

## THE DAO OF PRIVACY

*by*

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### 1. INTRODUCTION

In her 2012 book *Configuring the Networked Self*, Julie Cohen examines the “rhetoric of liberty” underlying debates about privacy rights (as well as intellectual property), and concludes that there are “deep inadequacies in the conventional ways of thinking about information rights and architectures.”<sup>1</sup> Privacy is a concept that consistently eludes definition, reliant as it is upon the vagaries of human psychology and assumptions about the nature of selfhood and its relationship with the outside world. As Cohen points out, however, legal analysis of privacy tends to reduce the issue either to economic analysis or a normative theory of rights. Cohen asserts this tendency is deeply rooted, to its detriment, in “the ideological commitments of liberal political theory,” which in turn has its origins in “a tradition of Enlightenment rationalism extending from Kant to Weber to Habermas and Rawls.”<sup>2</sup> This tradition, she says, makes several assumptions about the nature of the self as a legal subject; namely, that:

- (1) the legal subject is a “definitionally autonomous being, possessed of abstract liberty rights that are presumed capable of exercise regardless of the context”;

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<sup>1</sup> Julie Cohen, *Configuring the Networked Self* 4 (2012).

<sup>2</sup> Cohen, *Configuring the Networked Self*, 16.

- (2) the legal subject possesses a “capacity for rational deliberation” which is also “detached from the context”;
- (3) the selfhood possessed by the legal subject is transcendent, immaterial, and “distinct from the body in which the legal subject resides.” In other words, “the liberal self **has** a body, but is not understood as **being** a body.”<sup>3</sup>

These assumptions, in turn, lead to “abstract, quasi-scientific models of legal

reasoning” that formulate privacy rights in ways that are “always too broad or too narrow.”<sup>4</sup> Privacy rights are often reduced to property interests, or worse yet, subordinated to property interests or to other rights such as freedom of expression.

As an antidote to these conventional ways of thinking, Cohen advocates for an embrace of postmodernist thought. Postmodernism is often defined as “a late 20<sup>th</sup> century style and concept... which... has at its heart a general distrust of grand theories and ideologies...”<sup>5</sup> and Cohen’s book uses it to portray a more realistic model of the self as it develops through its interactions with the outside world. Cohen highlights the scholarship of Michel Foucault, Gilles Deleuze and Hans-Georg Gadamer as more adept at expressing the fluid nature by which selfhood develops through interaction or “play” with the surrounding culture. Such notions of self-development are in direct contradiction with the classic Western liberal concept of the self as an “autonomous, solitary, disembodied individual” who needs seclusion from culture in order to become fully realized.

Cohen singles out for particular praise the work of social psychologist Irwin Altman, who conceptualizes privacy as a dynamic process of interpersonal boundary regulation in which openness and closedness are of equal value, one that regulates not only the development of intimate relationships, but one’s evolving sense of identity.<sup>6</sup> In general, Cohen advocates for the abandonment of the “Western, liberal model of solitary subjectivity” in favor of “socially-situated models of the self,” and of abstract rights theories

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<sup>3</sup> Cohen, *Configuring the Networked Self*, 16.

<sup>4</sup> Cohen, *Configuring the Networked Self*, 18.

<sup>5</sup> Oxford English Reference Dictionary (2<sup>nd</sup> Ed. 1996), at 1132

<sup>6</sup> See Irwin Altman and Martin Chemers, *Culture and Environment* 77-79 (1980). Altman’s work is discussed by Cohen at 131, 143, and 146.

in favor of context-specific analysis. Cohen's groundbreaking work has opened many new doors for scholarly inquiry, and my humble goal with this article is to take a few initial steps through but one of them.

Cohen's throwing down of the gauntlet before the Western liberal tradition is an open invitation to a non-Western critique of privacy, although, with the notable exception of Amartya Sen, Cohen herself does not cite to virtually any non-Western scholarship. She is far from alone in this regard. Of the major privacy theorists currently publishing in the United States, few, if any, have ever analyzed, referred to, or even mentioned any works of philosophy, literature, political science, or art of non-Western origin.<sup>7</sup>

To the extent such scholarship reflects underlying assumptions that East Asia has no tradition of privacy, or for that matter, individualism, such perceptions are quite easily refuted. In 2008, Japanese blogger Osamu Higuchi posted a now widely-circulated open letter to Google, in which he articulated his objections to Google Street View using standards of Japanese etiquette that he claimed dated back to the 11<sup>th</sup> century.<sup>8</sup> Neo-Confucian

<sup>7</sup> Those hardy few who venture outside the cozy confines of the Anglo-American tradition seem to become quickly ensconced in the intellectual history of Continental Europe. See, e.g., Jeffrey Rosen, *The Unwanted Gaze: the Destruction of Privacy in America* 214 (2000) (referring to Foucault's discussion of Bentham's Panopticon). Daniel Solove, in *The Digital Person*, explains the importance of finding a proper literary metaphor to conceptualize privacy in the digital age, declares inadequate the current metaphors derived from the works of British author George Orwell—and then immediately turns to the works of Austrian/Czech author Franz Kafka for fresh inspiration. Daniel Solove, *The Digital Person* PAGE (2004). In fairness to Solove, however, I should note that he provided a very insightful analysis of the "Korean dog poop girl." See Daniel Solove, *Of Privacy and Poop: Norm Enforcement Via the Blogosphere*, June 30, 2005, available online at <http://balkin.blogspot.com/2005/06/of-privacy-and-poop-norm-enforcement.html>. Jeffrey Rosen, in *The Unwanted Gaze*, pauses only briefly at the Jewish legal tradition of *hezzek re'iyah*, on his way to the fictional works of Milan Kundera. Jeffrey Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* 18 (2000). *Hezzek re'iyah* means "the injury caused by seeing" or "the injury caused by being seen." Id. Even Amitai Etzioni, who grounds his definition of privacy in a system of thought he calls "new communitarianism," mentions contemporary Asian communitarians only in passing. See Amitai Etzioni, *The Limits of Privacy* 198 (1999), citing Bilahari Kausikan, "Asian versus 'Universal' Human Rights," *The Responsive Community* 7 (1997): 9-21.

<sup>8</sup> Osamu Higuchi, "Letter to the People at Google," August 7, 2008; English translation at <http://globalvoicesonline.org/2008/08/08/japan-letter-to-google-about-street-view/>. Osamu asserted that the part of a Japanese property that typically faces a public road is, unlike an American-style front yard, considered a more intimate part of one's living space, and that the act of "peeping" into such a space, referred to in Japanese as *kaimami* (stealing a peek), has been considered rude since "back in the days of the 'Tale of Genji.'" The *Tale of Genji*, sometimes characterized as "the world's first novel," is attributed to 11<sup>th</sup> century Japanese noblewoman Murasaki Shikibu. Osamu's conceptualization of privacy as a form of "etiquette" comports with Altman's assertion that all cultures have some sort of "compensatory privacy-regulation mechanisms," even if they involve nothing more than "cultural customs and verbal and nonverbal behaviors that people use in a compensatory way." Altman, at 85. Altman quotes anthropologist Gregor as noting that "Information on rules of privacy...may be buried in descriptions of etiquette, or must be inferred from the characteristic house type and settlement pattern." Altman, at 88, citing Gregor, T.A., *Publicity, Privacy and Mehinacu Marriage*. *Ethnology*, 1974, 348 (1974).

scholar Wing-Tsit Chan insisted several decades ago that there is a well-established tradition of privacy in China, particularly with regard to freedom of religious thought, and deemed the Daoist “the most rugged individualist among the Chinese,” a person who “would have as little government as possible.”<sup>9</sup> Perhaps Chan had in mind the story of Sun Pu-erh, a Daoist adept and 12<sup>th</sup> century Chinese noblewoman who wanted to travel alone to the city of Loyang to further her training. Her teacher told her she could not go because she was so beautiful she would surely be raped, whereupon she heated a wok full of cooking oil and threw it on her face to disfigure herself. She then dressed up and acted as a mad beggar woman, which enabled her not only to travel to Loyang alone but reside there for 12 years in solitude in an abandoned house.<sup>10</sup> Clearly, there are East Asians who value their privacy.

As a practical matter, it makes little sense to exclude Asian voices from the global privacy dialogue. As of June 2012, of the 2.4 billion Internet users worldwide, 44.8%, or just over one billion, are in Asia. Of the one billion Asian users, 65%, or 702 million, are in the People’s Republic of China (PRC), Hong Kong, Japan, South Korea, or Taiwan.<sup>11</sup> South Korea has the highest per capita penetration of broadband access of any nation on earth, followed closely by Singapore, Taiwan and Hong Kong.<sup>12</sup> Any privacy standard purporting to be universal or “global” in scope would have to address the needs of this population as well as trans-border transfers of data to and from East Asia.<sup>13</sup> An international instrument that arises from a strictly or predominantly Western dialogue is likely to be viewed not as a “global” privacy standard, but as yet another manifestation of Western cultural imperialism.<sup>14</sup> Alternatively, Western privacy laws could be embraced

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<sup>9</sup> Wing-Tsit Chan, 24-25.

