

THE INTERNAL MORALITY OF CHINESE LEGALISM

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It is widely held that there are no indigenous roots in China for the rule of law; it is an import from the West. The Chinese legal tradition, rather, is rule by law, as elaborated in ancient Legalist texts such as the *Han Feizi*. According to the conventional reading of these texts, law is amoral and an instrument in the hands of a central ruler who uses it to consolidate and maintain power. The ruler is the source of all law and stands above the law, so that law, in the final analysis, is whatever pleases the ruler.

This essay argues, to the contrary, that the instrumentalism of the *Han Feizi* is more sophisticated and more principled than the conventional reading recognizes. It suggests that, by examining the text of the *Han Feizi* through the lens provided by American legal theorist Lon Fuller, we can observe an explicit articulation of what Fuller called the internal morality of law. The principles of this morality are elaborated and their importance explained. In this way, the *Han Feizi* is retrieved as a significant reference point for thinking about legal reform in China today.

I. INTRODUCTION

The *rule of law* is now commonly regarded as an obligatory step to establishing China's rightful place in the global community. Yet it is widely believed that there are no indigenous roots for the rule of law ideal; it is an import from the West. The Chinese legal tradition, rather, is *rule by law*, as elaborated most fully in ancient Legalist texts such as the *Han Feizi*.

The distinction between rule by law and rule of law has many dimensions. Of central importance is the relationship of law and morality. Although no canonical formula exists for the rule of law, a moral ideal lies at the core, however it is specified. In rule by law, in contrast, at least according to the conventional understanding, law is amoral and an instrument of power. A typical statement is offered by Burton Watson, the respected translator of Han Fei's work in English: Legalism, Watson says, "professed to have no use for morality whatsoever" (and similarly for religion and ceremony). It focused on a single problem: strengthening and preserving the state.¹ In this regard, Watson follows Arthur Waley, who said that members of the "school of law" (*fajia*) "held that law should replace morality." Instead of the term "school of law," which he regarded as too narrow, Waley referred to members of the *fajia* as "the Amoralists."²

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¹ Han Fei, *Han Fei Tzu: Basic Writings*, trans. by Burton Watson (New York: Columbia University Press, 1964) at 5 and 7.

² Arthur Waley, *Three Ways of Thought in Ancient China* (London: G. Allen & Unwin, 1939) at 199. Kung-chuan Hsiao suggests that setting morality outside the political realm gives the *Han Feizi* a modern

It is because of this alleged amorality that Randall Peerenboom can write a 670-page book on “China’s long march toward [the] rule of law” and barely mention Han Fei. Peerenboom expresses the conventional view: for Han Fei, law is one instrument in the ruler’s toolbox for sustaining strong centralized control. Since the ruler is the source of all law and stands above the law, there are no limits or effective checks on the ruler’s arbitrary power. “In the final analysis, law was what pleased the ruler.”³

This view of Legalism is reinforced by a particular reading of Chinese legal history during the period of the Three Dynasties, China’s Bronze Age. Eminent legal scholar Liang Zhiping claims that the predilection for rule by law, for Han Fei and other Legalists, has its roots in the way law emerged initially in China, namely, as an instrument by which a single clan exercised control over rival clans. “[W]ithin a system that was inherently unstable ... [l]aw was seen as the will of the rulers and an instrument of suppression; its primary manifestation was in punishment.”⁴ Hence, the choice of rule by law was the product of an extended and unique cultural development. “[T]he legalists merely developed to its extreme the ancient legal model, ‘[y]ou who obey my orders shall be rewarded before my ancestors; and you who disobey my orders shall be put to death before the spirits of the land.’”⁵

These two conceptions of law and legal institutions—rule by law and the rule of law—are familiar in the West, although rule by law now has few advocates. But one needs to go back only to John Austin, the influential 19th century English legal theorist, for systematic elaboration of rule by law. Western theorists, indeed, might be tempted to look at Chinese Legalists through the lens of Austin, since his work enables us to see a systematic body of thought in the *Han Feizi*. However, this lens, I shall argue, brings some elements of the *Han Feizi* into sharp focus only at the cost of distorting others. Western theorists need a corrective lens, which is provided by Lon Fuller. In assessing Austin’s account, Fuller’s approach is most helpful because it offers an internal critique, showing that denial of a compelling connection between law and morality is inaccurate to the theory itself. Fuller’s account does not rest on a semantic analysis of “law” but on a pragmatic appreciation of legal order as a form of governance. Out of this appreciation, the practical connection—the interaction and mutual dependence of law and morality in the everyday work of lawmakers and other collaborative participants in the creation of legal order—emerges even in rule by law properly understood. Thus, Fuller shows how the moral core of the rule of law is present in the generic use of law in society.

flavor, along the lines of Machiavelli’s *The Prince*. I believe such a modern reading is as inadequate for Machiavelli as it is for the *Han Feizi*. See Hsiao Kung-chuan, *A History of Chinese Political Thought*, trans. by F. W. Mote (Princeton: Princeton University Press, 1979) vol. 1 at 386. Compare Kenneth Winston, “Necessity and Choice in Political Ethics: Varieties of Dirty Hands” in Daniel E. Wueste, ed., *Professional Ethics and Social Responsibility* (Lanham, MD: Rowman & Littlefield, 1994) 37.

³ Randall Peerenboom, *China’s Long March toward Rule of Law* (Cambridge, U.K.: Cambridge University Press, 2002) at 34. For a book-length stereotypical account of the amoral Legalists, see Fu Zhengyuan, *China’s Legalists: The Earliest Totalitarians and Their Art of Ruling* (Armonk, NY: M. E. Sharpe, 1996).

⁴ Liang Zhiping, “Explicating ‘Law’: A Comparative Perspective of Chinese and Western Legal Culture” (1989) 3 J. Chinese L. 55 at 78-79.

⁵ *Ibid.* at 81, quoting from *The Book of Lord Shang*.

The moral core of the rule of law—the thin theory, as it is often called—encompasses two key ideas:

1. While law is an instrument of political power, law also constrains power. Hence, law and power are, to some degree, opposed.
2. While law channels political power, law also enables power to be rightly exercised. Hence, law is a source of legitimation for the exercise of power.

How is political power constrained and yet also rightly exercised? The rule of law ideal is that these conditions are met if it is truly the law that governs legal subjects, not the wishes of specific individuals or groups. The ideal is a government of laws, not persons, so the moral core (in a word) is impersonal governance. My thesis is that Han Fei's text, the *Han Feizi*, displays this moral core and thus connects law and morality. I shall argue, indeed, that the *Han Feizi* advocates a purer form of the rule of law than is offered by many Western theorists. Chinese Legalism did not begin with the *Han Feizi*, but it is generally regarded as the most sophisticated exposition of the theory. I believe it is more nuanced than generations of commentators have acknowledged.

It is important to emphasize that my interest is with the rule of law as a legislative, rather than judicial, ideal. This focus is appropriate for the *Han Feizi*, since it contains no explicit judicial theory (although it has definite implications, as we shall see, for the work of judges). That means that the vision of law in the *Han Feizi* is incomplete. On the other hand, most Western theorists neglect the legislative ideal, and many mistakenly believe that judicial independence (or the separation of powers) is sufficient for establishing the rule of law.

I shall suggest that, at least for the legislative ideal, worthy indigenous Chinese sources for the rule of law exist. Contrary to Watson and Peerenboom, I argue that the *Han Feizi* intends to link law and morality. But I should say from the beginning that this essay is not an attempt to recapture Han Fei's conscious motives or point of view. It is an attempt to retrieve a text for contemporary understanding and use. Admittedly, this effort runs the risk of literary misprision—willful, not to say creative, misreading. But recovering the rich history of Chinese legal thought seems to me worth that risk. It is often said, with good reason, that successive Chinese emperors followed the Legalist template set out by the *Han Feizi*. If it turns out that the *Han Feizi* carries a different message from the one it is usually taken to convey, the imperial history may have to be re-examined to determine when it followed the template and when it did not.⁶

II. RULE BY LAW: HAN FEI AND JOHN AUSTIN

The conventional reading of the *Han Feizi* pictures law as an instrument in the hands of the ruler. This could mean different things.

⁶ I trust it will be evident that this essay has no connection to the successive efforts, beginning in the Guomindang period and intensifying during the Cultural Revolution, to rehabilitate the reputation of the Qin dynasty's founder, Qin Shihuangdi. For a brief review of these efforts, see Wang Gungwu, "'Burning Books and Burying Scholars Alive': Some Recent Interpretations Concerning Ch'in Shih-Huang" (1974) 9 *Papers on Far Eastern History* 137.

Instrumentalism is sometimes construed to mean that rulers use law only if and when it suits their purposes; it is employed (or not) at the ruler's discretion to achieve the ruler's own desires or ends. In this construction, law does not have any special pride of place, and certainly nothing beyond a fortuitous connection to moral value. On any particular occasion, if a ruler fails to realize his or her will by the use of law, an alternative instrument of governance could be deployed. Let's call this *ad hoc* or *strategic instrumentalism*. This is not rule by law, as I understand it. Rule by law meets at least one and possibly two conditions missing from *ad hoc* instrumentalism. Most importantly, the commitment to rules—fixed standards of general applicability—is not *ad hoc*; they are the ruler's chosen mechanism of governance. Thus, the commitment to rules is deliberate and firm, and the instrumentalism is *consistent* and *principled*. This commitment, we shall see, introduces a variety of self-imposed constraints on lawmaking and secures the connection between law and morality. Second, the rules promulgated are not necessarily intended to serve the lawmaker's personal desires or ends. They may serve common ends, or they may permit (or enable) subjects to pursue ends of their own. In that event, we move from a minimal to a morally robust instrumentalism. If the rules facilitate the pursuit of ends other than those of the lawgiver, principled instrumentalism transitions to the rule of law.

Although the *Han Feizi* is conventionally read as committed (at worst) to *ad hoc* instrumentalism or (at best) to a consistent but minimal instrumentalism, I shall argue in section III that many of the essays that make up the *Han Feizi* advocate a robust principled instrumentalism. For this reason, it is helpful to examine first a systematic statement of the minimally instrumentalist view. John Austin is more clearly committed to minimal instrumentalism, because his aims were more academic—to elaborate a systematic theory—whereas Han Fei wished to provide practical advice to rulers. A consideration of Austin enables us to grasp what coherence the minimally instrumentalist view has.⁷

Like Han Fei, Austin aimed to be a realist about law, examining actual facts in the world. That led him to trace the existence of law to the exercise of power. Accordingly, the proper understanding of law is genetic. In the strict sense, law is a command—a wish expressed by a determinate person or body possessing supreme power in an organized and independent society, backed by the credible threat of a sanction in the event of noncompliance. Why does the credible threat of a sanction make a law binding? Austin was a voluntarist about law as he was in theology. The duty to obey a command rests not on its conformity to an independent moral standard but simply on its emanating from a preponderant power. To have a duty to act is to be compelled to act. “[I]t is only by the chance of incurring *evil*, that I am *bound* or *obliged*.”⁸ Thus, whether divine or human, law makes its appearance within a relationship of domination—a superior (in power) issuing orders to an inferior (in power), where the former has the capacity to compel the latter to act by means of a

⁷ This account of Austin draws from my discussion in “Three Models for the Study of Law” in Willem J. Witteveen & Wibren van der Burg, eds., *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam: Amsterdam University Press, 1999) [Witteveen, *Rediscovering Fuller*] 51 at 52-58.

⁸ John Austin, *The Province of Jurisprudence Determined* (London: Weidenfeld & Nicolson, 1954) [Austin, *Province*] at 17 [emphasis in original].

threatened evil, *i.e.*, pain. The duty is legal if it is issued by a political sovereign, moral if issued by God.

