue cultivation. As states vie for hegemony, as is their fate, by Darwinian principles we see those states the organizational models of which are most efficient rise to power. It is in those states which approach actualization of the formally real political modality that we expect to find an intersection of nationalistic indoctrination and true virtue cultivation.

And yet, one might still complain that the story I've told about "virtues" here does an unacceptable degree of violence to our cherished notion of "virtue" or our set of what are commonly held to be virtues: righteousness, benevolence etc. In this paper, I have localized myself as part of a tradition of philosophical thought apropos virtue in which virtue or virtues are not simply observed or derived from common parlance but rather are deduced from the metaphysical or at least naturally necessary characteristics of our world. I understand "virtue(s)" to refer to those traits predicable of human beings or actions undertaken by human beings which express relatively higher modes of being and action, where "higher modes" refers to states recommend by the nature of substance, e.g., the Dao, the forms, the One (Parmenides), the Absolute, etc. My foregoing analysis appears to show that our common linguistic conventions with regard to virtues are perhaps confused and that we may be better able to determine the true set of virtues by relying on an epistemic guide, i.e., the state à la Plato. It's certainly possible that

these virtues, so determined, may hardly resemble our cherished set of virtues—righteous, benevolence, etc., but they *do* still deserve the designation “virtue” in its weightiest sense since they are derived from the nature of our world and do also describe relatively higher modes of being and action.

Before I could undertake any discussion of a Confucian-legalist political synthesis, it was necessary to consider Han Fei’s criticisms of Confucian cultivationism: (i) cultivation limits or altogether eliminates the predictive power of the monarch or state, (ii) high levels of cultivation are exceptionally difficult to achieve in even the most suitable candidates, and (iii) no one is quite sure which virtues ought to be cultivated at all. I provided responses: (R.i) As long as the content of cultivation is left undetermined, predictive power will be limited; if the state, however, implements a concrete system of cultivation, it need only control for either base uncultivated behavior *or* the expected behavior of a citizen who has been successfully cultivated. (R.ii) This objection is well-taken but only vicious if cultivation is the sole or central order-ensuring institution; if it were to be implemented in an auxiliary capacity, it could only hope to improve the situation in proportion to the degree of cultivation success. (R.iii) Taking the state, the success conditions of which it is our ultimate objective to satisfy, as our epistemic guide, we find two sets of virtue that should be cultivated—a general set of virtue that are suggested by the political model realized in a given state’s organizational modality, and a concrete set suggested by the historically contingent features of a given epoch.

## V. Toward a Solution

Recall the problem: Legalism, for reasons provided in chapter one, necessarily produces an unwieldy bureaucratic apparatus and what's more requires this apparatus to have a chance at ensuring regime continuity. This apparatus limits the agency of a potentially deranged ruler and thereby hopes to lengthen Legalism's stretches of solvency, but this comes at the cost of simultaneously limiting the alacrity with which the legalist state is equipped to respond to crises both internal and external, i.e., *the adaptability consideration*. We have now to examine how, if at all, the integration of a cultivation component is capable of resolving the adaptability consideration.

We should first endeavor to understand in what consists sufficient "adaptability" in the face of state crises. In chapter one, I motivated the adaptability consideration by a discussion of 20<sup>th</sup> century China's bureaucratic channels obfuscating the state's response to the Great Famine of 1958. Administrative speed then should be considered a necessary condition for sufficient adaptability. I also supposed that an exceptional (or simply enterprising) common citizen or minister might rise to the challenge and propose a radical response to the threat. I went on to refer to Han Fei's discussion of the ministers of cloaks and caps, from which I argued that such enterprising behavior is to be met with strict censure on Legalism. The ability for individuals to make bold original contributions should then also be considered a condition on sufficient adaptability, though perhaps not a necessary one. It's not at all the case that crises require original solutions, but they do in every case require swift response, even if that response is just the implementation of some standard protocol. If integration of a cultivation component is to be

considered a success, then it will have provided for rapid administrative response in crisis scenarios and, though not necessarily so, the possibility of bold and original individual contributions to state success.