<sup>10</sup> This story comes from the sixteenth century folk novel *The Seven Daoist Masters*, which documents seven disciples of Daoist master Wang Ch’ung-Yang who eventually achieved the Dao and are called the Seven Perfected. Sun Pu-erh is said to have eventually developed a following in Loyang. A work called *The Codified Sayings of the Primordial Goddess Sun Pu-erh*, which contains meditation practices for women, “may be the work of her disciples.” Deborah Sommer, ed., *Chinese Religion: An Anthology of Sources* 205-210 (1995)(contains a translated excerpt from *The Seven Daoist Masters*).

<sup>11</sup> “Internet Usage in Asia,” available at <http://www.internetworldstats.com>. The PRC alone accounts for 360 million Internet users.

<sup>12</sup> Strategy Analytics: U.S. Ranks 20<sup>th</sup> in Global Broadband Household Penetration/South Korea Leads with 95% in 2008, Press Release, June 18, 2009, available at <http://www.strategyanalytics.com/default.aspx?mod=PressReleaseViewer&a0=4748>.

by non-Western countries, but in a manner that runs contrary to their spirit or that leads to unexpected and undesirable results.<sup>15</sup>

Nonetheless, current discussions of so-called “global” privacy standards, which seek to regulate the transborder movement of personal data, often resemble little more than hair-splitting between American and European perspectives over whether the individual right to privacy is primarily a matter of civil liberty or of human dignity, and whether an omnibus data protection law or a sectoral approach to legislation is the better means to protect that right.<sup>16</sup> The most enthusiastic supporters of “global” privacy standards have pursued their agenda through the largely European-dominated International Conference of Data Protection and Privacy Commissioners (ICDP-PC),<sup>17</sup> as well as the Organization for Economic Cooperation and Develop-

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<sup>13</sup> The People’s Republic of China is now the EU’s second largest trading partner behind the U.S., with exports almost tripling between 1999 and 2005. May-Britt Stumbaum, “Engaging China—Uniting Europe? EU Foreign Policy Towards China,” in Nicola Casarini, Costanza Musu, eds., *European Foreign Policy in an Evolving International System* 57 (2007). The EU is also China’s largest trading partner, ahead of both the U.S. and Japan. Nicola Casarini, “The Evolution of the EU-China Relationship: from constructive engagement to strategic partnership,” Occasional Paper No. 64, October 2006, published by the European Union Institute for Security Studies, at 7. “China’s determination to strengthen economic ties and intensify technology transfers with the EU is closely linked with Beijing’s definition of its national core interests. Id. at 13 (emphasis added). According to Stumbaum, the EU’s approach towards China is “biased towards economics,” and because EU member states primarily see China as “a huge business opportunity,” they are highly competitive with one another; this intra-EU competition “prevents better coordination of European efforts and therefore undermines achievement of an influential European Foreign and Security Policy.” Stumbaum, at 58. This includes, apparently, human rights policy. The European Community initially froze its relations with China and imposed sanctions in 1989 following the Tiananmen Square massacre, but under strong pressure from EU member states (France simply disregarded the sanctions, starting in December 1989), the EU gradually lifted all such sanctions and restored EU-China relations in October 1990. Id. at 59. In 1998, EU member states agreed that at the upcoming session of the U.N. Council on Human Rights (UNHRC), the EU would “neither propose, nor endorse” any resolution criticizing China. “This position not to co-sponsor the UNHCR resolution with the U.S. has remained constant in the [EU General Affairs Council] since 1998.” Casarini, at 19. Instead, there is a separate EU-China human rights dialogue, to which the United States is not privy. Id. at 19-20.

All of this would suggest the possibility that the EU’s emphasis on the “fundamental human right to privacy,” as it pertains to transborder transfers of personal data is being much more vigorously enforced vis-à-vis the United States than vis-à-vis China (if it is in fact enforced at all with regard to the latter). I could find no examples of “Safe Harbor”-type frameworks governing the transfer of data between the EU and China, similar to the framework adopted by the United States in response to the 1995 EU Data Directive, which severely restricted transfers of data to third countries that do not meet the EU’s “adequacy” standard of data protection, and which at the time was thought to present a serious barrier to US-EU international trade (for information on the Safe Harbor Framework, see <http://www.export.gov/safeharbor/>). While EU-Chinese trade is still more likely focused on products and not services, it is not at all clear how EU member states are able to carry on so much trade with China consistent with the 1995 EU Data Directive, as it is virtually inconceivable that China’s legal protections for personal data are considered “adequate” by EU standards.

ment (OECD).<sup>18</sup> The Asia-Pacific Economic Cooperation (APEC)<sup>19</sup> developed its own Privacy Framework in 2004 and a system of Cross Border Privacy Rules in 2012, but its standards have been dismissed by Western privacy advocates as an attempt to ‘shift the balance in privacy protection away from individual control towards business interests,’ because of its use of industry self-regulation through contractual relationships with private accountability agents.<sup>20</sup> Some have speculated that the APEC Framework would not exist “without the influence of U.S. business interests,” who were

<sup>14</sup> Inoue Tatsuo, “Liberal Democracy and Asian Orientalism,” in *The East Asian Challenge for Human Rights*, Joanne R. Bauer and Daniel A. Bell, eds., 29-30 (1999). Tatsuo notes that Singapore’s ex-premier, Lee Kuan Yew, and Malaysia’s premier, Mahathir Mohamad, were both strident in their challenge to the “hegemony” of liberal democracy, particularly during the early 1990s. *Id.* at 27 n 2. Onuma Yasuaki explains that [t]he problem...is that most nations with serious violations of human rights and that are thus the targets of criticism were once under colonial rule and the victims of military intervention and economic exploitation by developed countries. Because of this humiliating past, they tend to respond to criticism by the developed countries in an excessively sensitive manner. For those who have experienced colonial rule and interventions under such beautiful slogans as “humanity” and “civilization,” the term “human rights” looks like nothing more than another beautiful slogan by which great powers rationalize their interventionist policies.

Onuma Yasuaki, “Toward an Intercivilizational Approach to Human Rights,” in *The East Asian Challenge for Human Rights*, Joanne R. Bauer and Daniel A. Bell, eds., 105.

<sup>15</sup> For example, Yokko Orito and Kiyoshi Murata assert that the Japanese Act on the Protection of Personal Information (APPI), which started being enforced in 2005 in response to “external pressure from the international community,” is being “overzealously” applied, to the point that the relatives of the victims of the 2005 JR Fukuchiyama train disaster were unable to obtain vital information about their loved ones from local hospitals. Yokko Orito and Kiyoshi Murata, *Rethinking the Concept of Information Privacy: A Japanese Perspective*, Journal of Information, Communication and Ethics in Society, Vol. 6 Issue 3 pp. 233, 245 (2008), available online at [www.kisc.meiji.ac.jp/~ethicj/Orito.pdf](http://www.kisc.meiji.ac.jp/~ethicj/Orito.pdf). Orito and Murata attribute this “excessive rigidity” in enforcement to the fact that most Japanese don’t really understand the Western concept of privacy, and thus conclude that “protecting the right to information privacy is equivalent to abiding by APPI.” *Id.* Of course, this is not a problem unique to Japan; there are similar reports regarding the overzealous enforcement of HIPAA in the United States. See, e.g., Bonnie Darves, “From Minor Annoyances to Treatment Delays, Physicians Feeling Fallout of HIPAA Privacy Law,” *ACP Internist* (2003), available at <http://www.acpinternist.org/archives/2003/09/privacy.htm>.

<sup>16</sup> See James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 *Yale L.J.* 1151 (2004); Paul M. Schwartz, *Preemption and Privacy*, 118 *Yale L.J.* 902 (2009); Patricia L. Bellia, *Federalization in Information Privacy Law*, 118 *Yale L.J.* 868 (2009). All EU member states are bound by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (“Data Protection Directive”). Official Journal L 281, 23/11/1995 P. 0031 – 0050, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML> (last checked Jan. 31, 2011). The Data Protection Directive requires member states to enact an omnibus data protection law and appoint an “independent” data protection or privacy commissioner. Any nation-state either inside or outside the EU that is lacking either a data protection law or an independent commissioner is deemed to have “inadequate” data protection. Personal data may flow freely between EU member states but may not be transferred outside of the EU to any country that does not meet the EU’s “adequacy” standard, including the United States. The Data Protection Directive provides the basic model for most of the proposals for “global privacy standards” arising in European circles.

motivated by “concerns regarding the [European Union’s] approach [to privacy regulation] to other jurisdictions.”<sup>21</sup>

Non-Western philosophy also provides a means of taking Cohen’s critique of Western political liberalism much farther back in time than Kant, to certain metaphysical presumptions that are ultimately Platonic and Aristotelian in origin. It at the metaphysical level, and not in the 18<sup>th</sup> century political works of Kant, where classical East Asian and Western thought diverge, in ways that have ramifications for notions of selfhood, privacy and the underlying “rhetoric of liberty” that Cohen so effectively deconstructs. There is not only a profound difference between classical Eastern and Western thought at the metaphysical level (with many commonalities between Daoism and the postmodernist thought supported by Cohen),<sup>22</sup> but much evidence to suggest also a correlation between East-West metaphysical divergences and other East-West differences in cognitive and behavioral patterns.<sup>23</sup> These differences are not rooted in race or biology; indeed, they are not only socially constructed but highly malleable, with considerable variety within cultures, and exposure to a different culture eventually alters one’s own mode of thinking and even one’s understanding of selfhood.<sup>24</sup> They also vary considerably within cultures.<sup>25</sup> At the same time, these differences are reflected in many forms of East-West interpersonal interaction, from business negotiations, to dispute resolution mechanisms, to the development of international human rights standards, in ways in which those

<sup>17</sup> The ICDPPC, a group whose membership consists solely of data protection and privacy commissioners, hosts an annual conference. Its membership criteria are somewhat obscure, and it was only recently that the U.S. Federal Trade Commission was granted voting member status. The European influence on the conference is evident from the list of participants in the development of a Joint Proposal for Setting International Standards on Privacy and Personal Data Protection, at [http://www.privacyconference2009.org/dpas\\_space/Resolucion/index-iden-idphp.php](http://www.privacyconference2009.org/dpas_space/Resolucion/index-iden-idphp.php). See also generally: <http://www.privacyconference2013.org>.