Hobbes observed that the conditions for a social contract obtain if persons are of roughly equal ability, for then they acquire an equality of hope in having their respective claims satisfied. But in circumstances where a clear supremacy of power lies in one individual or body, no question as to the proper distribution of duties and rights arises. The distribution of duties and rights naturally parallels the distribution of power.⁹ That, obviously, is Austin's view as well. The foundation of law is force or the threat of its use. To have a duty, therefore, in Austin's quaint phrase, is to be *obnoxious* to the superior's threat. Obnoxiousness is determined by one of two empirical facts: either the extent to which the inferior party is motivated by fear of the sanction, or the likelihood that the superior party will carry out its threat. While the pursuit of pleasure is as much an ultimate spring of human action as the avoidance of pain, the latter is more to be relied on than the former. The certainty and severity of threatened pain, in the event of noncompliance to the superior's commands, are defining features of legal (as of moral) order.

Since the definition of law stipulates nothing about the content of the superior's wish, law may have any content whatever and still be binding. The separation of law and morality is secured: *might makes right*. Thus, law is imperative, preemptory, morally arbitrary, coercive, and an instrument of domination. It also, as we shall see more fully in a moment, aims above all at stability and order. By definition, Austin's sovereign is not subject to a superior power and hence does not have any legal duties. (By the same token, the sovereign does not have any legal rights, either.) Austin formulates this point most sharply by observing that "every government is legally *despotic*."¹⁰ This is a provocative way of saying that its power is legally unlimited; it stands above the law and can make, or unmake, any law whatever. It is not misleading to say the sovereign is self-legitimizing, as long as we keep in mind that legitimation comes not from satisfying a normative standard of legitimacy but from the successful exercise of supreme power.¹¹

Yet one of the virtues of Austin's writing is that it is richer than the genetic definition of law would lead one to expect. (Failure in the legal literature to appreciate the richer analysis is the same kind of failure one finds regarding the *Han Feizi*.) Exploring some of this richness will help us develop a critique that illuminates the *Han Feizi*. Austin actually formulates three distinct definitions of law—in addition to the *genetic* there are *formal* and *purposive* definitions—each of which meshes imperfectly with the others.

The formal definition appears when Austin stipulates that a command is a law only if it has the attribute of generality, that is, it must refer to a class of acts to be done or avoided, not a single action. Particular or occasional commands are not laws in the strict sense.¹² This stipulation is sensible, since modern law typically consists of a body of standing rules, not extemporaneous orders. It shows that Austin thought of legal order as a system, or at least a set, of rules. But in relation

⁹ Thomas Hobbes, *Leviathan*, ed. by C. B. Macpherson (Baltimore: Penguin, 1968) at 183 and 397.

¹⁰ Austin, *Province*, *supra* note 8 at 20 [emphasis in original].

¹¹ In this essay, I set aside the problem in Austinian hermeneutics of reconciling the analysis of the sovereign/subject relation in Lecture I with the analysis in Lecture VI.

¹² Austin, *Province*, *supra* note 8 at 20.

to the genetic definition, it is completely unmotivated; nothing in the meaning of command requires it. At the same time, the implications are profound. The addition of generality represents a significant departure from personal command and toward impersonal governance. It commits the lawmaker to acting in certain ways in as yet unknown cases. And, by grouping actions into classes, it produces a degree of uniformity of treatment across persons. So, with generality, the picture of a compliant inferior following the wishes of a superior recedes to a significant degree.

These implications—uniformity across persons and prior commitment in unknown cases—indicate that certain formal features of laws may have moral import, and I shall say more about them in a moment. With law understood as a self-conscious instrument of domination expressing the wishes of a (human) sovereign, it is only to be expected that Austin would stress the potential divorce between the content of promulgated laws and the requirements of morality. “The existence of law is one thing; its merit or demerit is another.”¹³ But if law itself, simply as a body of general rules, has moral import regardless of its content, we have taken an important step toward a robust instrumentalist account of law.

The richness of Austin’s analysis is even more evident in his purposive definition. In its most general and comprehensive sense, he says, a law is “a rule laid down for the guidance of an intelligent being by an intelligent being having power over him.”¹⁴ Asymmetry in power is central for Austin, as we have seen, but intelligent guidance introduces a different dimension. Austin followed Locke in thinking of law as a human contrivance, establishing relations between rational beings. But the idea of intelligent guidance has implications Austin was hesitant to pursue. He recognized, for example, that the concept of command precludes *ex post facto* rules, since an utterance cannot constitute a command if the action required cannot be performed. Yet to acknowledge this conceptual point would be tantamount to placing a limit on sovereign power; an *ex post facto* pronouncement would not be a law, even though it possessed all the other features of the genetic definition.¹⁵ Further, such acknowledgement would be the first step on a slippery slope. It would allow one to say that other pronouncements of the sovereign are also not laws, for instance, ones that are not clear in meaning. How could an obscure or incoherent utterance provide intelligent guidance to human conduct? Or an utterance that was not made public? Or that kept changing?

These implications are precisely the ones pursued by Fuller in developing what he called the *internal morality of law*. Before turning to Fuller, however, we should pause to ask why Austin recoiled from the implications of his purposive definition and instead adhered to the idea of law as an instrument in the hands of a supreme person or body exercising power over others.

My hypothesis is that rule by law in its minimalist variant was important to Austin for two related reasons: the fear of disorder and the uncertainty of morality. Both of these were reflected in Austin’s ambivalence about the expansion of democracy in England in the early 19th century. He saw little possibility, at least in the foreseeable future, of achieving the educational and mental improvement of the general population that he regarded as a prerequisite of democratic government. As a result,

¹³ *Ibid.* at 184.

¹⁴ John Austin, *Lectures in Jurisprudence*, 5th ed. (London: John Murray, 1885) [Austin, *Lectures*] at 86.

¹⁵ *Ibid.* at 289n and 485.

according to John Stuart Mill's account, Austin developed an "indifference, bordering on contempt, for the progress of popular [*i.e.*, democratic] institutions."¹⁶ In addition, Austin believed that common moral opinion was so fractured, so full of partiality and prejudice, that ordinary people cannot be trusted to act decently. What makes government by a powerful ruler necessary and expedient is the "uncertainty, scantiness, and imperfection" of the moral beliefs people espouse. "Hence the necessity for a common *governing* (or common *guiding*) head to whom the community may in *concert* defer."¹⁷

The resonance of these passages with much of the *Han Feizi*, or at least the conventional reading of it, should be apparent. Lack of confidence in the capacity of human beings to govern themselves makes it necessary to have a sovereign whose will provides common directives that are easily discernible and effective. If people are allowed to follow their natural propensities, they will engage in all manner of disorderly behavior. Social order requires stable external direction by means of the threat of force. Thus, the solution to the problem of social order—Hobbes's problem—is managerial direction (to use Fuller's term). Without top-down control, matters are likely to get badly out of hand. The exercise of control in Austin's case, of course, is thought of as benign. The goods of order and unity are taken for granted. The power of the superior is canvassed, not in terms of personal wishes or even class interests, but its efficacy in producing the "steadiness, constancy, or uniformity" that every society needs. Thus, Austin—like Han Fei, as I shall argue—makes sense of law in practice as an instrument in the hands of a single individual or mandarin elite with the competence and requisite disinterestedness to attend to the public need. To that extent, Austin's theory is a pure expression of rule by law.

Unlike Austin, the view that law is an evil, even if a necessary evil, is perhaps not surprising in a theorist like Han Fei. After all, he was a product of an intellectual tradition that, alone among the major civilizations of the world, initially attributed the origin of law to barbarians. It would also not be surprising in light of the broad influence of Confucian thought, whose central message is that right relationships among people, including emperor and subject, are achieved through mutual respect, not the threat of force. By the time Han Fei was writing, however, the need for law was more widely appreciated, and stories about its origins took on a "soberly sociological" cast, in Derk Bodde's apt phrase.¹⁸ Austin's improvisational steps toward intelligent guidance and impersonal governance take us in the right direction. We shall discover similar moves in the *Han Feizi*. At the same time, our final assessment of the *Han Feizi* should not depend on finding in it a latent commitment to democratic government. That surely would involve taking too many liberties with the text. What we can find, I believe, is confidence in the abilities of ordinary people to be intelligent participants in legal order—the confidence that Austin lacked but that rule by law, in its robust form, presupposes.

However, first we need to explore more fully how formal features of law have moral import.

¹⁶ John Stuart Mill, *Autobiography* (New York: Columbia University Press, 1924) at 125.

¹⁷ Austin, *Lectures*, *supra* note 14 at 294 n29 [emphasis in original].

¹⁸ Derk Bodde, *Essays on Chinese Civilization* (Princeton: Princeton University Press, 1981) at 175-177 and 193-194.

III. FULLER'S INTERNAL MORALITY OF LAW

Fuller's central expository device is the hypothetical story of the hapless king, Rex, who attempts to make laws for his subjects and fails. Two versions of this story are instructive.

In the first, Fuller imagines a monarch whose word is law to his subjects. Further, he is utterly selfish and seeks only his own advantage. From time to time, he issues commands promising rewards for compliance and threatening sanctions for disobedience. (To this point, the resemblance to the conventional reading of the *Han Feizi* is perfect. Reward and punishment are *the two handles* employed by Han Fei's ruler.) However, Fuller's monarch is a dissolute and forgetful fellow, making not the slightest attempt to ascertain who has followed his commands and who has not. As a result, he often punishes loyalty and rewards disobedience. "It is apparent," Fuller says, "that this monarch will never achieve even his own selfish aims until he is ready to accept the minimum self-restraint that will create a meaningful connection between his words and his actions."¹⁹

Self-restraint is necessary, because even using law to get legal subjects to do what the ruler wants requires acknowledging the moral agency of subjects.

In a second version of the story, Fuller's monarch is not dissolute and forgetful but well-intentioned, even conscientious. Further, he issues not commands but rules, or at least attempts to. Unfortunately, he is inept. Although he attempts to make laws for his subjects, he utterly fails.²⁰ The failure is instructive, since each of the eight ways in which Rex bungles the job involves a violation of "the morality that makes law possible." The tenets of this morality are:

1. *generality*: there must be rules;
2. *publicity*: the rules must be made available to those expected to comply with them;
3. *clarity*: the rules must be understandable or intelligible to legal subjects;
4. *prospectivity*: the rules must typically be enacted and promulgated prior to the time when compliance is expected, hence not retroactive;
5. *noncontradiction*: the rules must not require conflicting actions;
6. *conformability*: the rules must not require actions that are impossible to perform;
7. *stability*: the rules must remain relatively constant over time; and
8. *congruence*: the rules promulgated by the lawmaker must be the rules actually administered and enforced.²¹

Why does violation of these principles constitute failure? What kind of failure is it? At the outset, we should bear in mind that Fuller displayed considerable impatience with semantic approaches to law. Definitions cannot settle fundamental questions. Analyses of meaning must be assessed as part of a larger intellectual enterprise.

¹⁹ Lon L. Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart," (1958) 71 Harv. L. Rev. 630 [Fuller, "Fidelity to Law"] at 644.

²⁰ Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969) [Fuller, *Morality*] at 33-38.

²¹ In his private papers, Fuller identifies other principles, e.g., [9] *means/ends coherence*: the rules should prescribe only such acts as are suited to achieving the rule's avowed objectives. These additions need not concern us.

It does not follow that disagreements over definitions are completely empty exercises. Rather, competing definitions are proxies for the deeper issues in contention. How, then, shall we understand such debates? Like the American pragmatists, Fuller regarded ideas—including the idea of law—as anticipatory and action-guiding; they always mean something that does not yet exist, “an ideal presence which is absent in fact,” in William James’s phrase. To develop a thought’s meaning is to determine what direction it gives to human conduct, and the preferred thought, for James and Fuller alike, was one that defines the future “congruously with our spontaneous powers,” such that it awakens our active impulses and leads us to conduct ourselves better than we otherwise would have done.²²

The critical question, therefore, is how a particular understanding of law directs the application of human energies. Building on Locke’s proposition that law provides intelligent guidance to rational beings, Fuller describes Rex’s purpose—the purpose that he failed to achieve—as subjecting human conduct to the governance of rules. This statement of purpose is not chosen at random. At a simple level, subjecting human conduct to the governance of rules involves three components: setting out rules of conduct, giving legal subjects advance notice of the rules, and ensuring that the rules can be complied with. But if law were designed, as Austin thought, just to maintain social order, there would be no necessary commitment to the use of rules except for convenience (with rules, the sovereign can act more efficiently). For Fuller, the point is not simply to govern but to govern by means of rules. Thus, the use of rules is not instrumental to some external or independent value but is part of the aim itself. Why?