There are two additional factors which bear strongly on the practical implementation of cultivationism on a legalist framework in a contemporary context; the first is the 20<sup>th</sup> century boom in information technology and automation. It is a consequence of this boom that, for instance, the Great Famine has come to be seen as some egregious or, in the West, even malignant case of mismanagement, a conclusion born of our short memories apropos the march of technological development. Instant communication technology and automated and transparent digital record-keeping change the character of bureaucratization in ways that must be considered here. Recall that one of the impetuses for bureaucratization in the Warring States period was the sheer territorial expanse claimed by the burgeoning Qin. Not only had it become unthinkable for the ruler to command allegiance via *de* as on the Confucian model, but the transit time for messengers to travel from the ruler to the outer territories of the state made governing without the creation of regional administrators (commanderies and counties in Qin) impossible. Instant communication and real-time database updates decrease the need for regional seats of power. The second factor is the near universal reach of democratic administration, representative or central, in the modern world. Inasmuch as we are concerned to present a viable political framework, this fact must also be taken into account. Given these features of the modern era, I will assume that a highly bureaucratized legalist will fair only marginally worse than modern non-legalist states in terms of adaptability. Upon further examination of Legalism + cultivation,

we find that it stands to resolve the adaptability consideration not by straightforwardly increasing crisis response abilities, but by mitigating against potential crises.

### **V.i. The Administrators of Legalism+**

In chapter one, I suggested that Legalism includes a binary ontology of political actors, the ruler and the people. It seems to me that, despite the transition to democratic administration in the modern world, the “binary ontology of political actors” has been reproduced—the modern analogs of the ruler and the people would seem to be our elected heads of state (president, chairman etc.) and their constituents respectively. I derived this binary ontology by considering the risk and corresponding security measures appropriate to each entity. *Shu, qua* implicit security measure, were designed to restrict the powers of the ruler, while *fa* were designed to check the people (which included the ministers). In the modern world, the ruler’s role as the central seat of power has been usurped by a democratically elected assembly. In the classical period, our gravest concern apropos the ruler, was the possibility of an inept ruler inheriting the throne and throwing the state into chaos. The democratic process itself was developed as a check against this possibility in the modern world, and yet in recent years we have seen that this alone is insufficient to maintain order given the emergence of such heads of state as Boris Johnson and comedy TV stars Donald Trump and Volodymyr Zelenskyy.

The erratic behavior of these and many other heads of state is fortunately checked to some degree by other elected representatives which, in cases of controversial decision-making, can result in a congressional gridlock (often in a so-called divided government), and relatively brief and anxiously enforced term durations exist to minimize the damage a single erratic head

can precipitate. Further, the demands of the democratic process necessitate massive amounts of time, money and consideration be allocated to reelection efforts; it is well known that an American president's first term is bound to be mild and relatively even-handed since a bid for reelection is already on the horizon. These controls, while obviously quite different than *shu*, are functionally the same; they operate to constrain the occasional uncritical decision-making of the heads of state. We are presented then with a surprising degree of similarity between modern democratically administered states and the legalist model—erratic heads of state arise on both models and a combination of bureaucratic hoops and practical leadership concerns limit the ruler's/head of state's ability to dramatically alter the state's trajectory.

If my arguments in chapter one are sound, then it seems likely that we should expect to see, on account of the above noted similarities, some persistent crises the state's response to which has been detrimentally inefficient. Unfortunately for us all, these expectations are realized—in the US, we find decades of human right's abuses along the southern border, a ballooning drug abuse epidemic and ever-increasing corporate sway in policy decision-making; the UK fairs no better with similar drug problems, poverty, and violent crime. There are two stages to be considered with regard to these crises—cause and state response. Legalist administration reduces the state's ability to *respond* to crises, yet it is, I assert, with the addition of the cultivation component, well suited to reduce the causes of these crises. Many if not all of the crises currently faced by Western nations are due in large part to the pursuit of short-term individual interests which, after some interval, brings about net negative consequences for the state.

Take for example the US's immigration crisis which has risen to its height of severity only in recent years after decades of unmitigated suffering.<sup>114</sup> The US administrative apparatus is apparently ill-equipped to respond to this crisis. Many initiatives have been undertaken,<sup>115</sup> but they are routinely abandoned far short of completion due to changes in party favor, and regime inconsistency due to short presidential terms. Migrant crises, however, do not occur spontaneously. A migrant crisis presupposes a local stimulus of sufficient strength to force the inhabitant of some region to risk life and limb escaping to a different region in which success and survival are often anything but guaranteed.<sup>116</sup> There is substantial support for the claim that instability, poverty and gang violence in Latin America, the stimuli for the US-Mexico border crisis, is the direct result of US economic and political intervention in Latin America. These inventions, undertaken to increase availability and lower the cost of natural resources in the

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<sup>114</sup> The US Customs and Border Protection database recorded an all-time high of greater than 1.7 million migrant encounters in 2021, a figure which is set to be eclipsed by the 2023 equivalent—already at 1.4 million encounters in April. Up-to-date figures are available at <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>.