<sup>18</sup> The OECD is an intergovernmental organization headquartered in Paris, France. It has 30 member countries, 23 of which are European (the other seven include Australia, Canada, Japan, Korea, Mexico, New Zealand, and the United States). See <http://www.oecd.org>. The recently revised OECD Guidelines for the Protection of Privacy and the Transborder Flow of Personal Data can be found at <http://www.oecd.org/sti/ieconomy/privacy.htm>.

<sup>19</sup> APEC has 21 member states, including Australia, Brunei, Canada, Chile, the PRC, Hong Kong, Indonesia, Japan, South Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, the Philippines, Russia, Singapore, Chinese Taipei (Taiwan), Thailand, the United States, and Vietnam. See [http://www.apec.org/apec/member\\_economies.html](http://www.apec.org/apec/member_economies.html). The APEC Cross Border Privacy Rules can be found at <http://www.apec.org/Groups/Committee-on-Trade-and-Investment/Electronic-Commerce-Steering-Group.aspx>.

<sup>20</sup> Nigel Waters, “The APEC Cross Border Privacy Rules: A Civil Society Perspective,” Privacy International, July 3, 2013, at <https://www.privacyinternational.org/blasts/the-apec-cross-border-privacy-rules-system-a-civil-society-perspective>.

<sup>21</sup> Chris Connelly, “Asia-Pacific Region at the Privacy Crossroads (2008), available at <http://www.galexia.com>.

participating in such cross-cultural dialogue may not be fully or consciously aware.<sup>26</sup> Which direction the causal link runs as between philosophy, history, culture, politics and ecology scarcely matters, so long as the examination of one can help illuminate the others.

I therefore hope with this article to instigate a more inclusive and global conversation about privacy, by examining both privacy and privacy rights through the lens of traditional Daoist metaphysics. My decision to focus on Daoism is made for several reasons. First, Daoism has provided the metaphysical foundation for all major schools of Chinese philosophy,<sup>27</sup> as well as for Zen Buddhism. Chinese philosophy, in turn, has been the predominant source of philosophical thought and political theory throughout Northeast

<sup>22</sup> Indeed, many of the postmodernist scholars cited by Cohen likely owe Daoism a certain conceptual debt. Gadamer was heavily influenced by his mentor Martin Heidegger, who repeatedly has been accused of incorporating Chinese and Japanese philosophy into his own work without attribution. See *infra* note 97. Deleuze resorts to the use of Zen koans, along with Lewis Carroll references, as a means of demonstrating the paradoxical and ultimately nonsensical nature of Western logic. Gilles Deleuze, *The Logic of Sense* 136-137; see also 8 (1990 [1969]). Altman, who makes one of the strongest cases yet for privacy as a universal human need, cites to the I Ching and uses a yin-and-yang symbol to diagram the dynamic and opposing interplay between openness and closedness as equally important components of privacy. Irwin Altman and Martin Chemers, *Culture and Environment* 77-78 (1980). Some have speculated that Foucault's criticism of Western morality and technologies of power was fueled by "a preoccupation with Eastern thought, including Buddhism....Schaub suggests that Foucault's constant questioning of limits and his explorations of transgressivity were influenced by an Eastern 'counter-discourse that appropriates Oriental lore in opposition to Western strategies of control'...." Janet Afary and Kevin B. Anderson, *Foucault and the Iranian Revolution: Gender and the Seductions of Islamism* 17 (2005)(citing Ua Liebmann Schaub, "Foucault's Oriental Subtext," *PMLA* 104, no. 3, 306-16, at 306-308 (1989)).

<sup>23</sup> See generally Richard E. Nisbett, *The Geography of Thought: How Asians and Westerners Think Differently...And Why* (2003). These differences even appear to have an effect on the practice of clinical psychology. In Japan, Western-style psychoanalysis is rather unpopular, "despite a large number of existing publications on Freud and his work." Chikako Ozawa-de Silva, *Demystifying Japanese Therapy: An Analysis of Naikan and the Ajase Complex through Buddhist Thought*, *Ethos* Vol. 35, Issue 4, pp. 411-446 (2007), at 419. Instead, a system called Naikan, developed by a Zen Buddhist businessman in the 1940s, is increasingly being viewed as a very effective form of psychotherapy for alcoholism, gambling and drug addictions, eating disorders, anxiety disorders, marital problems, and other psychological issues. *Id.* at 413-14. Unlike Western psychotherapies, which emphasize independence from others, Naikan seeks a reintegration of or "resocialization" of the self, a "recovering of the sense of oneness or unity with the other." *Id.* at 419. Naikan was once considered a therapy that would only work within a Japanese cultural context, but there are now five mental health centers that offer Naikan in Austria, two in Germany, two in Switzerland, one in Spain, one in Canada and one in the United States. *Id.* at 425. In the United States, Asian Americans are believed to underuse available mental health services, in part because they may think "that the problems reflect hereditary flaws that shame the family," and in part because they come from cultures in which mental health is defined not by happiness or the ability to share feelings, but by the ability to work hard, provide for the family, and maintain good interpersonal relationships. Laura Uba, *Asian Americans: Personality Patterns, Identity and Mental Health* 196-201 (1994). Asian Americans also "tend to express their psychological problems in the form of psychosomatic symptoms," and, because many Asian Americans do not make a sharp distinction between mind and body in the way that most Westerners do, they may seek the services of physicians, herbalists, spiritualists, or other providers of holistic medicine instead of seeking out a mental health specialist. Uba, at 201.



Asia (China, Korea and Japan) for thousands of years, in much the same way that ancient Greece provided the foundation for Western philosophy. I make no claim that any particular number modern East Asians consider themselves "Daoist," or for that matter, take an interest in philosophy at all. However, given that Eastern philosophy has covered the same range of issues and with the same degree of sophistication as its Western counterparts, the fact that certain ideas and philosophers rose to prominence in some societies but not others points to deeper cultural and historical differences that are still relevant today.<sup>28</sup> Exploring Daoism is thus, at the very least, a reasonable initial attempt to include in the global privacy dialogue the traditions of the 702 million current Internet users who are Chinese, Japanese or Korean.

Second, to the extent Daoist notions of selfhood track with the postmodernist conception espoused by Cohen, the fact that Daoism has had such a profound influence on East Asian thought renders East Asia somewhat of a living laboratory for Cohen's theories. If a society were to be organized around Cohen's postmodernist ideas of the socially situated and embodied self, free from the ideological commitments of political liberalism fomented by Kant, what would such a society look like? I contend that it would look a great deal like East Asia, with its generally greater tendencies towards collectivistic social organization than is typically seen in the West (particularly the United States). The history and current state of privacy and privacy rights in East Asia are to some degree a litmus test of Cohen's approach to selfhood, a way of assessing if Cohen's view of selfhood, if thoroughly in-

<sup>24</sup> As Nisbett explains with regard to the results of his own research, "My claim is not that the cognitive differences we find in the laboratory cause the differences in attitudes, values, and behaviors, but that the cognitive differences are inseparable from the social and motivational ones. People hold the beliefs they do because of the way they think and they think the way they do because of the nature of the societies they live in." Nisbett, 201. This assertion seems fully consistent with many of the postmodernist assertions about the socially-constructed self to which Cohen has cited.

<sup>25</sup> The studies reported by social psychologist Richard Nisbett indicate, for example, that white American protestants show the most "Western" patterns of behavior and cognition and that Catholics, African-Americans, Latinos and other ethnic minorities, as well as Continental Europeans, "are shifted somewhat toward Eastern patterns." Nisbett, 70-71.

<sup>26</sup> For example, Svensson notes that "although most Chinese have not consciously tried to build upon traditional values, this has not prevented them from describing human rights in terms that carry some echoes of Confucian views on human dignity and self-cultivation." Svensson, at 56.

<sup>27</sup> Hua Hsiao-Peng, at 2.

<sup>28</sup> As Stephen Angle notes, "reviewing the history of Chinese rights discourse helps us to appreciate the wisdom of seeing moral traditions as contingent and rooted in historical particularity." Angle, Stephen C., *Human Rights and Chinese Thought: A Cross-Cultural Inquiry* 19-20 (2002).

ternalized within a society's written and unwritten rules of conduct, results in privacy being more appreciated and valued by that society, or less valued.