The brief answer is that the enterprise of governing by rules involves recognition of subjects as *responsible moral agents*.²³ This phrase is neither technical nor esoteric. It has a descriptive component, which is the capacity of subjects to engage in practical deliberation and accept responsibility for their actions. This capacity includes the cognitive and moral powers involved in reflection, reasoning, and choice. And it has a normative component, which is acknowledgement by the lawgiver of the rightfulness of subjects exercising such agency. Respect for the moral competence of subjects is, as John Rawls would say, “intimately connected” to certain *prima facie* duties. The principles of the internal morality of law capture the moral relationship between ruler and subject by giving expression to eight *prima facie* duties of the lawmaker. For a lawmaker to acknowledge these duties, and thus to govern by rules, is to stand in moral relation to legal subjects.²⁴

²² See Kenneth Winston, “Introduction to the Revised Edition”, *The Principles of Social Order: Selected Essays of Lon L. Fuller*, rev. ed. (Oxford: Hart Publishing, 2001) at 10-15.

²³ Fuller, *Morality*, *supra* note 20 at 162. Fuller sometimes formulated the point in more generic terms:

[I]n nearly all societies men perceive the need for subjecting certain kinds of human conduct to the explicit control of rules. When they embark on the enterprise of accomplishing this subjection, they come to see that this enterprise contains a certain inner logic of its own, that it imposes demands that must be met (sometimes with considerable inconvenience) if its objectives are to be attained. It is because men generally in some measure perceive these demands and respect them, that legal systems display a certain likeness in societies otherwise quite diverse (at 150-151).

²⁴ John Rawls, “Justice as Fairness” in Samuel Freeman, ed., *Collected Papers* (Cambridge: Harvard University Press, 1999) 63. Rawls explicitly follows Fuller’s lead in his characterization of law: “A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating

The longer answer to the question—Why govern by rules?—proceeds by considering in turn three salient attributes of law: generality, impersonality, and authority. Each attribute expands the scope of respect for the moral agency of subjects.

A. *The Generality of Law*

Austin, we observed, stipulates that laws have the attribute of generality; they refer to classes of acts to be done or avoided, not a single action. Since Austin, legal theorists have added that general rules also refer to classes of persons, not single individuals.

The reasons for having general rules could be practical. Justice Holmes suggests, perhaps only half seriously, that the generality of laws makes them easier to remember.²⁵ H.L.A. Hart observes: “[N]o [modern] society could support the number of officials necessary to secure that every member of the society was officially and separately informed of every act which he was required to do.”²⁶ In the language of economists, general rules produce efficiency gains, such as minimizing the cost of obtaining information relevant to a decision.

Others see in generality an attribute of moral import, although their arguments are not always convincing. In a different context, for example, Hart says: “[T]here is, in the very nature of law consisting of general rules, something which prevents us from treating it as if morally it is utterly neutral, without any necessary contact with moral principles.”²⁷ Specifically, he believed that generality implicates the principle of treating like cases alike, which is justice in application. Other theorists have argued that law consisting of general rules is not morally neutral because general rules necessarily “apply equally to everybody,” which in turn entails that we are not subject to anyone else’s will. Generality entails equality which entails freedom. I have argued elsewhere that these particular claims are flawed, resting on equivocations in such terms as “apply equally.”²⁸

The non-neutrality of interest here emerges in an entirely different way. It begins with the observation that general rules are typically written in abstraction from their application in identifiable cases. They classify types of persons and acts, and specify consequences attaching to those types, or alternatively they specify how someone could perform an act of a certain type (*e.g.*, acquiring property or making a will)—leaving subjects to decide whether or not to engage in such acts. This captures a difference between doing what someone else orders one to do, and doing what one decides to do in light of consequences that may result from so acting.

Since general terms are formulated by abstracting from particular cases, rules necessarily treat legal subjects as instances of general descriptions rather than individually. As a consequence, application cannot be automatic or mechanical; it requires

their conduct and providing the framework for social cooperation.” Rawls, *A Theory of Justice*, rev. ed. (Cambridge: Harvard University Press, 1999) 207.

²⁵ Oliver Wendell Holmes, Jr., “The Path of the Law” (1897) 10 Harv. L. Rev. 457 at 458.

²⁶ H.L.A. Hart, *The Concept of Law*, 2d. ed. (Oxford: Clarendon Press, 1994) at 21.

²⁷ H.L.A. Hart, “Positivism and the Separation of Law and Morals” (1958) 71 Harv. L. Rev. 593 at 623.

²⁸ Kenneth Winston, “Toward A Liberal Conception of Legislation,” in J. Roland Pennock & John W. Chapman, eds., *Liberal Democracy* (New York: New York University Press, 1983) at 313-342 and Winston, “On Treating Like Cases Alike” (1974) 62 Cal. L. Rev. 1.

discernment and judgment. What exactly does the rule require? Does it cover the present set of circumstances? How should the facts of the situation be weighed? Even if a rule is clearly applicable (in the sense that the fact situation falls under the description in the rule), would application of the rule to the case be warranted (would it accord, for example, with the rule's purpose)? The indispensability of judgment is underlined by observing that rules are designed to govern future events. They engage, as Fuller liked to say, in a kind of intellectual absentee management by having implications for yet unknown cases. We know that no rule anticipates all possible contingencies, but subjects cannot appeal to the lawmaker every time they find themselves in a new situation—that indeed would tend to defeat the point of governing by rules. Accordingly, rule-application depends crucially on legal subjects' ability to determine the meaning and scope of a rule, not to mention the self-restraint to do what the rule, reasonably interpreted, requires.

The use of rules to govern, in other words, presupposes that legal subjects have the capacity for practical deliberation. Law guides conduct by making certain considerations paramount, if not determinative, in how people act, while still leaving them with much they need (or are free) to figure out for themselves. This reveals a crucial aspect of what is at stake in a ruler's (or a society's) choice of *law*, that is, general rules, rather than some other mechanism to achieve social order.

The point is illustrated by a well-known New York case, *Tedla v. Ellman*²⁹ ('*Tedla*') involving pedestrians who walked on the right-hand side of a highway lacking sidewalks, contrary to an ordinance requiring them to walk on the left side, facing the traffic. They did so because the traffic on the left was very heavy at the time, whereas the traffic on the right was light. Thus, although walking on the *wrong* side (as specified in the statute), they were, in Judge Lehman's words, exercising "such care for [their] safety as a reasonably prudent person would use" and as the ordinance was intended to foster. It would be nonsensical, the judge argued, to believe the New York legislature expected the statute to be followed literally in every situation. For then the legislature would have decreed that pedestrians must observe a general rule prescribed for their safety even in circumstances where observance would subject them to imminent danger. It is unreasonable, Judge Lehman believed, to ascribe to the legislature such an intention.

The decision suggests, in other words, that to follow a legal rule faithfully—what Fuller refers to as *fidelity to law*—means reading its requirements in light of its rationale and the circumstances of application. Both figure in to determining what one is supposed to do. (We know what a law says only if we know why it is said and why it is relevant to us.) Intelligent rule following, therefore, rests on the capacity of legal subjects to determine the applicability of rules to their situation. Effective lawmaking, correlatively, rests on the lawmaker's anticipation of this capacity in legal subjects. To anticipate and acknowledge the importance of this capacity is even in the ruler's interest as lawmaker, in the sense that it helps sustain the enterprise of governance by rules. Through reflective rule-application, each subject becomes a participant and collaborator in sustaining legal order. In *Tedla*, Judge Lehman

²⁹ 280 N.Y. 124, 19 N.E.2d 987 (2nd Cir. 1939).

expressed his confidence in subjects' capacity for rule-governed conduct—as any lawmaker would need to do in a regime of governance by rules.³⁰

The *Tedla* decision demonstrates that the duty of congruence between rule-maker and rule-applier (the eighth principle of the internal morality) does not require literal reading of statutes. It requires fidelity to law. Thus, exercising judgment in application does not violate the rule of law; it fulfills it. In emphasizing this point, I am aware that in this respect (as in others) Fuller's analysis sets the bar very high for the *Han Feizi*, which is most readily understood as committed to *strict application* of law as written. As we shall see, Han Fei's ruler sometimes appears to aim at making laws as determinate as possible, to render vanishingly small any uncertainty about whether a rule is or is not being followed. If judicial inquiry reveals that application of a rule would produce injustice in a particular case, the remedy most consistent with the conventional reading of the *Han Feizi* would be for the magistrate not to second-guess the ruler, let alone to amend the law, but to inform the lawmaker of the difficulty. This allows the ruler to decide whether the law should be amended and whether its application in the case should be suspended retroactively. The ruler thereby maintains a monopoly on determining the meaning of the law.

Fuller could meet Han Fei halfway, perhaps, by conceding that in some situations strict application of rules is desirable. The thought is that, since no rule dictates its own application, we should conceive of each rule as accompanied by a second-order policy directive about its application. Sometimes the directive allows for "faithful" application of the sort that *Tedla* exemplifies; in others, it requires strict or literal application. Either way, Fuller might say, the choice is based on an empirical assessment of which policy directive is likely to have what kind of effects. Strict application, for example, is the traditional common law policy for criminal acts. With strict application, people are more likely to know ahead of time exactly how officials will render the law's meaning. Since the lives and liberty of subjects are at stake, they will be able to adjust their conduct accordingly. And this is so even though the inflexibility of strict application may lead to injustice in specific cases. It needs to be said, however, that second-order directives also do not dictate their own application; the capacity of subjects to engage in practical deliberation is presupposed even then. Further, sticking strictly to a rule regardless of its rationale is antithetical to the principle that law should be intelligible to those to whom it applies. Fuller would point out that literalism in rule-application is often a strategy of protest.

At any rate, with fidelity to law, the self-restraint of legal subjects in doing what a rule requires (in light of its purpose and the circumstances) is matched by the lawmaker's self-restraint in adhering to the declared rule. As a lawmaker must be able to anticipate that subjects will observe the rules promulgated, so subjects must be able to anticipate that lawmakers will abide by their own declared rules, in deciding, for example, whether someone has committed a crime or is entitled to property under a valid deed. Practical deliberation requires official faithfulness. The emphasis is on guidance and predictability. General rules, if they are clear, prospective, stable, and so on, give legal subjects advance notice of what the law is. But they do so only if the lawmaker is bound by the rules so formulated and announced, so that

³⁰ This is not to deny the court's right of review in the event of an unfortunate outcome. In this case, the decision to walk on the right-hand side of the road resulted in an accidental death, but that outcome does not undermine the fact that Anna Tedla made a reasonable decision about where to walk.

legal subjects can foresee with fair certainty how the government is likely to use its coercive powers.

There is a kind of paradox here. Normally, a lawmaker can change any law simply by repealing it or promulgating a different one. Indeed the whole book of law can be re-written in a trice. But when a law is issued, the lawmaker expects subjects to follow it, that is, to rely on it being the law. The lawmaker is aware of this expectation, and so is the subject. The subject's reliance is founded on the commitment implicit in the ruler's promulgation. If the ruler reneges, the subject has a legitimate basis for complaint. Thus, as long as the law is in effect, the lawmaker is bound. The subject's expectation that the lawmaker will abide by a promulgated law is warranted because, by making law, the lawmaker has made a commitment. Was the subject's reliance on that commitment reasonable? It was—given the point of governance by rules.

B. *The Impersonality of Law*

When Fuller first introduces generality, he equates it with the attribute of impersonality and sets it aside because he associates the use of class terms with fairness (the principle of treating like cases alike), which, he says, belongs to external morality. As the analysis proceeds, however, class terms are taken for granted and later a second conception of impersonality—absence of specific legislative directives (with its correlative notion of self-directed action by subjects)—is added and identified with the internal morality of law.³¹ That is the meaning I shall elaborate here.

Governing by rules contrasts with governing by persons; it is impersonal. One obvious sense in which governance can be impersonal is that personal qualities of subjects, such as family pedigree or social rank, are not a basis for exemptions from the rules. The *Han Feizi*, as we shall see, makes much of this point. A less obvious sense in which governance can be impersonal—the critical one here—is that it does not matter who the lawmaker is. This idea of legislative anonymity is a second step in recognizing subjects as responsible moral agents.