<sup>115</sup> Nixon's 1969 Operation Intercept; Fords' 1975 Domestic Council Committee on Illegal Aliens; Carter's 1978 Select Commission on Immigration and Refugee Policy; Reagan's 1986 Immigration Reform and Control Act; H. W. Bush's 1990 Immigration Act and creation of the U.S. Commission on Immigration Reform; Clinton's 1994 reform of the Title I program and the 1996 Illegal Immigration Reform and Immigrant Responsibility Act; W. Bush's creation of the Department of Homeland Security, 2004 Intelligence Reform and Terrorism Prevention Act, and the 2006 Secure Fence Act; Obama's 2012 DACA program; Trump's Executive order 13767 which produced the as yet unfinished multi-billion dollar border wall.

It's beyond the scope of this paper to make detailed comments on these initiatives; I list them here to show the great deal of attention and resources that this crisis has received only to continually reach new heights of severity.

<sup>116</sup> I don't intend to take a strong stance on migration theory here; my comments concerning the "local stimulus" should be amenable to the historical-structural theorist as well as the microeconomist, who is encouraged to interpret the local stimulus as an expression of high labor availability and relatively low available capital.

target countries for exploitation by US corporate concerns served, as far as the responsible political parties were concerned, to boost share prices and line pockets. Considered less cynically, one might also say that these decisions served to secure corporate interests for the further aim of increasing the overall prosperity of the state. This is, I'm sure, a poor interpretation of the case as the short-term nature of that geopolitical strategy would inevitably result in the migrant crisis the US is currently facing, which, in addition to the extreme human cost at the border and in the target countries, has cost the US taxpayers vast sums in both federal and state monies.<sup>117</sup> In fact, the migrant crisis is very likely only a middle-term consequence for the US of the destabilization strategy; as China and the BRICS alliance has begun to challenge US global hegemony, nations which have been long victimized by the US have begun to consider realigning themselves with a neighbor more oriented to long-term success.

Legalism+ then should retain the modern iteration of *shu* by implementing democratic elections to decrease likelihood of the emergence of erratic leaders and a system of checks and balances further reinforced by a large bureaucratic apparatus appears to be moderately successful

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<sup>117</sup> Since 2003, federal spending on agency enforcement alone has surpassed \$333 billion according to the American Immigration Council (figure derived directly from the DHS budget). Cost studies on the net cost to American taxpayers as a result of immigration are heavily tinged by partisan bias; organizations like the Center for Immigration Studies and FAIR, the Federation for Immigration Reform are nearly synonymous with white supremacy and eugenics, and their data is published with the distinct purpose of supporting inhumane border crackdowns. On the other hand, centrist and left-leaning American media avoid publishing such cost studies as it hurts their pro-immigration position. While it's difficult to cut through the biased reporting, between border control, healthcare, education, and social support services the net cost burden easily reaches to the order of tens of billions annually and increases year-over-year. Again, I mention this not to push some agenda with regard to immigration response but instead to suggest that it would be misguided, to say the least, to construe US destabilization efforts in Latin America is a well-considered strategy for state success given these all too predictable downstream effects.

as a check on the power of the head of state. Security measures should be considered and implemented which ensure that the short-term interests of the congressional appointees are brought into alignment with long-term state success—this, as evidenced by the US-Mexico border crisis, is not currently effected on the democratic-liberal political model.

There are at least two avenues of approach to bring short-term interests of the administrators into alignment with long-term state success. The first is found in Legalism proper, which is to manipulate the two handles. The second is via the cultivation component of Legalism+, which would entail the manipulation of the short-term interests of the people. Just as the ministers were plausibly the secondary target of *shu*, they were to be primarily restricted by *fa*, just as were the common people. The ministers received rewards when they comported themselves well in their duties and were sanctioned severely for failures and for acting outside their prescribed duties or otherwise attempting to succeed beyond their station. On Legalism+ then, the rewards (remuneration) for administrators would be tied indissolubly and *solely* to the success of the state. Remuneration received outside of this relation, is obviously suspect and naturally interpreted as an attempt at advancement beyond one's station and by means other than excellent performance of prescribed duties. Any instance of this which comes to light should incur a swift and extremely harsh civil penalty (e.g., state requisition of all of the offender's privately held assets).