As this article discusses, a wave of recent scholarship examining how privacy has been experienced in East Asian cultures makes readily apparent that the universal need for privacy is felt just as acutely in East Asian cultures as in Western cultures, with equally robust traditions and practices. Indeed, there is much in recent East Asian studies to suggest that Cohen's postmodernist notions of selfhood, as exemplified in East Asian culture and society, result in a more nuanced and thorough understanding of privacy. The East Asian experience also validates Altman's conception of privacy as a dynamic process of navigating one's interpersonal boundaries, a universal human need to which virtually anyone of any society can relate regardless of whether the society is more or less collectivistic than any other society. There is, quite simply, no discernible link between a culture's tendency toward individualism or collectivism and the value it places on privacy.

The rub is that, while political liberalism is not necessary for an understanding of privacy, the East Asian experience suggests that the Kantian tradition is somewhat necessary for the rule of law, at least in the traditional Western sense of the term. East Asia has a tradition of privacy, but not privacy *rights*. What is novel to East Asia is Western legalism, i.e., "the view that law and legal institutions can keep order and resolve policy disputes," through a combination of "powerful courts, a dominant class of lawyers, and reliance in legalistic procedures in policymaking bodies."<sup>29</sup> The irony is that, while many in the privacy community will read Cohen's innovative theories as providing a basis on which to build global privacy standards, many current proposed methods for achieving privacy protection through legal instruments are hopelessly Rawlsian.

These conclusions are set forth in the following sections. First, I will provide a brief overview of Daoism and Zen thought, and describe four key aspects of Daoist metaphysics that both differ from the Western metaphysical tradition, and that are to some extent reflected in modern cognitive differences between Westerners and East Asians. Second, I will relate these metaphysical differences to differing East/West notions of selfhood. Fourth, I will examine the nascent interdisciplinary scholarship exploring East Asian

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<sup>29</sup> Eric A. Posner, *The Perils of Global Legalism* 21 (2009).

concepts of privacy that I contend generally vindicates Cohen's approach. Finally, I will discuss how Daoist/Zen metaphysics and East Asian concepts of selfhood affect East Asian views towards Western legalism, and what implications this has for the development of global privacy standards. My conclusion is that the pursuit of global privacy standards is a worthwhile endeavor, but that the proponents of such standards would benefit from taking a few cues from Daoism, particularly the principle of *wu wei*.

## 2. CONTRASTING DAOIST AND WESTERN METAPHYSICS

Daoism is one of three major systems of classical Chinese thought that emerged between the sixth and second centuries, B.C., the other two being Confucianism and Moism.<sup>30</sup> The two major works of classical Daoism include the *Daodejing*, generally attributed to Laozi sometime in the fourth century B.C.; and the *Zhuangzi*, attributed to the author of the same name, sometime in the late fourth century to third century B.C. (The *Yijing*, or "Book of Change," along with the concept of yin and yang, appears to pre-date both Daoism and Confucianism).<sup>31</sup> Both the *Daodejing* and the *Zhuangzi* establish the concept of Dao, a term that "is transcendently used to refer to the inexpressible ontology of the Universe."<sup>32</sup> While the Dao is considered indescribable, Laozi "attempted to present the closest concrete example, by using the analogy of the natural phenomenon of water to manifest Dao's properties."<sup>33</sup>

<sup>30</sup> Chan Wing-Tsit, "The Story of Chinese Philosophy," in *The Chinese Mind: Essentials of Chinese Philosophy and Culture*, Charles A. Moore, ed., 31 (1967). Moism takes its name from Mozi (Mo Tzu), who advocated a sort of "utilitarian humanism" which rejected the ritualism and formalism of Confucianism. *Id.* at 42-45. As historian Fung Yu-Lan points out, from the fifth through the third centuries B.C. there were so many schools of thought that they are sometimes referred to as "the hundred schools." Fung Yu-Lan, *A Short History of Chinese Philosophy* 30 (1948). Fung divides them into six schools, the Yin-Yang Chia or Yin-Yang School, the Ju Chia or School of Literati (known in the West as the Confucianist school), the Mo Chia or Mohist school, the Ming Chia or School of Names, the Fa Chia or Legalist School, and the Dao-De Chia or School of the Way and its Power. *Id.*, 30-31. Moism had largely died out by the end of the Ch'in period. Kung-Chuan Hsiao, *A History of Chinese Political Thought* 428 (1979).

<sup>31</sup> Hua Hsiao-Peng, Chun-Yen Chang and Maggie Maeve MacRaven, *Daoism and Its Implications for Science Education*, paper presented at the Annual Meeting of the National Association for Research and Science Teaching, Boston, Massachusetts, USA, March 28-31, 1999, at 2; accord Herrlee G. Creel, *What is Daoism? And Other Studies in Chinese Cultural History* 1-2 (1970). With regard to the authorship of these documents, Creel points out that "Many scholars have long since agreed that the Chuang Tzu [Zhuangzi] is a compilation of Daoist documents from various hands, and the same is probably true of the [Laozi]." Creel, at 38.

<sup>32</sup> Hua Hsiao-Peng, *supra*, at 3.

<sup>33</sup> Hua Hsiao-Peng, *supra*, at 3.

Despite the predominance of Confucian political thought for the most recent 800 years of Northeast Asian history,<sup>34</sup> Daoist metaphysics continue to exert a heavy influence on East Asian philosophy for several reasons. First, it is virtually uncontested that Zen Buddhism is built upon basic principles of Daoism; Jay Griggs goes so far as to call Zen "Taoism disguised as Buddhism."<sup>35</sup> Second, beginning in the Song Dynasty (960-1279), Chinese philosophers started a movement that is now called "neo-Confucianism,"<sup>36</sup> which incorporated certain aspects of Daoist thought into Confucianist social philosophy. Daoism gave Confucianist social and political theory a metaphysical basis, and in the process became legitimized and institutionalized into both Confucianism and Buddhism.<sup>37</sup> Thus, neo-Confucianism, which came to dominate political thought in the centuries that followed as it spread into Korea and Japan,<sup>38</sup> also spread Daoism.

There are four specific aspects of Daoist metaphysics (which are also reflected in Zen) that differ from Western thought in ways relevant to current thinking about privacy. Each of these aspects was incorporated into neo-Confucianism and continues to manifest itself in East Asian thought today, with a strong correlation between Daoism and modern East-West cognitive differences, as documented by social psychologist Richard Nisbett and his colleagues. It is at this level, the metaphysical level, that the groundwork is laid for an East Asian concept of selfhood that is quite different from the Kantian/Rawlsian version, much closer to Cohen's postmodernist ideal, with ramifications both for privacy and for the rule of law and notions of justice. In exploring these metaphysical differences, it becomes apparent that the Kantian notion of individual identity is the natural by-product of a basic Western metaphysical outlook that simply does not represent a global consensus.

The first aspect of Daoism that differs from the Western tradition concerns the individual's ability to apprehend and express reality, and specifically, to resolve the "opposition and tension between actualities and ideas,

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<sup>34</sup> Wing-Tsit Chan, "The Story of Chinese Philosophy," at 57.

<sup>35</sup> Gregg, xiii; accord Bodde, D. "Harmony and Conflict in Chinese Philosophy," in Wright, A., ed. *Studies in Chinese Thought* 56 (1953).

<sup>36</sup> Wing-Tsit Chan, "The Story of Chinese Philosophy," at 56.

<sup>37</sup> Gregg, 48.

<sup>38</sup> See Palais, James B. *Confucian Statecraft and Korean Institutions: Yu Hyongwon and the Late Choson Dynasty* 5-9 (1996), which dates the neo-Confucian influence in Korea to 1392; and S.N. Eisenstadt, *Japanese Civilization: A Comparative View* (1996), at 194, which notes that neo-Confucianism became widely adopted during the Tokugawa period in Japan, starting in the fifteenth and sixteenth centuries.

immanence and transcendence, individual and universal, [and] temporal and eternal.”<sup>39</sup> Zen scholar Masao Abe calls this the tension between *ji* (the particular) and *ri* (the universal). Zen resolves the tension with the concept of *Mu*, which Abe translates into English as “Emptiness,” for lack of a better term. *Mu* is neither being nor non-being, neither particular nor universal, and neither positive nor negative. Abe finds the origins of *Mu* to be rooted in part in the Daoist concept of the *Dao*.<sup>40</sup>

Comparative scholars tend to pinpoint Plato as representing a major point of departure between the Dao/Zen and Western traditions in this regard. In *The Cratylus*,<sup>41</sup> for example, Plato concludes that absolute reality is not really in flux, for if it were constantly changing, accurate or “absolute” knowledge would be impossible. The *Zuangzi* takes the same problem and reaches precisely the opposite result: that, because the universe is constantly changing, absolute knowledge is impossible.<sup>42</sup>

Plato ultimately comes to the conclusion, known as his Theory of Forms or Theory of Ideas and explained famously through the Allegory of the Cave,<sup>43</sup> that the material world known to us through sensation is not the true reality, as it is constantly changing, but that the Ideas or Forms which are the original prototype for these ephemeral material phenomena are true being, and the only true objects of study that can provide genuine knowledge.<sup>44</sup> In doing so, according to Masao Abe, Plato elevates the status of “being” over “non-being” and positivity over negativity, and never adopts such a concept as *Dao* or *Mu*.<sup>45</sup>

<sup>39</sup> Abe, Masao, “Zen and Western Thought,” in *Zen and Western Thought*, William R. Fleur, ed. (1985), at 84.