Legislative anonymity is evident in Rawls' account of lawmaking. As Rawls has his contractors move from the original position to the legislative stage, he partially lifts the veil of ignorance behind which decision making is conducted. Legislators are aware of the full range of economic and social facts characterizing their society, but they assess proposed laws without knowing any facts about themselves or specific constituents. As a result, the effect of a law on identifiable individuals, including themselves, cannot be foreseen at the time of enactment. This restriction prevents personal interests or biases from skewing the choice of legislative proposals. Laws are not tailored to promote the interests of specific lawmakers or known subjects. (The veil of ignorance secures impersonality, even if it turns out that a law in fact affects only a single individual.)

Eliminating ends or interests of specific individuals does not mean eliminating common ends or interests. Yet it may suggest legislative restraint even here, because lawmakers' ideas about the public good are often difficult to disentangle from their ideas of their own good. It could be the case, therefore, that impersonal governance is

³¹ Fuller, *Morality*, *supra* note 20 at 46-49 and 207-214.

best realized by complete deference to the self-chosen acts of subjects. In this view, laws would not express or reflect any preference of the lawmaker regarding what is good or worthwhile. They would not embody instructions for accomplishing specific objectives, telling subjects at each turn or in general what to do. Rather, legislation properly conceived would permit subjects to act according to their own ideas of the good. It would establish *baselines* for the self-directed acts of subjects, preventing harms and securing a stable framework for continuing voluntary interactions among them. (The New York ordinance regarding pedestrian traffic is an illustrative, albeit prosaic, example.) The role of government would be primarily to serve as guardian of the integrity of this framework.³²

With this idea, we have moved from self-direction as the capacity of individuals to choose in light of circumstances (including the ruler's advance warnings) to self-direction as the freedom to set and act on one's own ends (with the ruler establishing the *enabling constraints* that make such freedom possible). At stake here are two opposing conceptions of political power. According to the first, political power consists in the capacity of the ruler to achieve compliance with goals the ruler has set. This is the directive style of command-and-control governance exemplified in Austin, with the lawmaker issuing prescriptive rules and backing them with the threat of sanctions. No doubt every legal order must use some degree of coercion, on some occasions, to secure compliance with official acts; that is unavoidable. However, when the commitment to responsible moral agency is prominent among those who govern, coercive threats are disfavored. They are a necessary means only when alternative methods have failed or are unworkable. The search for alternatives is imperative.

Respect for the independent moral agency of subjects suggests a different orientation. According to this alternative, power consists in the lawmaker's capacity to facilitate subjects' capacity to engage in practical deliberation. Hence, the lawmaker is disposed, wherever feasible, toward a facilitative rather than directive style of governance. Law in this conception defines a mode of association between ruler and ruled respecting the rightfulness of each subject pursuing his or her own ends, individually or collectively—without being coerced by the lawmaker to serve any other person's or group's preferences. This is impersonal governance, as I understand it here, and I shall say more about it when we come to the *Han Feizi*.³³

C. The Authority of Law

A third step toward recognizing subjects as responsible moral agents emerges if we refine our account of the reasons for having a regime of rules. The aim is not just to govern by rules, but to govern *everyone's* conduct (within a certain territory) by a *common* set of rules. At a minimum, this is an effort not only to coordinate the activities of an indefinite number of subjects but to facilitate forms of cooperation

³² *Ibid.* at 210.

³³ This conception of governance is suggested in some of Kant's political writings and was advocated most forcefully in the 20th century by F.A. Hayek. See F.A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960) and *Law, Legislation, and Liberty*, 3 vols. (Chicago: University of Chicago Press, 1973-1979).

among them. Law is a device for getting people to adopt a general perspective, reconciling private with public purposes.

For this aim to be realized, law must take priority over other standards of conduct in the behavior of subjects. Only with such priority can common public rules come to serve as the basis of legitimate expectations among them. In Austin's terms, a "common governing head" requires the subordination of private standards, displacing reasons for action that subjects may possess before the law has spoken. However, the priority of law is not automatic or to be taken for granted (and certainly not to be stipulated by definition). Whether lawmakers actually succeed in establishing law's priority depends crucially on how they act and the substance of what they say. That is, the priority of law depends on its authority, and the conditions of authority are very demanding.

To establish law's priority, the lawmaker must be able to anticipate that citizens as a whole will accept and abide by the body of rules promulgated. Government by law cannot take root without widespread voluntary compliance. In sociological terms, since the costs of achieving compliance through the threat of coercion are too great, laws must be supported by strongly-held beliefs that warrant their hold on people's conduct. If subjects act in accord with laws primarily to avoid the consequences of noncompliance, or to obtain the rewards of compliance, and not because of what the laws require, we do not have a regime of rules. (Thus Austin did not envision a regime of rules in this sense.) For that to happen, subjects must understand and accept the *raison d'être* of the laws, or at least of the institutional forms from which they emerge.

The need for widespread acceptance is implicit in Fuller's principles of clarity and publicity. Since the lawmaker's aim is for rules to govern, the lawmaker must attend to the way legal subjects are likely to understand any enacted rule. Otherwise desired outcomes will not occur. As noted in the discussion of *Tedla*, however, legal subjects judge not only the meaning but the reasonableness of a rule in assessing whether application in a specific case is warranted. Indeed, meaning depends on reasonableness: the less reasonable, the less intelligible the rule is. A lawmaker's rules run the risk of lack of intelligibility if they are not supported by, or are not at least consistent with, pervasive attitudes, expectations, and practices.³⁴

The less intelligible, the less authority law has. Because authority is not determined wholly by content-independent criteria, some legal rules are more authoritative than others. Authority becomes attenuated, for example, if rules are considered morally objectionable, for then they elicit strategies of resistance and avoidance. Authority also becomes attenuated if rules are poorly administered, perhaps by being selectively enforced or applied judicially on the basis of faulty reasoning. In these and other ways, maintaining a regime of rules presupposes willing endorsement or allegiance by most legal subjects, and endorsement requires that the rules are believed to embody (in a phrase) orderly, fair, and decent terms of cooperation. As Fuller says, a legal order "derives its ultimate support from a sense of its being 'right' ... [which rests on] tacit expectations and acceptances." Thus, law's authority is a product of the interplay between lawmaker and subject, not a one-way projection imposing itself

³⁴ For an illuminating discussion of this point, see Gerald J. Postema, "Implicit Law" in Witteveen, *Rediscovering Fuller*, *supra* note 7 at 376-377.

from above.³⁵ The authority of law does not depend exclusively, sometimes not even primarily, on the authority of the lawmaker; rather, the authority of the lawmaker depends crucially on the authority of the law made.

The threat of coercion draws the law to our attention and requires that it be taken seriously. If it is supported by a persuasive rationale, it gains in authority. When law has authority, it is a compelling reason for action for both citizens and officials. This view does not entail that each law must be regarded as morally compelling taken one at a time. A legal subject may well follow a particular law out of calculated self-interest or to avoid a threatened sanction. But such an attitude can exist without disaster only at the periphery of the legal order. Fuller says that when U.S. citizens pay their income taxes they need not ask, as a gesture of goodwill, how they might most effectively achieve the purposes of the *Internal Revenue Code*. On the other hand, absence of a cooperative attitude in relation to most laws, and especially to the fundamental procedures of lawmaking, would be poison to the legal order. In such circumstances, subjects themselves become ad hoc instrumentalists and manipulate rules for individual or political ends. The rules are bent and stretched; loopholes are found and exploited. The rules do not govern conduct but, at best, are invoked to rationalize conduct otherwise engaged in. Where such moral distance is common, the law is unstable. A regime founded more on the threat of force than on allegiance, or more on unreflective habit than on critical reflection, is that much more vulnerable to collapse. Thus, the lawmaker's need to attend to the conditions of acceptance and endorsement has a disciplining effect on the measures that will be promulgated.

What do these features of law—generality, impersonality, and authority—signify in practical terms? One important implication is that the obligation to obey the law turns on the distinctive relationship between lawmaker and subjects. Fuller says:

Certainly there can be no rational grounds for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted, or was unintelligible, or was contradicted by another rule of the same system, or commanded the impossible, or changed every minute. . . . There is a kind of reciprocity between government and the citizen with respect to the observance of rules.³⁶

In other words, the moral duty of subjects to comply with laws depends crucially on how well lawmakers are doing their job, especially in meeting the prima facie duties of lawmaking highlighted by the internal morality. If lawmakers fail to act with professional integrity, the duty to comply is undermined. There is of course no guarantee that the intent of lawmakers to realize a regime of rules will be effectively realized. But that aim is the source of criteria for assessing success (or failure) in the legislative enterprise, and thus assessing whether subjects have a reason—not necessarily a decisive reason, but a reason—to comply (or not) with the law.

Fuller's account, then, draws our attention implicitly to an ideal state of affairs, from which the standards of success or failure in lawmaking are derived. Needless to say, a lawmaker's official pronouncements could be called laws even if they did

³⁵ Fuller, *Morality*, *supra* note 20 at 138 and 204. See also Lon Fuller, "American Legal Philosophy at Mid-Century," (1954) 6 J. Legal Educ. 457 at 462-464. Since the element of fiat never entirely disappears, the need for a certain degree of trust in officials remains.

³⁶ Fuller, *Morality*, *supra* note 20 at 39.

not succeed in their purpose—perhaps because they were not made public, or when made public were unintelligible—but they would be defective as laws. Is a defective law still a law? We should not quibble about words. The point is that the lawmaker who labors to make statutes intelligible and consistent and prospective is fulfilling a duty to citizens drawn from the point of having general rules. Thus, the internal morality of law consists in just those standards that must be honored if the purpose of governing by general rules is to be realized.

IV. RETRIEVING THE *HAN FEIZI*

The discussion so far reveals that I approach the *Han Feizi* with a point of view. Rule by law is a consciously chosen and principled mode of governance, not simply instrumental to the preferences or interests of the lawmaker. Rather, it is a cooperative venture and carrier of collective value, involving reciprocal dependence between ruler and ruled. On one side, lawmakers are constrained to issue directives that meet critical standards, such as intelligibility and reasonableness; on the other side, as collaborators in a regime of rules, subjects engage in practical deliberation, taking the lawmaker's directives as their presumptive guide in particular cases. Now, some scholars of China's legal history will see this approach to the *Han Feizi* as liable to generate grave misunderstanding; I want to suggest that it is a source of illumination. Indeed what has struck me in reading the *Han Feizi* is how evident the connection of law and morality is and therefore how curious is the tradition of scholarship that has suggested otherwise.

I have remarked that the case for Fuller's internal morality of law is compelling if we take for granted the overarching purpose of subjecting people's conduct to the governance of rules. It could be objected that this notion goes far beyond anything the *Han Feizi* envisions for law, which is limited to establishing order and consolidating power in the hands of the ruler. Therefore, even if Fuller's conception of law's purpose entails the internal morality, it does not follow that the *Han Feizi*'s conception does so. The minimal desiderata of order and power perpetuate the separation of law and morality.

I shall consider this objection straight away and attempt to show that the apparently neutral tones of the *Han Feizi* are in fact morally weighted.

The desideratum of order carries us farther than the objection realizes, because order itself is an ideal. When a legal theorist talks of public order apart from morality, "the order intended is certainly not that of a morgue or cemetery."³⁷ The theorist has in mind a functioning legal order and thus an order that is good according to some standard. Consequently, the difference between order and good order is a difference between the standard invoked for what is properly orderly. Tacitly, this judgment presupposes a set of criteria for what makes the arrangement sufficiently in order to be called *law*. As Fuller remarks, the existence of law is not like that of apples or comets. The criteria of orderliness do not mirror an independent fact of the matter; they bring to bear assumed purposes that the arrangement in question is thought to fulfill. Thus, no theorist escapes offering an appraisal of the adequacy of the arrangement for achieving specified ends.

³⁷ Fuller, "Fidelity to Law", *supra* note 19 at 645.