The manipulation of the short-term interests themselves should be undertaken by a systematic approach to cultivation. As discussed above, effective cultivation will occur at two levels—the general and the specific. There are two general targets for cultivation: (i) since the

administrators are to be constrained by manipulation of the two handles, i.e. punishments and rewards, they should be inculcated with a great admiration for personal wealth and fear of civil sanction;<sup>118</sup> and (ii) the administrators should also be educated to such a degree that they will be able to act as effective administrators and in such a way that they will be able to understand the complex code of law, which will determine their duties and financial obligations. The character of the specific targets of cultivation will depend upon contingent facts particular to some given state but should likely include a deep investment in the national project (e.g., selective state-biased historical education, forced repetition of the national slogan, mantras and anthems, heavy consumption of state sponsored media). The general effect should be that the recipient of cultivation sees the success of the state as inseparable from her own success.<sup>119</sup>

While cultivation has little hope of expediting crisis response, it does succeed in mitigating future crises. Applied to the earlier example of the US-Mexico border crisis, it should be obvious that cultivating strong relationships with neighboring nations and binding them to the US through fair trade relations will bring about the long-term success of the US and the region broadly. The downside of course is that powerful individuals may not make a quick buck quite so reliably—but on Legalism+, this would certainly be in their best interest, short- or long-term. I

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<sup>118</sup> This is done already world-over. To propose intentionally integrating an infatuation with material wealth into state strategy is at first jarring, but given the present epidemic of lifestyle-oriented advertising, would it not be better to integrate this into our system, then allow it to go on unutilized?

<sup>119</sup> The historically-minded reader might like to note that such programs have produced infamous cults of personality like Hitler or Mussolini, who managed to successfully construct an image of themselves and their personal interests as identical with those of the state. I'm certainly ready to acknowledge that this is not impossible on Legalism+, but I have provided numerous provisions in chapter one which work to prevent such cases.

cannot consider all of the implications of these organizational developments, but I'm ready to acknowledge that they would be quite wide-ranging, including for instance repeal of the outdated Federalist model in the U.S. Unlike a strict Han Feizian Legalism though, Legalism+, even partially implemented, as is more realistic, still promises graded improvements.

## **V.ii. Concluding remarks on the import of this examination**

The objective of *Legalism Reconsidered* is, more than anything, to present a series of considerations about Legalism which terminate in an inauspicious conclusion as to the value, insofar as we are concerned at about implementation, of the legalist administrative framework. Legalism continues to receive positive and interesting scholarly attention, which often concerns itself with the application of the system, or at least some of its elements, to modern administrative models, e.g., corporate and state administration. In brief, these scholars should be wary that when applied with a state-level scope Legalism suffers tremendously from inflexibility (the adaptability consideration), and, when applied with a mere organizational-level scope, its security and stability assurance, the hallmark of Legalism, is but a shadow of itself (the scale consideration).

It is interesting, I think, to consider what it would take for Legalism to succeed, and I have attempted to make some progress toward a more successful political model born out of Classical Chinese political philosophy. I reached the surprising conclusion that Western democratic liberalism, which is often taken to be antipodal to authoritarian modalities like Legalism, is, in abstract, quite similar to Legalism. Further, I found that the measures which

might serve to rescue Legalism, are much the same as the measures which would be required to mitigate or entirely avoid the ongoing migrant crisis in the US and perhaps many other crises born out of a conflict of individual short-term interest and long-term state success. For what it's worth, half-measures like "campaign finance reform" at its presently discussed scope, will, on a Han Feizian analysis, be wildly insufficient if will not be paired with a rigidly enforced penal code.

As a final note, I should mention that the similarities between Legalism+ and the current organizational framework of the People's Republic of China are not at all lost on me, nor should they come as a surprise as the path of inquiry undertaken here roughly tracks the political evolution of the Chinese territory. After the failure represented by the Qin empire, Legalism was excoriated, and Confucian values reinjected which ultimately led to separatism, inequality, abuses, and crises. At the turn of the 20<sup>th</sup> century the Chinese Communist Party implemented a self-consciously legalistic political reformation with a great emphasis on state-specific cultivation, precisely as I have recommended here. So, the synthesis that I have recommended is hardly original, but I believe there is value in that my analysis shows that this synthesis grows dialectically from the joint failures of Legalism and Confucianism. The unequivocal success of the modern Chinese state in its eradication of *extreme* poverty, boom in literacy and home-ownership, and robust economic growth recommend Legalism+ as effectively as any argument which I could humbly hope to present.

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