<sup>40</sup> See Abe, Masao, “Zen and Western Thought,” 124-126. Abe notes that the Upanishadic Philosophy of ancient India also had a theory of oneness related to the oneness of Brahman and *atman*, “the seer who cannot be seen, the knower who cannot be known.” Id. at 125.

<sup>41</sup> *The Cratylus*, available on line at <http://classics.mit.edu/Plato/cratylus.html>.

<sup>42</sup> Herrlee G. Creel, “The Great Clod,” in *What is Daoism? And Other Studies in Chinese Cultural History* (1970), 26-27.

<sup>43</sup> Plato, *the Republic*, Book VII, in *Plato Part I, The Republic, Part II, The Statements*, translated by George Burges, MA (1901), at 233 et seq.

<sup>44</sup> See Abe, at 122.

<sup>45</sup> Abe notes that Daoism parts ways with Confucianism in this regard:

In the East, people who have identified themselves with the Confucian tradition, have emphasized human ethics and the intrinsic goodness of the human. Having thus understood positivity and negativity in a way not unlike Western humanism, their view of what it means to be genuinely human has a common element with certain traditions in the West. Daoists and Buddhists, however, have maintained that the idea of nothingness is ultimate, and in this sense they have no Western counterpart.

Aristotle, Kant and many other Western philosophers have quibbled with the Theory of the Forms, but a constant that runs throughout most of Western philosophy is the notion that the use of human intellect, when freed from bodily sensation, can not only apprehend ultimate reality but can also articulate it, and that this is, in fact, the purpose of philosophy. This tendency manifests itself in the 20<sup>th</sup> century work of John Rawls, whose scholarship on justice and fairness promotes what Amartya Sen calls “transcendental institutionalism,” a philosophical inquiry “aimed at identifying the nature of ‘the just,’” and seeking “ideals of perfection” for a theoretically perfectly just society.<sup>46</sup>

The perfect comprehension of absolute reality through abstract modeling is not the purpose of Daoism, which often views intellectualism as a hindrance. Like traditional Yoga (by which I mean, the Yoga that translates from the Sanskrit as “union” and that is generally geared towards higher aspirations than the imparting of a few good hamstring stretches), Daoism seeks the resolution of the subject-object, active-passive paradox that was invented by self-conscious deliberation. It puts together the wholeness that personal willfulness took apart. In simplest terms this is done by entering the dichotomy and becoming the empty stillness in the center of the paradox.<sup>47</sup>

Indeed, historian Fung Yu-Lan asserts that the purpose of Chinese philosophy in general, at least with regard to metaphysics, is to satisfy one’s

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Abe, “Non-Being and Mu—the Metaphysical Nature of Negativity in the East and the West,” in *Zen and Western Thought*, at 124. Abe further explains:

in the West such positive principles as being, life, and the god have ontological priority over negative principles such as non-being, death, and evil. In this sense, negative principles are always apprehended as something secondary. By contrast, in the East, especially in Taoism and Buddhism, negative principles are not secondary but co-equal to the positive principles and even may be said to be primary and central. This is so in the sense that the realization of negativity is crucial to reveal ultimate Reality, and in the sense that the nameless Tao or Emptiness is realized as the root-source of both positive and negative principles in their relative sense.

Id., 133.

<sup>46</sup> Amartya Sen, *The Idea of Justice* 6 (2009).

<sup>47</sup> Gregg, 6.

"craving for what is beyond the present actual world," a craving that in the West is more likely addressed by religion.<sup>48</sup> He adds,

its function is not the increase of positive knowledge (by positive knowledge I mean information regarding matters of fact), but the elevation of the mind—a reaching out for what is beyond the present actual world, and for the values that are higher than the moral ones...in the tradition of Chinese philosophy there is a distinction between working on learning and working on Tao (the way). The purpose of the former is what I call the increase of positive knowledge, that of the latter is the elevation of the mind. Philosophy belongs in the latter category. The view that the function of philosophy, especially metaphysics, is not the increase of positive knowledge, is expounded by the Viennese school in contemporary Western philosophy, though from a different angle and for a different purpose.<sup>49</sup>

This is not to say that Daoism is wholly unconcerned with "knowledge," but the type of truth that is sought in Daoism is not believed to be expressible in words. While "[o]ntologically speaking, Taoism would assume a final reality exists and this reality is named as 'Tao,'" this reality "cannot be defined directly by human language."<sup>50</sup> The Daodejing begins by asserting that "the Dao that can be told of is not the eternal Dao," and legends abound of practitioners who demonstrated their achievement of the Dao by simply falling silent or smiling. As the Daoist saying goes, "He who speaks does not know, and he who knows does not speak." Anyone who litigates in U.S. courts on a regular basis or watches cable television news can attest that this is quite a foreign concept in the West.

A second major East-West divergence concerns the Western preoccupation with objects and the separation of form from content. A constant throughout virtually the entire history of Western thought is that absolute knowledge is possible with regard to understanding the independent nature and properties of individual objects. It is evident in Plato's preoccupation with the eternal quality of "Forms," in Aristotle's *Categories*,<sup>51</sup> and throughout Kant's *Critique of Pure Reason*.<sup>52</sup> The tendency seen in the more

<sup>48</sup> Fung Yu-Lan, *A Short History of Chinese Philosophy* 4 (1948, 1976).

<sup>49</sup> Fung Yu-Lan, 5.

<sup>50</sup> Hua Hsiao-Peng, at 3.

<sup>51</sup> Aristotle, *Categories*, written 350 B.C.E., translated by E.M. Edghill, available on line at <http://classics.mit.edu/Aristotle/categories.html>.

<sup>52</sup> See, e.g., this quote from Immanuel Kant, *A Critique of Pure Reason* (Aesthetic), *Transcendental Aesthetic*, available online at <http://www.hkbu.edu.hk/~ppp/cpr/aesth.html>:

recent works of Rawls, Adam Smith and Jurgen Habermas, extolling the virtues of absolute objectivity among society's decision-makers as a key component of ideal justice (Rawls describes the ideal decision-maker as operating from behind a "veil of ignorance"),<sup>53</sup> reflects this general mindset. The emphasis on objects is reflected in Western society even in the manner in which Americans teach vocabulary to their children, which results in American children learning nouns at a much faster pace than verbs as compared to their East Asian counterparts, who acquire nouns and verbs at a more balanced rate.<sup>54</sup>

The Eastern tradition tends more toward contextualization and holistic analysis.<sup>55</sup> Buddhism adheres to the theory of *pratitya-samutpada*, or "dependent co-origination," which holds that "anything experienced by us arises through dependence on something else. It involve[s] a denial of the concept of substantiality; i.e., the concept that anything has a true substantial nature through which it can exist independently."<sup>56</sup> This same basic concept is expressed in the *Daodejing*, which states that "Being is the product of Nonbeing;"<sup>57</sup> i.e., one cannot exist without the other.

As noted above, these philosophical differences are reflected in actual cognitive differences between modern East Asians and Westerners. For example, in an experiment carried out by cognitive psychologists Mutsumi Imae and Dedre Gentner, American and Japanese subjects, varying in age

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In whatever manner and by whatever means a mode of knowledge may relate to objects, intuition is that through which it is in immediate relation to them, and to which all thought as a means is directed. But intuition takes place only in so far as the object is given to us. This again is only possible, to man at least, in so far as the mind is affected in a certain way. The capacity (receptivity) for receiving representations through the mode in which we are affected by objects, is entitled sensibility. Objects are given to us by means of sensibility, and it alone yields us intuitions; they are thought through the understanding, and from the understanding arise concepts. But all thought must, directly or indirectly, by way of certain characters relate ultimately to intuitions, and therefore, with us, to sensibility, because in no other way can an object be given to us.

<sup>53</sup> Amartya Sen, *The Idea of Justice*, 6, 31-55 (2009).

<sup>54</sup> See Nisbett, 148-52. He notes, "Western parents are noun-obsessed, pointing objects out to their children, naming them, and telling them about their attributes. Strange as it may seem to Westerners, Asian's don't seem to regard object naming as part of the job description for a parent." *Id.* at 150. In a study observing how mothers engage with their infants, "American mothers used twice as many object labels as Japanese mothers ("piggie," "doggie"), and Japanese mothers engaged in twice as many social routines of teaching politeness norms (empathy and greetings, for example)." *Id.*

<sup>55</sup> This is not to say that there is no history of analytic thought on par with Plato's Theory of the Forms or Aristotle's categories. As noted above, the ancient Chinese School of Names explored similar ideas, but appears not to have gained much traction in its surrounding culture. See Fung Yu-Lan, at 80-92.

<sup>56</sup> Masao Abe, "Zen, Buddhism and Western Thought," in *Zen and Western Thought*, 92-93.