Of course, “good according to some standard” does not necessarily mean morally good. The fact that appraisal enters at all, however, indicates that certain kinds of statements (“here is a legal order”) are not quite what they appear to be. Any theorist who assumes a different end, or a different relation between means and ends, may disagree on the apparently factual question of whether or not a legal order exists. Thus, agreement on facts requires agreement on evaluations. The reason one might think otherwise is that legal theorists do not always make it evident what difficulty they are grappling with and what hypotheses they are entertaining for its solution. As a result, they disguise an appraisal of arrangements in their capacity as means to look like a straightforward description of independently existing states of affairs.

How, then, do we choose among conceptions of law? As I mentioned, Fuller follows the American pragmatists in regarding ideas as anticipatory and action guiding. To develop a thought’s meaning is to determine what direction it gives to the application of human energies. What is at stake in a particular definition of law, therefore, is that it leads us to act one way rather than another. Accordingly, disagreements about the meaning of law are not verbal or semantic disputes; they are about what kind of lawmaker or law officer one ought to be. Definitions of law encourage us to ask: How would the adoption of one conception or the other affect the way a legislator or magistrate or lawyer spent the working day? The preferred thought is one that is responsive to our situation and leads us to conduct ourselves better than we otherwise would have done.

Thus, a pragmatic definition embodies a teleological element combining the real and the ideal. To have assurances that an ideal is practical, it must be based on social realities. At the same time, it cannot simply recapitulate what already exists. Rather, it extrapolates from an existing (or developing) pattern and envisions it as perfected in some crucial way. The resulting model then offers a standpoint from which to assess the ongoing activity and suggest improvement. In following this path, one must not be so overly impressed by the ideal as to neglect the fact that the actual only partly embodies it, and one must not be so overly impressed by the real that one neglects the active striving toward an ideal. On one side, law is not simply reason or justice; on the other, it is not simply the will of the sovereign. The middle ground between these extremes leaves room for pragmatic choice and thus the use of moral criteria for what is properly orderly. Understanding law as the enterprise of subjecting human conduct to the governance of rules is one option.

Does the *Han Feizi* offer a picture of a legal order that is good according to some standard—and, indeed, good according to a moral standard? I think there can be no doubt. The *Han Feizi* consistently addresses its advice not to the ruler per se but to the good ruler—also referred to as the enlightened, benevolent, or sage ruler—and the language of success and failure in meeting the pattern set by the good ruler is pervasive. (This does not mean that Han Fei expects the ruler to possess exceptional qualities, either of virtue or intellect. The mediocre ruler, in particular, needs the guidance that comes from the correct ideal.) Further, a conception of the public good guides the whole analysis. The good ruler “investigates the conditions of order and chaos” with the aim of promulgating clear laws and severe penalties “in order to rescue all living beings from chaos.” What counts as avoiding chaos and achieving order? At an abstract level, the answer is a regime of governance by

law, which will serve every subject's interest. On occasion, Han Fei goes further in specifying the public good. In the passage just quoted, for example, he adds: What the enlightened ruler does is to "rid All-under-Heaven of misfortune, prohibit the strong from exploiting the weak and the many from oppressing the few, enable the old and the infirm to die in peace and the young and the orphan to grow freely, and see to it ... that father and son support each other...[and so on]." ³⁸

For Han Fei, order was not an abstract problem but grew out of his experience during the Warring States period. In light of the extremity of the political situation, certain methods appeared necessary and appropriate. "If the [ruler] is stupid and upholds no rule, [ministers] will act at random." That is, unless the ruler exercises strict and effective control, the mandarin elite will act to augment its own power and wealth. "The wealth and powerfulness of [ministers] eventually breed chaos." ³⁹ Here, as elsewhere, we need not accept all of Han Fei's empirical assumptions, especially as we move beyond the formative period of nation-building that he anticipated, when the solution to Hobbes's problem required that people's habitual assumptions be questioned and their loyalties redirected. The specific details of the Warring States period, and the empirical claims Han Fei took for granted, should not stand in the way of appreciating the basic thrust of the argument—a state is orderly ("in good order") when it succeeds in providing clear and effective guidance in accordance with general rules. Thus, to the extent that Han Fei can portray traditional Confucian society as disorderly, he warrants its replacement by a new kind of regime. The disorder in question need not be absolute; it can be the disorder created by Confucian social hierarchy and its deep inequalities, which are a continuing source of conflict and injustice—replaced by the orderliness of governance by uniform rules.

In language as close as any ancient Chinese legal theorist could possibly get to formulating the rule of law ideal, Han Fei says: "[T]he most enlightened method of governing a state is to trust measures [*i.e.*, laws] and not men [*i.e.*, Confucian ministers]." ⁴⁰ This sentence is missed, perhaps, because it follows a paragraph in defense of the system of collective guilt that most contemporary readers find repellent. Yet it hints at the possibility that the preferred solution to the problem of order must include intelligent rule-following by subjects, and therefore that effective lawmaking rests on the ruler's anticipation of the capacity of legal subjects to determine the relevance of rules to their situation. To anticipate and acknowledge the importance of this capacity is even in the lawmaker's interest, in the sense that it aids the enterprise of governance by rules. Through reflective rule-application, each subject becomes a participant and collaborator in sustaining legal order—as any lawmaker would hope in a rule-based regime.

³⁸ Han Fei, *The Complete Works of Han Fei Tzu: A Classic of Chinese Legalism*, trans. by W. K. Liao (London: Arthur Probsthain, 1939), vol. I at 124. (The second volume of this translation was published in 1959.) Despite its imperfections (as judged by China scholars), Liao's translation is the only complete translation of the *Han Feizi* available in English. It is, therefore, indispensable for anyone working in English. Watson's more recent (and more reliable) translation contains only twelve of the fifty-five essays in the *Han Feizi*, *supra* note 1. Hereafter, quotations of Watson's translation are referred to as W, and of Liao's translations are referred to as L I for vol. I and L II for vol. II.

³⁹ L II at 271.

⁴⁰ *Ibid.* at 332.

Are the standards of the internal morality of law evident, then, in the *Han Feizi*? Does Han Fei's Rex ("the good ruler") abide by Fuller's eight prima facie duties? I will suggest a positive answer by considering:

- A. the *Han Feizi*'s evident connecting of law and morality;
- B. the manifest appeal in the text to many principles of the internal morality; and
- C. the text's recognition of the importance of impersonality in lawmaking.

Let me note that, in part of the analysis that follows, I make use of several of the so-called Daoist essays in the *Han Feizi*. Whether they are indeed Daoist, and whether they were actually written by Han Fei, as some scholars have argued, are not issues I need to decide.⁴¹ To retrieve this text as a resource, it is sufficient, I believe, that we have the text and that the Daoist essays are consistent with many, even if not all, of the other essays in it. If particular passages do not appear to support the argument for the internal morality of law, we can show in many instances how a sympathetic reconstruction leads in that direction.

A. *Connecting Law and Morality*

The first point to establish is that the *Han Feizi* aims to make a connection between law and morality (thus countering the conventional reading). The following passage is characteristic: "The Way is the beginning of all beings and the measure of right and wrong. Therefore the enlightened ruler holds fast to the beginning in order to understand the wellspring of all beings, and minds the measure in order to know the source of good and bad."⁴²

No doubt this passage defies full explication. But any reasonable reading has to allow that the good (enlightened, sage) ruler is guided by an objective standard of right and wrong and acts accordingly. In other places, there are similarly suggestive passages. Thus, a ruler must have the strength of character to defy the counsels of corrupt ministers and the self-interested pleas of common people, to "heed only that advice which truly accords with the Way."⁴³ Elsewhere, Han Fei writes at length about the importance of wiping out "the five vermin" (groups of men who further their private interests at the expense of the public welfare) and encourages their replacement by "men of integrity and public spirit."⁴⁴ Similarly, the enlightened ruler rewards ministers only for the public good they do. When the people esteem this system, "the state will be in good order."⁴⁵ These admonitions are not easily read as strategies by which a ruler preserves power; they are precepts for achieving a desirable political order.

The reason for confusion on the connection of law and morality is that the *Han Feizi* repudiates the Confucian social order. If the latter is identified with morality, then the *Han Feizi* separates law and morality. What exactly does Han Fei object to

⁴¹ For a defense of the authenticity of the Daoist passages, see especially Wang Hsiao-po & Leo S. Chang, *The Philosophical Foundations of Han Fei's Political Theory* (Honolulu: University of Hawaii, 1986).

⁴² W at 16.

⁴³ *Ibid.* at 81 and 36-37.

⁴⁴ *Ibid.* at 117.

⁴⁵ L II at 272.

in Confucianism? A key contention has to do with the mechanisms of governance. Ruling by law and ruling by virtue are fundamentally incompatible. According to the Confucians, law depends on punishments and rewards, which reinforce self-interested calculation. They circumvent the sense of shame and fail to encourage habits of self-control, thereby undermining moral development. The proper method is to inculcate a sense of appropriate conduct ('*yi*') and the rules of propriety ('*li*'), through education and imitation of exemplary persons. In the *Han Feizi*, however, the Confucian rules of propriety constitute an esoteric body of knowledge requiring intensive study and training. Since only a select group undergo (and indeed are capable of) such training, Confucians come to have a monopoly on interpreting the rules and exemplifying virtue—and then expect deference from everyone else on moral matters, including the ruler.

The *Han Feizi* asks whose interests are actually served by the esoteric knowledge of this educated elite. Is it society's interests, or that of the elite itself? "[H]e who manages to get clothing and food without working for them is called [by the Confucians] an able man, and he who wins esteem without having achieved any merit in battle is called a worthy man. But the deeds of such able and worthy men actually weaken the army and bring waste to the land. If the ruler rejoices in the deeds of such men ... private interests will prevail and public profit will come to naught."⁴⁶ Recognizing the ill effects of the supposed monopoly on virtue, the *Han Feizi* rejects the need for Confucian worthies as intermediaries between ruler and subjects and advises the ruler to issue public rules accessible to all.

Even when Confucians acknowledged the collective need for legal order, they had a tendency to regard themselves as exceptions to common rules. Indeed it appears that they measured their status, many of them, by the laws they could be exempted from. By shutting down these exemptions, Han Fei's ruler is not forbidding Confucians (let alone others) from leading a private life of virtue; the ruler is eliminating personal privileges in the public realm. In this sense, Confucians failed to appreciate the exigencies of governance—especially the need for a common set of standards for everyone—and therefore failed to develop a compelling public morality. In the *Han Feizi*'s view, rule by law serves everyone's interest, but it does so only if everyone conforms to the laws. And everyone will be motivated to conform only if each is assured that others will also conform. The ruler, who has sole authority to issue laws and enforce them, provides the needed assurance. (In one passage, the admonition against showing compassion in specific cases, by mitigating punishment, is run together with the admonition not to allow ministers to take bribes. In both circumstances, "legal institutions will crumble."⁴⁷)

Still, the repudiation of Confucianism leaves it open how exactly the connection of law and morality is made in the *Han Feizi*.

⁴⁶ W at 104-105. An analogous critique of intellectuals is offered by John Dewey in *The Public and Its Problems* (Chicago: Swallow Press, 1927) at 207-208: "A class of experts is inevitably so removed from common interests as to become a class with private interests and private knowledge, which in social matters is not knowledge at all. . . . No government by experts in which the masses do not have the chance to inform the experts as to their needs can be anything but an oligarchy managed in the interests of the few." Dewey goes on to say that the work of experts is systematic inquiry; their role is not to frame and execute policies but to present the results of inquiry to citizens, who can then make informed decisions.

⁴⁷ L II at 273.

B. *The Internal Morality of Law in the Han Feizi*

Let us take note of at least some passages where the *Han Feizi* invokes the tenets of the internal morality. We should not expect the text to identify all of them; it is sufficient if it formulates a few and implies the others. Even less should we expect the *Han Feizi* to offer a clear expression of the rightness of the relationship between ruler and ruled that the internal morality involves. When we turn, in the next subsection, to the impersonality of law, we shall see, however, how recognition of the rightness of the relationship emerges explicitly.

1. *Generality*

In the scholarly literature on the Legalists, the precise meaning of the standard term for law (*'fa'*) is a matter of dispute.⁴⁸ In a generic sense, *fa* covers positive or written laws, but it also conveys, or is connected to, the notions of model, pattern, and standard. Further, in the *Han Feizi*, *fa* is often used so as to include commands, punishments (penal statutes), and regulations. These multiple meanings create difficulties for the claim that generality is a salient attribute of law. At the same time, various passages indicate awareness of the space between a law and its application of the sort that generality involves. For example, subjects are not coerced by law unless they act so as to place themselves in violation of it. "Reward and punishment follow the deed; each man brings them upon himself."⁴⁹ This appears to be an implicit acknowledgement that rules written in abstraction from their application in specific cases presuppose the capacity for practical deliberation. Subjects do not need to obtain permission from the ruler before they act; they are not supplicants. They are expected to act by their own lights, in consideration of the rules laid down, and thus as responsible moral agents.

More telling evidence is the *Han Feizi*'s actually going a step beyond Fuller, by insisting not only on generality but universality—subjects of high rank must be treated no differently than those of lower degree or status. This attempt to minimize legal differentiation is usually construed by commentators in political terms: universality helps to secure the absolute authority of the ruler. In place of the five Confucian relationships, each with its own form of deference, the singular relationship of ruler and ruled becomes the only one of importance. A less cynical reading is the one I alluded to above: the practice of exempting people who enjoy a certain status or who have familial connections tends to undermine the prospects of success in governing by rules. Each subject must be able to anticipate that other subjects will play by the rules—and, indeed, by the same set of rules that applies to himself. If some subjects are allowed to pick and choose which rules they honor and which they spurn, rule by law will be fatally weakened. Wang Hsiao-po observes that, during Han Fei's time, tens of thousands of military personnel deserted their posts and received protection from powerful families, thereby evading taxation and *corvée*.⁵⁰ Presumably, this phenomenon is at least part of what Han Fei had in mind when he wrote that the

⁴⁸ Derk Bodde offers several helpful discussions in his *Essays*, *supra* note 18.

⁴⁹ W at 38.

⁵⁰ Wang Hsiao-po, "The Significance of the Concept of 'Fa' in Han Fei's Thought System" trans. by Leo S. Chang, (1977) 27 *Philosophy East and West* 35 at 44.

powerful would act on their own will, if they could, breaking the law to benefit themselves and helping their families by consuming state resources.⁵¹ In this sense, Han Fei fully grasped what it means to use law as the basic organizing principle of society.⁵²

Remarkably, the *Han Feizi*'s insistence on universality is more in accord with some understandings of the rule of law. In the classic treatment of the topic, A.V. Dicey comments that the rule of law requires "the equal subjection of all [social] classes to the ordinary law of the land administered by the ordinary law courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals."⁵³ Dicey's emphasis is on the importance of ordinary courts, which is part of his attempt to ensure that "ordinary law" applies to all, without exemptions or special prerogatives.

2. Publicity

The *Han Feizi* says "law wants nothing more than publicity." The context is a comparison drawn between law and "technique" ('*shu*').⁵⁴ The latter is a method that enables rulers to manage their ministers (about which I shall say more below), whereas law is aimed at the general population. The text says:

The important business of the lord of men [*i.e.*, the ruler] is either law or [technique]. The law is codified in books, kept in governmental offices, and promulgated among the hundred surnames. [Technique] is hidden in the bosom and useful in comparing diverse motivating factors of human conduct and in manipulating the body of officials secretly. Therefore, law wants nothing more than publicity; [technique] abhors visibility. For this reason, when the enlightened sovereign speaks on law, high and low within the boundaries will hear and know it.⁵⁵

But while the requirement of publicity is unmistakable, the *Han Feizi* appears not to appreciate that making law public (promulgation) is itself a rule-governed activity. It is done in a prescribed way, with procedures to follow. So in this respect, as in others, the lawmaker is bound by rules simply to accomplish his own necessary objectives. Would Han Fei have denied this? Should we not say, as scholars have said of Hobbes, that he must have meant to acknowledge the constraints that determine

⁵¹ L I at 97.

⁵² The political versus moral diagnoses of the universality requirement have their contemporary counterparts regarding the current regime's intermittent efforts to replace the ethics of *guanxi* (personal networks) with the universal ethic of comradeship, which favors equal treatment for all. Comradeship, obviously, orients subjects to central authority. But that does not exhaust its significance, as we can see by examining moral discourse at the village level. Some villagers exploit their *guanxi* to create exceptions for themselves to common rules, while other villagers complain that the practice is unfair. See Hok Bun Ku, *Moral Politics in a South Chinese Village: Responsibility, Reciprocity, and Resistance* (Lanham, MD: Rowman & Littlefield, 2003) at 146-147 and 195-196.

⁵³ A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London: Macmillan & Co., 1961) at 202-203.

⁵⁴ I follow Creel's translation, rather than Liao's, *infra* note 95.

⁵⁵ L II at 188.

what counts as a valid exercise of power?⁵⁶ In highlighting these constraints, we are not revising the doctrine of the *Han Feizi*; we are simply working out the logic of its argument.

3. *Clarity*

Among the many passages on the importance of clarity, I shall emphasize one that expresses the connection to success in governing. “[I]n administering your rule and dealing with the people, if you do not speak in terms that any man and woman can plainly understand, but long to apply the doctrines of the wise men [*i.e.*, Confucian scholar-officials], then you will defeat your own efforts at rule.”⁵⁷ These efforts are defeated when subjects are not able to determine with fair certainty how the ruler or the ruler’s magistrates will respond to their actions.

There is an important tension between clarity and generality. Generality means that, in some number of cases, the effects of application are not completely foreseeable at the time of enactment. Rule-appliers, whether magistrates or ordinary subjects, must go beyond mechanical application and specify what the law requires, or does not require, in unanticipated circumstances. The rule-applier may attempt to infer what the lawmaker’s intent would have been, had the lawmaker thought about the novel case, or (in another view) may appeal to the underlying purposes of the law as a guide. In *Tedla*, Judge Lehman employed both of these strategies. If one denies rule-appliers the power to specify or qualify rules, it may lead to injustice (as it would have in *Tedla*). The *Han Feizi*, however, insists on strict application, and the reason is that failure to apply laws strictly creates openings for miscalculation and temptation, and produces confusion among subjects about what the law actually is. Determinate guidance in most cases is not sufficient. The exercise of discretion, even in a small number of cases, makes the law as a whole unclear, so it is claimed. (In the English case *Re Castioni*, Judge Stephen captures something of the spirit of the *Han Feizi* when he says: “[I]t is not enough to attain to a degree of precision which a person reading [the statute] in good faith can understand; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand.”⁵⁸)

Although the implications are not always drawn out, the concerns underlying the insistence on strict application would also appear to require that the law be as complete a code of conduct as humanly possible. For, if the law leaves blank spaces, if some eventuality is unprovided for, the evils of discretion in rule-application emerge once again. (“[W]hen laws are too vague, vagabonds dispute. For this reason ... the laws of the intelligent ruler always penetrate the minute details of fact.”⁵⁹) It is perhaps for this reason that successive dynasties in China wrote ever more refined codes, adding sub-statutes to already very specific statutes, and sub-sub-statutes to those. Derk Bodde hypothesizes that this “minute differentiation” aimed to maximize justice “by enabling the law to fit as closely as possible every

⁵⁶ David Dyzenhaus, “The Genealogy of Legal Positivism” (2004) 24 *Oxford J. Legal Stud.* 39 at 58.

⁵⁷ W at 108.

⁵⁸ [1891] 1 Q.B. 149 at 167, cited by William Twining & David Miers, *How To Do Things With Rules*, 2d. ed. (London: Weidenfeld & Nicolson, 1982) at 182.

⁵⁹ L II at 256.

foreseeable circumstance.” He adds a note of skepticism that such differentiation could ever entirely eliminate the need for a magistrate to choose between close but competing statutes.⁶⁰ The *Han Feizi*’s insistence resembles Aristotle’s when he said that well-crafted laws should “define everything as exactly as possible,” leaving little if anything to the discretion of judges or other appliers of the law.⁶¹ The reason for such well-crafted laws is that “the judgment of a lawmaker is not about a particular case but about what lies in the future and in general,” and thus is more likely to reflect prudential judgment and cumulative learning. (I am prepared to make the same assumption about Han Fei’s sage ruler.) This is in contrast to the judge or jury member who faces current and specific cases: “For them, friendliness and hostility and individual self-interest are often involved, with the result that they are no longer able to see the truth adequately, but their private pleasure or [pain] casts a shadow on their judgment.”⁶² The *Han Feizi* shares this worry about distorting factors getting in the way of better judgment, but it appears to add the thought that any exercise of discretion by rule-appliers leaves subjects wondering whether the law applies—or could be made not to apply—to them.

I would like to believe Han Fei knew that reality is always more complicated than the rules issued by even the wisest lawmaker in the attempt to cabin it. He observes: “For there are in All-under-Heaven neither laws without difficulties nor gains without losses.”⁶³ Of course, if laws are vague or amorphous, they obviously provide too much leeway for other officials—judges, police, administrators—to act in non-general ways. Vague terms, such as “reasonable care” or “in good faith”, require specification before they are compatible with a regime of rules. But the difficulty is at the other end: if laws are too precise, they fail to leave room for the contingencies of application that inevitably appear. Since these contingencies cannot be completely foreseen, overly prescriptive laws are likely to produce resistance and confusion—and will discredit the authority that issued them.

And surely Han Fei would have recognized that strict application, as a general policy, will lead to injustice in some cases. If so, would it not be preferable to mitigate injustice through the exercise of judicial power—recognizing that, far from diminishing the lawmaker’s power, the judicious use of discretion (within the parameters of enacted law) actually enhances it? Or, is judicial power, once granted, too difficult to keep confined within proper bounds, and therefore injustice in some number of cases is a cost to be weighed against the benefits of certainty and uniformity most of the time? Lawmakers, I suppose, could pretend this problem does not exist, out of the belief that the pretense of certainty is necessary to achieve order. But given subjects’ intimate knowledge of their own situation, the pretense is likely to be exposed, and that will be a source of distrust and instability.⁶⁴

⁶⁰ Derk Bodde, *supra* note 18 at 185.

⁶¹ Aristotle, *On Rhetoric*, trans. by George A. Kennedy (New York: Oxford University Press, 1991) at 31 (1354a32-34).

⁶² *Ibid.* at 1354b5-11.

⁶³ L II at 253.

⁶⁴ For the thesis that, under certain conditions, rules work best in achieving good outcomes if they convey this pretense, see Larry Alexander & Emily Sherwin, “The Deceptive Nature of Rules” (1994) 142 U. Pa. L. Rev. 1191.

To give subjects advance notice is to treat them with respect as moral agents, and “[i]t is human nature ... that everybody loves respect.”⁶⁵ At the same time, the *Han Feizi* fails to recognize that, since the meaning of a rule depends on its rationale, publicity and clarity together may require the lawmaker to offer an account of any enacted rule. At least, they push in that direction. Without a rationale that is both apparent and acceptable, the law loses its intelligibility and, therewith, its authority. One can understand the *Han Feizi*’s hesitancy on this point, since offering an account could be the first step toward reasoned assessment and criticism of the lawmaker’s act. Yet it is difficult to imagine satisfying the conditions of publicity and clarity without it. These principles, then, provide another example of how merely drawing out the implications of the *Han Feizi*’s explicit statements leads to a robust conception of the relation between ruler and ruled.

4. *Non-Contradiction*

The principle of non-contradiction is not as explicit as some of the other tenets of the internal morality but is nonetheless patent. When Shen Buhai became prime minister of the newly independent state of Han, he promulgated new laws without repealing laws inherited from the older Qin state. The result was a set of contradictory provisions that caused much confusion. Hence, the *Han Feizi*’s criticism: “As Shen [Buhai] neither enforced the laws [consistently] nor unified the mandates and ordinances, there were many culprits.”⁶⁶

5. *Conformability and Constancy*

Since a regime of rule by law depends on the compliance of subjects, the conformability requirement is implied. More conspicuous is the requirement of constancy or relative stability over time, which is needed for long-term planning. Using an analogy to the craftsman whose accomplishments suffer with frequent changes in his work, Han Fei says “if, when governing a big country, you alter laws and decrees too often, the people will suffer hardships. Therefore, the ruler who follows the proper course of government ... takes the alteration of the law seriously.”⁶⁷ But caution does not preclude change, since laws must fit the circumstances, and times do change. “Change or no change, the sage does not mind. For he aims only at the rectification of government.”⁶⁸ Everything depends on whether specific institutions are helpful in meeting the social need. “If laws are adjusted to the time, there is good government.”⁶⁹ Still, the laws are not changed lightly: “If the ruler ... alters laws and prohibitions at random, and issues commands and orders frequently, then ruin is possible.”⁷⁰

⁶⁵ L II at 173.