<sup>57</sup> See discussion in Masao Abe, "Zen, Buddhism and Western Thought," 124-26



from two years old to adulthood, were shown a pyramid made of cork and two other objects, one of which was a white plastic pyramid, the other of which had an entirely different shape made of cork. When asked to identify the “match” for the cork pyramid, the Americans would tend to match it to the white plastic pyramid, while the Japanese would match it to the object made of cork.<sup>58</sup>

Taken at face value, the Imai and Gentner results indicate that Westerners and Asians literally see different worlds. Like ancient Greek philosophers, modern Westerners see a world of objects—discrete and unconnected things. Like ancient Chinese philosophers, modern Asians are inclined to see a world of substances—continuous masses of matter. The Westerner sees an abstract statue where the Asian sees a piece of marble; the Westerner sees a wall where the Asian sees concrete. There is much other evidence—of a historical, anecdotal, and systematic scientific nature—indicating that Westerners have an analytic view focusing on salient objects and their attributes, whereas Easterners have a holistic view focusing on continuities in substances and relationships in the environment.<sup>59</sup>

This tendency towards holistic thinking dovetails with the Daoist belief in the inexpressibility of reality. Nisbett points out that

[a]nalytic thought, which dissects the world into a limited number of discrete objects having particular attributes that can be categorized in clear ways, lends itself to being captured in language. Holistic thought, which responds to a much wider array of objects and their relations, and which makes fewer sharp distinctions among attributes or categories, is less well suited to linguistic representation.”<sup>60</sup>

This may go a long way towards explaining the relative silence of East Asian students in many Western college classrooms.<sup>61</sup> It may also explain why the *Daodejing* is written in such sparse, suggestive language. As Fung Yu-Lan explains,

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<sup>58</sup> Nisbett, 81, citing Imai, M. and Gentner, D. (1994) “A cross-linguistic study of early word meaning: Universal ontology and linguistic influence.” *Cognition* 62, 169-200.

<sup>59</sup> Nisbett, 82.

<sup>60</sup> Nisbett, 211.

epistemological problems arise only when a demarcation between the subject and the object is emphasized...This...explains why the language used by Chinese philosophy is suggestive but not articulate. It is not articulate, because it does not represent concepts in any deductive reasoning. The philosopher only tells us what he sees. And because of this, what he tells is rich in content, though terse in words.<sup>62</sup>

The third East-West divergence concerns conceptualizations of change, the passage of time and progress. The classic Confucian views on time and progress are linear in nature, similar to that found in the West. The Daoist view is more cyclical and sees the world in constant change. The Confucian and Daoist found some reconciliation in the *Yijing*, which conceives of time as cyclic but not in the sense of a mere repetition of opposites represented in a closed circle. The essence of time is change, but the universe being a continuous whole, nothing is absolutely different and separated from everything else: "Everything is constantly changing into something else, and therefore all things are one."<sup>63</sup>

This cosmic view depends greatly on the Daoist law of reversal, the notion that "when one thing reaches its extreme, it reverts to the opposite."<sup>64</sup> This is quite different from the straight linear view of time and progress that predominates in Western thinking, and it is once again reflected in modern cognitive differences. In one study, for example, two groups of students, Americans and Chinese, were shown graphs of an economic trend (such as rising stock prices), and then asked what they thought would happen in the future. The Americans were much more likely than the Chinese to predict that the trend would continue.<sup>65</sup> Nisbett notes,

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<sup>61</sup> See, e.g., Nisbett, 210-11 (describing the experiences of an exasperated Korean graduate student studying psychology at Stanford and being "told repeatedly that failure to speak up could be taken as an indication of failure to understand the material," whereas she felt strongly that she would not benefit from speaking because the Asian way of understanding the material was "not verbal"); Yang Hwei-Jen, "Communication Patterns of Individualistic and Collective Cultures: A Value Based Comparison (Nov 1993), presented at the Annual Meeting of the Speech Communication Association (79<sup>th</sup>, Miami Beach, FL, Nov. 18-21 (1993)(describing the Daoist "distrust toward eloquence" and Zen's opposition to both words and "then to the intellect which deals exclusively in words.") Available online at <http://www.eric.ed.gov>.

<sup>62</sup> Fung Yu-Lan, 25.

<sup>63</sup> Dy.

<sup>64</sup> Dy.

<sup>65</sup> Nisbett, 104-06.

[a]ncient Greek philosophers were powerfully inclined to believe that things don't change much or, if they really are changing, future change will continue in the same direction, or at the same rate, as current change. And the same is true for ordinary modern Westerners. But like ancient Taoists and Confucian philosophers, ordinary modern Asians believe that things are constantly changing; and movement in a particular direction, far from indicating future changes in the same direction, may be a sign that events are about to reverse direction.<sup>66</sup>

The fourth and final major East-West divergence concerns logic and is probably the hardest difference for Westerners to understand or cope with. Here, Aristotle generally represents the major point of departure. In the *Prior Analytics*, written around 350 B.C., Aristotle pioneered both the syllogism (a form of deductive argument consisting of a major and minor premise and a conclusion), and the practice of abstracting objects or concepts by representing them with single letters (e.g., "If all A is B, and all B is C, then all A is C").<sup>67</sup> He also propounded the law of identity (A is A), the law of contradiction (A is not non-A), and the law of the excluded middle (A cannot be A and not-A). Despite the fact that Aristotelian logic is now rarely taught in formal logic classes, it "has so deeply imbued [modern Western] habits of thought that it is felt to be 'natural' and self-evident, while on the other hand the statement that X is A and not A seems to be nonsensical."<sup>68</sup> Heraclitus of Ephesus, a contemporary of Socrates and founder of the philosophical school called Stoicism, took a quite different approach to both the law of identity and notions of change; he was known for pithy, Laozi-like sayings such as "the road up and the road down is one and the same," and "you could not step twice into the same rivers."<sup>69</sup> However, among his Greek contemporaries his "puzzling" remarks only earned him the moniker "Heraclitus the Obscure," and later, "the weeping philosopher."<sup>70</sup>

In ancient China, by contrast, it was the logicians who were left weeping in obscurity. There were a few minor schools of thought that dabbled in

<sup>66</sup> Nisbett, 103.

<sup>67</sup> Aristotle, *Prior Analytics*, Book 1, written 350 B.C.E., translated by A.J. Jenkinson, available online at <http://classics.mit.edu/Aristotle/prior.html>.

<sup>68</sup> Erich Fromm, *The Art of Loving* 68 (1956).

<sup>69</sup> Bartlett's *Familiar Quotations* (16th Ed. 1992), at 62.

<sup>70</sup> Seneca, Lucius Annaeus; John M. Cooper & J.F. Procopé (translators) (1995). *Moral and Political Essays*.

both logic and abstraction--the Mozi, the foundational work of the Mohist school of thought, contains a few chapters on logic and mathematics<sup>71</sup>--but these efforts were "of little influence in the East."<sup>72</sup> By the second century A.D., such Aristotelian endeavors had been largely written off by mainstream Chinese thinkers as nothing more than "minute examinations of trifling points in complicated and elaborate statements,"<sup>73</sup> just as Heraclitus' work had been marginalized in the West. As late as the first millennium A.D., there were essentially no traces of a logical approach to understanding the world. Instead there was a trust in sense impressions and common sense. And there was never, even among the Logicians and Mohists, a willingness to accept arguments that flew in the face of experience—unlike the Greeks, who sometimes seemed quite delighted to deny the evidence of the senses.<sup>74</sup>

Formal logic is certainly essential to mathematical reasoning, and there is no indication that modern East Asians lack familiarity or face particular struggles with either. The difference between the modern East Asian and Western approaches to logic has to do with its applicability to philosophy, theology and everyday social settings.

In the West, logic has been "central [to philosophy] and the thread of transmission has never snapped..."<sup>75</sup> Western philosophers and theologians (several of whom were also prominent mathematicians) have repeatedly advanced, for example, formal logical arguments as "proof" of either the existence or non-existence of God.<sup>76</sup> It is hardly surprising that the quintessential expression of Enlightenment-era individualism, *Cogito ergo sum*, was coined by Rene Descartes, also a mathematician, and also intended literally as a logical "proof" of autonomous human consciousness. One would be hard pressed to find East Asian philosophers engaged in such exercises.

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<sup>71</sup> See Fung Yu-Lan, 118-19.

<sup>72</sup> Nisbett, 166. The two movements that explored both logical inference and the sort of abstract thinking used in geometry were the Ming Chia (School of Names) and the Mohists. *Id.*; accord Fung Yu-Lan

<sup>73</sup> *Ssu-ma T'an, Historical Records*, Ch. 120 (quoted in Fung Yu-Lan, 81), referring to the Ming Chia or School of Names.

<sup>74</sup> Nisbett, 167.

<sup>75</sup> Graham, A.C. *Disputers of the Tao*, 6 (1989), quoted in Nisbett, at 165.

<sup>76</sup> See, e.g., the Cosmological Argument presented by Thomas Aquinas, or the Ontological Argument presented by Anselm of Canterbury. The latter argument was also presented by Rene Descartes in his Fifth Meditation. Twentieth Century philosopher Bertrand Russell, who is also considered one of the founders of modern logic, logically "disproved" the existence of God in his 1927 essay *Why I Am Not a Christian*.

Nisbett has found modern Americans to be particularly prone to what he calls a “phobia” of logical contradiction in social settings that “may sometimes cause them to become more extreme in their judgments under conditions in which the evidence indicates they should become less extreme.”<sup>77</sup> This “phobia,” he says, “seems related to the long-standing Western inclination to search for principles that will justify beliefs. If I can show that some principle is guiding my beliefs, then I can demonstrate that, any appearances to the contrary notwithstanding, my beliefs are consistent with one another.”<sup>78</sup> Easterners, by contrast, “are not concerned with contradiction in the same way that Westerners are. They have a greater preference for compromise solutions and for holistic arguments and they are more willing to endorse both of two apparently contradictory arguments. When asked to justify their choices, they seem to move to a compromise, Middle Way stance instead of referring to a dominating principle.”<sup>79</sup> In some East Asian cultures, “[t]o argue with logical consistency...may not only be resented but also be regarded as immature.”<sup>80</sup> In repeated studies, Nisbett and his colleagues have found that “East Asians...are more likely to set logic aside in favor of typicality and plausibility of conclusions” and “are also more likely to set logic aside in favor of the desirability of conclusions.”<sup>81</sup>

In place of the Western tendency to believe that any given reality must be either A or not-A regardless of the context, Daoism employs a form of reasoning that is referred to as either paradoxical logic or dialecticism, and is reminiscent of both Heraclitus and Hegel. Dialecticism “focuses on contradictions and how to resolve them or transcend them or find the truth in both.”<sup>82</sup> In this tradition, there is no necessary incompatibility between the belief that A is the case and the belief that not-A is the case. On the contrary, in the spirit of the Tao or yin-yang principle, A can actually imply that not-A is also the case, or at any rate soon will be the case. Dialectical thought is in some ways the opposite of logical thought. It seeks not to decontextualize but to see things in their appropriate contexts: Events do not occur in isolation from other events, but are always embedded in a meaningful whole in

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<sup>77</sup> Nisbett, 185.

<sup>78</sup> Nisbett, 183.

<sup>79</sup> Nisbett, 184.

<sup>80</sup> Nobuhiro Nagashima, “A reversed world: Or is it?” in R. Horton and R. Finnegan, eds., *Modes of Thought* 96 (1973).

<sup>81</sup> Nisbett, 171.

<sup>82</sup> Nisbett, 174.

which the elements are constantly changing and rearranging themselves. To think about an object or event in isolation and apply abstract rules to it is to invite extreme and mistaken conclusions. It is the Middle Way that is the goal of reasoning.<sup>83</sup>

Many Daoist sayings and Zen koans are paradoxical comments, non sequiturs or “apparently nonsensical remarks” designed for the precise purpose of providing a “jolt” to the mind that frees it to comprehend a truth “outside the pale of ordinary logic...”<sup>84</sup> The Daodejing declares that “[g]ravity is the root of lightness; stillness the ruler of movement.”<sup>85</sup> A common literary device found throughout the Zhuangzi is described by one of its Western translators as a “pseudological discussion or debate that starts out sounding completely rational and sober, and ends by reducing language to a gibbering inanity.”<sup>86</sup>

As to why these differences exist between East and West, what appears to be the prevailing theory is rooted in geography and ecology. The ancient Chinese were mostly landlocked and devoted to settled agriculture, which is highly dependent upon the cycles of nature. The ancient Greeks “lived in a maritime country and maintained their prosperity through commerce.”<sup>87</sup> Greek merchants lived in towns, while Chinese farmers and their landlords lived with their families, staying in the same location for generations. The Greek formed democratic city-states, while the Chinese formed a “family state.”<sup>88</sup> The Greeks had to engage in trade and other interactions with strangers a wide variety of foreign cultures, whereas the Chinese needed primarily to cooperate with one another. These differences may well have affected how each culture came to process information, perceive reality, and resolve conflict, though this theory leaves many questions unanswered.

The Western tendency towards confident rationalism reached its apex, not with Kant, but with Descartes, Cartesian dualism, 17<sup>th</sup> century scientists like Newton, and the German philosopher Gottfried Wilhelm Leibniz, yet

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<sup>83</sup> Nisbett, 27.

<sup>84</sup> Burton Watson, trans., *Chuang Tzu: Basic Writings* 1 (1964), quoted in Griggs, 24.

<sup>85</sup> Laozi. *Dao De Jing: The Book of the Way*. Berkeley: University of California Press, c2001 2001

<sup>86</sup> Burton Watson, trans., quoted in Griggs, at 24.

<sup>87</sup> Fung Yu-Lan, 25.

<sup>88</sup> Fung Yu-Lan, 25-26; accord Nisbett, 34-35. S. Hayashi “has claimed that rice agriculture has affected Japanese characteristics; growing rice requires a collective decision-making process, making the group more valuable than the individual.” Yohko Orito and Kiyoshi Murata, *Privacy Protection in Japan: Cultural Influence on the Universal Value*, supra note [??], citing Hayashi, S. *Management and culture, Chuko-Shinsho* (in Japanese), 84-87 (1984).

another mathematician “who tried to resolve the most profound moral problems by the use of his reason.”<sup>89</sup> Kant was brought up in the Leibniz tradition, but was, according to Kant himself, “awakened from my dogmatic slumber” by the publication by David Hume in 1752 of *Enquiry Concerning Human Understanding*.<sup>90</sup> Hume, following somewhat in the empiricist tradition of John Locke, asserted that “reason...can never pretend to any other office than to serve and obey the passions.” He believed that the scope of human knowledge was limited to sense impressions and the images formed in the mind as their result. He also asserted that we have no knowledge or experience of cause and effect; we merely assume that what happened in the past will continue to happen.<sup>91</sup> Kant realized the threat that Hume’s philosophy posed to Enlightenment rationalism and to the pursuit of knowledge generally, and his goal in publishing *A Critique of Pure Reason* in 1781 was to “rescue science from Humean skepticism.”<sup>92</sup> In order to do so, he created two sharply different categories. The realm of science, which is useful knowledge, deals with the phenomenal world, the world of appearances. The realm of value, of moral and esthetic experience, is intuitive and deals with the noumenal world....One of his achievements was to riddle the proofs of God’s existence derived from the facts of physical nature....Kant devastated all these venerable “proofs” with such effectiveness that few have dared to revive them since. The proofs appropriate to science have nothing to do with God, Kant believed. For they can never give us values.<sup>93</sup>

In so doing, Kant preserved the essence of the Western metaphysical tradition with regard to the physical sciences, while carving out a “noumenal realm” in which he conceded doubt that we could ever know it at all, except to “glimpse it fleetingly” in “moments of moral or esthetic experience.”<sup>94</sup> Fung Yu-Lan sees this as a great step forward in Western philosophy in that Kant adopted the “negative method of metaphysics” typified by Daoism and Zen. Fung asserts that “[t]he business of metaphysics is not to say something about the unknowable, but only to say something about the fact

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<sup>89</sup> Roland M. Stromberg, *An Intellectual History of Modern Europe* 120 (1975).

<sup>90</sup> Stromberg, 160, 215.

<sup>91</sup> Stromberg, 160-161.

<sup>92</sup> Stromberg, 216.

<sup>93</sup> Stromberg, 217-18.

<sup>94</sup> Stromberg, 218.

that the unknowable is unknowable. When one knows that the unknowable is unknowable, one does know, after all, something about it.”<sup>95</sup>

It was not until the 1920s, with the publication of Martin Heidegger’s *Being and Time* and Alfred North Whitehead’s *Process and Reality*, that any of these underlying assumptions of Western philosophy were directly questioned, in ways that led to Western postmodernism. This occurred only after the 1907 publication of a popular work by Okakura Kakuzo entitled *The Book of Tea*, in which the philosophy of Zhuangzi was introduced to a large Western audience. The similarities between Whitehead’s philosophy and Mahayana Buddhism are widely recognized,<sup>96</sup> and Whitehead himself said that his philosophy was similar to those in the Eastern tradition. Heidegger has been directly accused of incorporating Daoism and Kakuzo’s work directly into his own without proper attribution.<sup>97</sup> Neither Whitehead nor Heidegger credited the classical Eastern works from which they may well have drawn their inspiration; instead, interestingly enough, they both cited frequently to Heraclitus of Ephesus in support of their assertions.<sup>98</sup>

Meanwhile, the bulk of Western rationalism was largely preserved in Western legal thought, including the line of thought running from Kant to Rawls. Neither Kant nor any of his philosophical progeny have departed from the Western obsession with independent objects, mind-body dualism or the linear notion of time. It was on the Kantian foundation that Rawls constructed his own theories of justice and fairness. Moreover, as will be seen in the next section, it is also on this Western rationalist foundation that Kant, Habermas and Rawls rest their assumptions about the autonomous self as a legal subject, assumptions that, as Cohen points out, are crucial to understanding the limitations of the prevalent Western concept of privacy.

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<sup>95</sup> Fung Yu-Lan, 341.