⁶⁶ L II at 213. This passage is cited by Wang Hsiao-po, *supra* note 50 at 41.

⁶⁷ L I at 184-5.

⁶⁸ *Ibid.* at 154.

⁶⁹ L II at 328.

⁷⁰ L I at 138.

6. *Prospectivity and Congruence*

Relative stability together with clarity and publicity give us the idea of advance notice, which in turn entails prospectivity and congruence. Since congruence requires that particular cases must be decided in accordance with the lawmaker's directives, it has far-reaching implications for the principles governing administrative and judicial bodies, which specify and apply the lawmaker's rules. A lawmaker's intent is not carried out if administrators and judges can displace the lawmaker's rules with their own preferences, even if public-spirited. This point is underlined when the *Han Feizi* links clarity and congruence: "[T]he ruler of men must make certain that, no matter how wise and capable his ministers may be, they are never allowed to turn their backs on the law and concentrate power in their own hands; no matter how worthy their actions may be, they are never allowed to presume upon their achievements and snatch rewards that belong to others; no matter how loyal and trustworthy they may be, they are never allowed to discard the law and circumvent the prohibitions. This is what it means to make the law clear."⁷¹ That is, only when the law actually promulgated by the ruler is the law that governs specific cases is there a regime of rules. While no institutional mechanism is envisioned by the *Han Feizi*, it is not much of a stretch to argue that the good ruler wishes to facilitate effective redress by legal subjects of ministerial abuses of power, if not also his own abuses.

In sum, the *Han Feizi* recognizes what Fuller refers to as the reciprocity between ruler and ruled: "[The ruler] establishes the standard [and] abides by it. . . ."⁷² To discard the law one has issued and instead follow one's personal whim would produce disorder.⁷³ Thus, it is simply not true that the ruler "can make, repeal, change, suspend, override, violate, or revoke any law at his pleasure."⁷⁴ Since the ruler must abide by the law, what a subject properly attends to is not the ruler's whims but what the law requires. "The enlightened sovereign . . . [does not] inflict punishment upon innocent people."⁷⁵ It is fair to say, then, that the *Han Feizi* gives expression to basic principles of legality, such as *nullum crimen, nulla poena sine lege* (no crime, no punishment without law). Of course, as William Alford observes, when a regime commits itself to legality, even if it gets to it for instrumental reasons, it opens the possibility of subjects taking the regime at its word, demanding to know the legal basis of this or that act. But that, surely, is what rule by law is all about.⁷⁶ The regime may well fail to provide a standing mechanism by which a claim of legality or illegality can be vindicated, but not to do so is self-defeating.

⁷¹ W at 91 and 88.

⁷² *Ibid.* at 36.

⁷³ *Ibid.* at 29.

⁷⁴ Fu, *supra* note 3 at 68.

⁷⁵ L II at 149.

⁷⁶ William P. Alford, "Double-edged Swords Cut Both Ways: Law and Legitimacy in the People's Republic of China" in Tu Wei-ming, ed., *China in Transformation* (Cambridge, MA: Harvard University Press, 1994) 45. It is sometimes observed that, for most of its existence, the current regime in China has been committed to the traditional idea of rule by law, regarding law as an instrument of the proletarian dictatorship. Then it is observed that the party leadership often disregards or openly tramples on the law. That means the regime exhibits ad hoc instrumentalism, not consistent or principled instrumentalism, and thus not rule by law as I have construed it.

C. *The Impersonality of Lawmaking*

The third step toward acknowledging the moral agency of subjects—and the deeper insight in the *Han Feizi*—is that a regime of rules requires impersonal governance. Given Han Fei's conventional reputation, this aspect of the argument is the most surprising.

Partly, the reasoning is prudential; micro-management is impractical. "If the ruler of men tries to keep a personal check on all the various offices of his government, he will find the day too short and his energies insufficient."⁷⁷ However, the burdens of micro-management do not explain the importance of impersonal governance, for non-micro-managerial rule could still be selfish or at least self-interested. Yet it is clear that the *Han Feizi* rejects self-interested governance because it is incompatible with the public good. Governance becomes arbitrary when public power is used to serve private ends. "It is the duty of the sovereign to make clear the distinction between public and private interests, enact laws and statutes openly, and forbid private favors."⁷⁸ As we might say today, the *Han Feizi* opposes the rent-seeking behavior of well-organized interest groups.

The point is most clearly articulated regarding ministers, who must be "men who have a clear understanding of what is beneficial to the nation and a feeling for the system of law and regulations."⁷⁹ The state is well ordered only if the ruler puts an end to the "private scheming" of ministers and "blocks [their] selfish pursuits. . . . If appointments to office are controlled by cliques, then men will work only to establish profitable connections."⁸⁰ "It is the intelligent sovereign's way that rewards [to ministers] always result from contributions to the public benefit. . . ."⁸¹ Here, as elsewhere, we see that law moves people from the particular to the general; where they are inclined to follow more immediate desires, the law offers reasons for concentrating on more distant and long-term consequences.

However, restraint on the ruler is also evident: "For his part, the ruler must never make selfish use of his wise ministers or able men. . . . This is the perfection of good government."⁸² "Therefore, the officials [the enlightened ruler] appoints to office must have the required abilities, and the rewards and punishments he enforces must involve no selfishness but manifest public justice to gentry and commoners."⁸³ Along these lines, I would emphasize the *Han Feizi*'s extended defense of the practice of selecting government officials on the basis of merit even when contrary to the ruler's personal likes and dislikes.⁸⁴ This passage, along with the others cited, indicates why it is misleading to say the ruler hides his likes and dislikes so as not to be manipulated by his subordinates to their own advantage. At issue is not just the ruler's struggle to maintain power but the struggle to achieve governance by law.

⁷⁷ W at 26.

⁷⁸ L I at 167.

⁷⁹ W at 22.

⁸⁰ *Ibid.*

⁸¹ L II at 272.

⁸² W at 25.

⁸³ L II at 240.

⁸⁴ *Ibid.* at 82-83.

“Indeed, the purpose of enacting laws and decrees is to abolish selfishness. Once laws and decrees prevail, the way of selfishness collapses. . . . Therefore, in my main discourse I say: ‘The cause of order is law, the cause of chaos is selfishness. Once law is enacted, no selfish act can be done.’”⁸⁵ In this passage, the *Han Feizi*’s targets are Confucian worthies whose private interests are inimical to the state. But it is difficult to read this passage without applying the point to the ruler as well. Thus, the claim that the *Han Feizi* prescribes royal indulgence in “earthly delights and extravagant luxury”⁸⁶ is, I believe, a gross misrepresentation and is countered by this: “If the ruler is greedy, insatiable, attracted to profit, and fond of gain, then ruin is possible.”⁸⁷ Similarly: “When a violent man is on the throne, laws and decrees are arbitrary; ruler and minister oppose each other; the people grumble and beget the spirit of disorder.”⁸⁸ Rather, “[t]he enlightened ruler makes people public-spirited. . . .”⁸⁹

How do we make sense of this restraint on the ruler? How can it happen that a ruler’s laws and policies, when properly formulated, “are actually inimical”⁹⁰ to private interests, including those of the ruler? The answer, cryptically stated, is: If the state is well managed, it runs on its own, requiring little of the ruler. The ideal condition for a ruler is inactivity (*wu wei*). “[The ruler] does not try to tell others what to do, but leaves them to do things by themselves. . . . [H]e has provided the rules and yardsticks, so that all things know their place. Those who merit reward are rewarded; those who deserve punishment are punished. Reward and punishment follow the deed; each man brings them upon himself.”⁹¹ (The “rules and yardsticks” are what Fuller calls baselines for self-directed actions.)

One interpretation of *wu wei* (non-action) is that, once the ruler’s threats of severe punishment for non-compliance have had their desired effect, such that no one dares to transgress the law, the ruler will no longer have anything to do. Clear and strictly applied laws regulate the people, as it were, by themselves. This interpretation equates non-action with passivity.

Another interpretation of *wu wei* has it refer to a division of labor between ruler and ministers. This meaning was anticipated by Confucius: “The Master said, ‘If there was a ruler who achieved order without taking any action, it was, perhaps, Shun. There was nothing for him to do but to hold himself in a respectful posture [*i.e.*, observe the rites] and to face due south [the traditional position of the throne].’”⁹² This passage is commonly taken to mean that the ruler does not concern himself personally with running the government but leaves it in the hands of competent ministers. The ruler is inactive, but the ruler’s subordinates are not. This interpretation is consistent with a number of passages in the *Han Feizi*: “The enlightened ruler reposes in nonaction. . . . [H]e causes the wise to bring forth all their schemes. . . . He causes the worthy to display their talents. . . .”⁹³ “The way of the ruler of men is to treasure stillness and reserve. Without handling affairs himself, he can recognize

⁸⁵ *Ibid.* at 235.

⁸⁶ Fu, *supra* note 3 at 24.

⁸⁷ L I at 135.

⁸⁸ L II at 255.

⁸⁹ *Ibid.* at 181.

⁹⁰ W at 81.

⁹¹ W at 38 and L II at 179.

⁹² Confucius, *Analects*, trans. by D. C. Lau (London: Penguin, 1979) at para. 15.5.

⁹³ W at 17.

clumsiness or skill in others; without laying plans of his own, he knows what will bring fortune or misfortune [to the state].”⁹⁴

The conventional reading sees in these passages the doctrine of bureaucratic accountability known as *xing-ming*, a term that may be translated as “performance and title”—a minister’s title or job description (‘*ming*’) is the measure by which the ruler assesses the minister’s success or failure, his performance (‘*xing*’). “[The preferred] technique [for a ruler] is to bestow [ministerial] office according to the capacity [of the candidate]; [and] to demand actual performance in accordance with the title [*ming*]. . . .”⁹⁵ “He will decide between right and wrong according to the relation between name and fact and scrutinize words and phrases by means of comparison and verification.”⁹⁶ Thus, the ruler delegates responsibility and then holds officials accountable for success or failure in fulfilling their assigned tasks.

But *xing-ming* does not explain the *Han Feizi*’s confidence that good outcomes will follow from measuring performance against title. What guarantees that the ruler has gotten the job description right? What guarantees that the minister’s acts, even if they conform to the job description, serve the public good? Wang and Chang answer these questions by interpreting *wu wei* as a condition of “emptiness and quiescence” that suppresses sensations and emotions, *i.e.*, subjective knowledge, in order to open oneself to the objective standards provided by the *dao*. That is how they read: “Who knows how to govern the people, thinks and worries in repose.”⁹⁷ I believe this reading is a bit of unnecessary metaphysical overreaching. When Han Fei suggests that objective information must replace subjective perception, he may have in mind nothing more than what Shen Buhai had in mind—basing an assessment of conditions in the kingdom on statistical reports and surveys, not personal impressions.

We need an additional premise here, and I believe we get what we need by pursuing the hint that enlightened rulers exercise a *natural* form of governance, establishing a political order that embodies or reflects or is aligned with the *dao*. *Wu wei*, I want to suggest, rests on a theory of *spontaneous order*. The good ruler does not issue directives in accordance with his own, necessarily limited understanding of the public good—a point we could underscore by emphasizing the middling talents of the ordinary ruler. He rather aims to make it possible for benevolent natural forces to work their way in human affairs. As Shen Buhai says: “Names rectify themselves; affairs settle themselves.”⁹⁸

With spontaneous order, human activity is coordinated but not directed. It is the product of individuals acting on their own initiative, engaging each other in a continuous series of mutual adjustments, subject only to laws that apply uniformly to all, resulting in an overall harmony or equilibrium—as though by an *invisible hand*. A standard example is a market economy. Other possibilities could be the enterprise of scientific discovery or the Anglo-American system of common law. Agents within each domain act from what Michael Polanyi calls “standard incentives” appropriate

⁹⁴ *Ibid.* at 19.

⁹⁵ Herrlee G. Creel, *Shen Pu-Hai: A Chinese Political Philosopher of the Fourth Century B.C.* (Chicago: University of Chicago, 1974) at 123.

⁹⁶ *L I* at 120.

⁹⁷ *L I* at 181. Wang & Chang, *supra* note 95 at 35.

⁹⁸ Creel, *supra* note 98 at 173.

to their domain. Self-interest is the standard incentive in a market, while for a scientist it is the search for truth, and for an Anglo-American judge it is applying the law.⁹⁹ Within this division of labor, the individual's entire responsibility is the fulfillment of his or her own special task.

Is no one, then, assigned responsibility for general oversight of the institutions within which agents are interacting? What happens when markets fail, for example, and generate externalities? Who formulates the laws that apply uniformly to all? The *Han Feizi*, I suggest, sees a role for a lawmaker who monitors the goings-on of All-under-heaven and intervenes as necessary to sustain the conditions for natural forces to operate. Non-action, therefore, is not a passive state. On the other hand, the activity it requires is limited. It aims at preserving and refining institutional forms rather than achieving specific substantive outcomes: for example, removing encumbrances to the effective operation of a free market rather than ensuring a certain distribution of goods. (Consistent with this idea is the claim of Wang and Chang that the usual translation as "non-action" does not fully convey the meaning of *wu wei*, which they render as "refraining from taking any action contrary to what-is-so-of-itself."¹⁰⁰)

The appeal to spontaneous order may appear to be another bit of metaphysical overreaching. But the intellectual tradition running from Adam Smith through Friedrich Hayek and beyond has understood spontaneous order in a completely naturalistic way and used it as a foundation for the purest forms of the rule of law ideal. Contrary to postmodern animadversions, the fact that the good society is brought into being by the deliberate acts of enlightened rulers, pursuant to a correct understanding of social forces, does not preclude its naturalness, "any more than the fact that legislators who are committed to a free market economy must first take the initiative to remove the 'artificial' institutional obstacles [impeding it] precludes the 'naturalness' of such an economy."¹⁰¹ We could add that wise legislators not only take the initiative but continue to act as necessary to meet the demanding conditions of a properly functioning market.¹⁰²

With this interpretation of *wu wei*, one need not share the characteristic Daoist disdain for political power. One could wish to gain power to ensure that others do not exercise power over oneself, or do not exercise it so as to interfere with the benevolent processes of spontaneous order. What would be disdained is the lawmaker's use of power to make subjects do exactly (and only) what the lawmaker desires. This reading is supported by the *Han Feizi*'s anti-Confucianism. The ruler must refrain from practicing "benevolence and righteousness,"¹⁰³ *i.e.*, imposing a specific idea of the good. Not because benevolence is unimportant, but because the ruler is likely to get it wrong. If permitted, nature will take care of things. Indeed, precisely because nature will take care, Han Fei's ruler has the same concern with human well-being—a desire for people to prosper and be contented—as the Confucian ruler. The difference turns on whether one relies on one's own idea of human well-being or nature's. The

⁹⁹ Michael Polanyi, *The Logic of Liberty: Reflections and Rejoinders* (Chicago: University of Chicago, 1951) at 159ff and 194-195.

¹⁰⁰ Wang & Chang, *supra* note 41 at 172 n14.

¹⁰¹ Benjamin I. Schwartz, *The World of Thought in Ancient China* (Cambridge, MA: Harvard University Press, 1985) at 344.

¹⁰² For an extended list of examples of natural human efforts aimed at increasing revenues, see L II 168-169.

¹⁰³ W at 103.

Confucian (in Han Fei's view) regards subjects as an inert mass, passive recipients of the ruler's goodwill. Han Fei's ruler sees in subjects the exercise of independent moral agency.

Thus, the *Han Feizi*'s ruler embraces the moral core of the rule of law, the idea of impersonal governance, out of a desire to respect the natural order. Law, in turn, is not an instrument of control employed for the ruler's personal ends. What the ruler wants is for subjects to be innovative and productive; he seeks to release energies and enhance social solidarity. In this light, the ruler regards the moral competence of subjects as social capital, a resource for achieving a well-ordered society. Well-trained soldiers and productive farmers are not valuable assets of the ruler but of the collectivity. The work that the ruler performs is to set boundaries and clear away obstacles and facilitate self-directed activity. Of course, the very capacities that make individuals a social resource also enable them to act for purposes of their own. Independent agents can act either in concert with others or against them. The lawmaker's task is to get subjects to act with solicitude for the society as a whole. They will do so, presumably, if they see that, in a well-ordered society, their interest converges with that of everyone else. Gaining allegiance means eliciting support for the project of sustaining the state as a going concern. When successful, law creates a mode of association that promotes an orderly, fair, and decent society.

In the regard for spontaneous order, I think we can detect a further shift away from Confucian hierarchy and its valuation of deference to moral expertise. The hierarchical conception, if benign, is that good governance is achieved as long as the commands of the sovereign are enlightened and aim at the public good. Top-down control is assumed. The alternative in the *Han Feizi* is that good governance consists in enabling subjects to work out their relations with one another on their own. The special task of the ruler is to create and support the variety of institutional mechanisms—markets, elections, forums for the adjudication of disputes, and so on—by which people's decisions about their lives are brought into meaningful relation with each other. Rather than exercising top-down control, lawmakers are disposed, where appropriate, to defer to horizontal forms of association, even to enhance their operation if they are faltering, rather than using legislation to supercede them. Too much top-down control stifles the spontaneous forms of cooperation and civic association that enable subjects to exercise practical deliberation. The chief danger of government by directives from above is that it impoverishes mutuality and the sense of responsibility for relationships to specific others. By facilitating individual decision making, the lawmaker displays respect for the capacity for self-rule.

If this reading is not unfair to at least some parts of the text, it counters the conventional interpretation that has Han Fei say that the authority of law depends on the authority of the ruler. To the contrary, the authority of the ruler depends on the authority of the impersonal order the good ruler creates. The ruler who facilitates the spontaneous workings of the benevolent forces of nature will be regarded as having the authority to rule. Conformity to the natural order will elicit people's allegiance.

V. OBJECTIONS

The major stumbling block to this interpretation of the *Han Feizi* is the prominence of the ruler's use of *the two handles of government*, punishment and reward.¹⁰⁴ This aspect of Han Fei's instrumentalism appears to make manipulation of incentives (by rulers) and calculation of incentives (by subjects) essential to governance. "Human [beings] have likes and dislikes, [hence] reward and punishment can be applied. If reward and punishment are applicable, prohibitions and orders will prevail and the course of government will be accomplished."¹⁰⁵ In this view, incentives provide motivations to act in ways conducive to objectives fixed by the ruler. The assumption is that manipulation is needed because subjects would not otherwise act as the ruler desires.

Yet, the expectation of calculation by subjects is already a step toward recognizing their moral agency, and it implicates principles of the internal morality. For example, subjects' capacity to calculate benefits and costs would be undermined if the ruler engaged in secret manipulation of their choices. Open announcement by the ruler that deeds have consequences is not manipulative but displays recognition of people's ability to take responsibility for their actions.

More fundamentally, a society in which the ruler is a manipulator of incentives and every subject is a calculator of benefits and costs is not on a trajectory toward eliciting allegiance or commitment. Han Fei was surely aware of the Confucian worry that, when the ruler depends on punishments, the people will find cunning and ingenious ways to avoid them. Incentives can change people's calculations, not necessarily their minds. To some extent, Han Fei's response was that laws of sufficient clarity and precision would obviate this problem. But he also appears sometimes to recognize that to rely on the manipulation of incentives is inherently unstable as a basis for legal compliance and social order.

While Shang Yang believed the ruler could control the conduct of subjects no matter what the content of his commands, Han Fei strikes me as someone who appreciates the limits of law. "[T]hough you have the wisdom of Yao but have no support of the masses of the people, you cannot accomplish any great achievement."¹⁰⁶ By implication, the authority of the ruler is not a kind of acquiescence based on awe, that is, fear of superior power; it is allegiance based on appreciation of the law-maker's successful fulfillment of a ruler's duties. Authority rests on acceptance, which implicates principles of legitimization. Since the measure of success is the "good (enlightened, benevolent, sage) ruler," the distinction between having power and having authority is clear. That is how I read this passage: "Acting contrary to the hearts of the people, even Pên and Yü cannot make them exert their forces to the utmost ... when the ruler wins the hearts of the people, he elevates himself without being raised."¹⁰⁷

¹⁰⁴ W at 30-34.

¹⁰⁵ L II at 258.

¹⁰⁶ L I at 259.

¹⁰⁷ *Ibid.* at 275.

One tactic for strengthening this interpretation is to marginalize the tendencies in the *Han Feizi* toward minimal instrumentalism. We could note, for example, that punishment and reward are resources for law, not its essence (contrary to Austin), and perhaps most useful in securing Fuller's baselines (the *Han Feizi*'s "rules and yardsticks"), which leave most social ordering to the work of spontaneous forces. In this view, it is not necessary for legal codes to be extremely detailed; indeed, the aspiration to write detailed codes would reflect a fundamental misconception about how social order is achieved. Laws do not (cannot) simply displace the customary expectations and long-standing practices that constitute the normative order of society. Han Fei was attracted to a contrary view because he aimed to destroy the customary privileges of the existing Confucian elite. But the effectiveness of laws in bringing about social change—as Yao, Pên, and Yü would report—is limited. Manipulation from the top cannot be the principal strategy.

Han Fei sometimes seems aware, but does not quite say that subjects, too, not just rulers, must be non-manipulative. Thus, even if he regards people as "naturally" self-interested, he hints that they do not remain so in a well-ordered polity. "Once law and decrees prevail, the way of selfishness collapses. . . ." ¹⁰⁸ This openness to changes in human nature is consistent with the *Han Feizi*'s account of the stages of human history: "Men of high antiquity strove for moral virtue; men of middle times sought out wise schemes; men of today vie to be known for strength and spirit." ¹⁰⁹ These changes were not accidental but depended on circumstances. The work of the benevolent leader who establishes a regime of rule by law is so to shape people's circumstances to produce such a result. "If laws and punishments are justly applied, then tigers will be transformed into men again and revert to their true form." ¹¹⁰

There are of course still other objections to my reading of the *Han Feizi*, but I shall not pursue them here. They set an agenda for further research. Instead I shall close by reiterating that the analysis I have presented does not require, and is not illuminated by, claims of a conceptual or linguistic connection between law and morality. For Austin, it is a logical or conceptual truth that a law can exist without having been made public or written intelligibly. For Fuller, as for Han Fei, it is an empirical truth that systematic failure by a lawmaker to promulgate clear public rules will undermine legal order. And it is a moral truth for Fuller, and arguably for Han Fei, that a lawmaker's engaging in such a practice is a kind of dereliction of duty. In light of the empirical and moral claims, the conceptual claim has little importance. *Morality* is the correct term here because the enterprise of governing by rules embodies a certain respect for persons as moral agents. The internal morality sets constraints on the exercise of power and thereby makes (constrained) power morally acceptable. This happens because the *right relationship* is achieved between lawmaker and subject. So, we ask two questions about governance by rules: "How effective is it?" and "What kind of relationship is established between ruler and ruled?" In practice, the answers are intimately connected.

¹⁰⁸ L II at 235.

¹⁰⁹ W at 100.

¹¹⁰ *Ibid.* at 39-40.

A different kind of challenge to this project is that the specific variant of the rule of law I have allegedly retrieved from the *Han Feizi*—the thin theory—is inadequate, because it fails to encompass a strong commitment to human rights or social justice. However, the debate on thin and thick theories is about the adequacy of the rule of law itself as a political ideal and not something I claim to have addressed. In any case, the point of retrieval is not blind imitation. What I have been searching for is continuity, an account of a fertile past that can be projected coherently into the future.