<sup>96</sup> See, e.g., Masao Abe, “Mahayana Buddhism and Western Thought,” in *Zen and Western Thought* 152-170;

<sup>97</sup> See, e.g., Reinhard May, *Heidegger’s Hidden Sources: East-Asian Influences on His Work* (2001). Graham Parkes asked Heidegger’s protégé, Gadamer, why Heidegger would only have cited to Daoism twice in over 50 years’ worth of publications if he was so enthusiastic about it. Gadamer replied, “You have to understand that a scholar of the generation to which Heidegger belongs would be very reluctant to say anything in print about a philosophy if he were unable to read and understand the relevant texts in the original language.” Graham Parkes, *Heidegger and Asian Thought* 7 (YEAR).

<sup>98</sup> J.J. Clarke, *Oriental Enlightenment: The Encounter Between Asian and Western Thought* 118 (1997)



### 3. DAOIST AND ZEN CONCEPTS OF SELFHOOD

The Daoist and Zen concepts of selfhood flow naturally from the same basic outlook, social and/or historical conditions that produced Daoist metaphysics in several respects. First, in both Daoism and Zen, selfhood, like the Dao, is seen as something that can neither be purposefully sought nor expressed in words. In 1974, Zen scholar Masao Abe participated on a discussion panel at a seminar on Zen Buddhism for Christian missionaries in Kyoto.<sup>99</sup> A member of the audience, identified in the transcript as “Father De Weirtdt,” asked Abe whether he thought that the self was “nothing,” and if so, “what are we doing here in this world, both in the ontological and actual spheres of life?”<sup>100</sup> Abe’s response and the following interchange illustrates just how far Daoist and Zen thought is from the world of cogito ergo sum:

Prof. Abe: My counterquestion is this: do you think that the human self is something?

Father De Weirtdt: I think so, Professor, I think so!

Prof. Abe: What is it who thinks of yourself as something?

Father De Weirtdt: My consciousness of being something, a somebody. And I believe that people around me are real people, that this house is a real thing, that the universe is a real thing. I am conscious of that in my mind.

Prof. Abe: What is it that has such a consciousness?

Father De Weirtdt: The human being.

Prof. Abe: Human being in general?

Father De Weirtdt: Each human being! It is difficult to say if it is up here in the head or in the heart—I don’t know. But as a human being I have that consciousness.

Prof. Abe: Who is talking about “I” as a human being—what has that consciousness?

Father De Weirtdt: Many people are talking about themselves. Each individual being talks about himself and others.

Prof. Abe: What is it that is talking about yourself and other people in that way?

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<sup>99</sup> Masao Abe, *Zen and Western Thought*, Chapter 9 n. 1, at 287.

<sup>100</sup> Masao Abe, “Self Awakening and Faith—Zen and Christianity,” in *Zen and Western Thought* 194 (1985).

Father De Weirtdt: My own consciousness of myself and of the relationship to others.

Prof. Abe: May I ask you again, what is it that is talking about your own consciousness of yourself?

Father De Weirtdt: I would say that it is my personality.

Prof. Abe: I am afraid, Father De Weirtdt, you always objectify yourself when you talk about yourself or your own consciousness. Whenever I ask you "What is it that is so talking?" you say that it is your consciousness, it is your own consciousness of yourself, your personality or so on. Thus you objectify your own consciousness, your own existence, your own self, and in that way you yourself move back step by step. When you answered my questions in that way, you were always regressing, trying to present something more inner including your "self." However, your true "Self" can never be presented in that way because it is always standing "behind" your presentation, "behind" your regression...

In our thinking, we objectify everything including ourself and, in objectifying, we always regress...In such an endless regression we always miss our true Self, our true Subjectivity. In this case, therefore, our understanding of the self and its relation to everything in the world does not indicate the totality. It becomes partial and does not reach the ultimate Reality. Through our thinking we can understand the self and its relation to the world only so far as they are objectified. In order to reach ultimate Reality or the total understanding of Reality, we must go beyond thinking and objectification.<sup>101</sup>

Because Daoism posits that all things emerged from the same Dao, "it becomes very difficult to mark a dividing line between 'things' and 'the self,'" <sup>102</sup> just as Daoism in general takes a holistic view of reality. To the extent one draws distinctions between "I" and "not-I," this is a tendency one seeks to overcome through practice. Indeed, Zen appears to view ego as a burden peculiar to humanity; writes Masao Abe,

To be human means to be an ego-self; to be an ego-self means to be cut off from both one's self and one's world; and to be cut off from one's self and one's world means to be in constant anxiety. This is the human predicament.

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<sup>101</sup> Masao Abe, "Self Awakening and Faith—Zen and Christianity," 195-96.

<sup>102</sup> Kung-chuan Hsiao, *A History of Chinese Political Thought*, Vol. I 302 (1979)(F.W. Mote, trans.).

The ego-self, split at the root into subject and object, is forever dangling over a bottomless abyss, unable to gain any footing.<sup>103</sup>

Daoism, similar to modern Western phenomenology, also recognizes no division between the body and the soul or spirit.<sup>104</sup> The self is entirely phenomenal, which also means, when coupled with the Daoist and Buddhist belief that there is nothing with a permanent and true nature, that there is no true permanent “selfhood.”<sup>105</sup> In traditional Japan, the principle of *Musi* or “denial of self” (derived from the word *Mu*, for “Nothingness,” and “*si*” meaning a sort of surface subjectivity) “seems to have been one of the most important values not only for critics and authors, but also for the majority of Japanese people.”<sup>106</sup> In Japanese culture, “it is often said that *Musi* ... is the best—but ‘hidden’ and difficult—way to learn fine arts, martial arts, and so on. It is believed that if someone stops relying on superficial subjectivity or will, he can rely on these underlying, more powerful sources of energy ... *Mu* is an ontological way to get the sources of hidden power or the ‘true’ subjectivity.”<sup>107</sup>

Where Daoism in its more religious forms speaks of immortality or the pursuit thereof, what is usually meant is not the “disembodied survival of the individual person”<sup>108</sup> but a long (sometimes unusually long) and happy natural life.

Indeed, the very term “immortality,” carrying as it does in the West the notion of disembodied survival of the individual person, may fail to do justice to the Daoist goal of ultimate absorption in the *dao*, for strictly speaking only the *dao* itself is immortal, all individuals being subject ultimately to change and transformation.... Daoism offers us a radically transformative paradigm which sees change as an ultimate property of nature, and as such stands in sharp contrast to typical yearnings in the Western religious and philosophical traditions for ultimate permanence and stasis.<sup>109</sup>

These concepts are quite far from the Kant/Weber/Habermas/Rawls vision of the autonomous self that Cohen finds so problematic for privacy theory. It should also be noted in this regard that Kant and Weber were both

<sup>103</sup> Masao Abe, “Zen and its Elucidation” in *Zen and Western Thought* 6-7 (1985).

<sup>104</sup> J.J. Clarke, 119.

<sup>105</sup> Masao Abe, “Zen, Buddhism and Western Thought,” in *Zen and Western Thought*, 92-93.

<sup>106</sup> Makoto Nakada and Takanori Tamura, *Japanese Conceptions of Privacy: An Intercultural Perspective*, *Ethics and Information Technology* (2005) 7:27-36, 31.

<sup>107</sup> Nakada and Tamura, 29.

<sup>108</sup> J.J. Clarke, 120.

<sup>109</sup> J.J. Clarke, 120.

devout Christians. Habermas is an atheist, as was Rawls (who asserted that he lost his Christian faith upon learning of the horrors of the Holocaust); nonetheless, all four of these philosophers were raised in the Christian faith, and in a culture in which the prevailing belief is that the most valuable aspect of one's personhood is the soul, a non-corporeal entity whose perfection and immortality is achieved through its abstraction from bodily existence. To the extent this religious grounding provided unspoken assumptions about personhood that informed their notions of an autonomous legal subject, these are assumptions that the Daoist tradition does not share.

It is true that classical Daoist texts can occasionally seem consistent with the Kant/Weber/Habermas/Rawls view of the self, with its promotion of rugged individualism, a sort of extreme libertarianism, and the practice of spending extended periods seeking enlightenment in Thoreau-like solitude.<sup>110</sup> However, these aspects of classical Daoism reflect its political status in ancient China, and arose in part from a dichotomy the Zhuangzi created between the "natural" and the "artificial" that was later rejected. To classical Daoists, everything that was the product of man was artificial, "external," and hence, to be avoided. This led Daoists to a political theory regarded as "the most thoroughgoing of all individualisms, ancient and modern, Chinese and foreign ... and also the most extreme of libertarian philosophies, ancient and modern, Chinese and foreign."<sup>111</sup> For the individual, classical Daoism recommended a life of simplicity, limited desires, and wu-wei, a term that is generally translated into English as "non-action" but actually comes closer to meaning "acting without artificiality and arbitrariness."<sup>112</sup> For governments and rulers, Zhuangzi took wu-wei a step further and introduced the concept of tsai yu, or "letting people alone."<sup>113</sup> Like Confucianism, Daoism posits that "the ideal state is one which has a sage as its head," but unlike Confucianism, asserts that the duty of the sage ruler "is not to do things, but rather to undo or not to do at all."<sup>114</sup> Julia Ching finds Daoism "evocative of the 'hippie' movement of the 1960s";<sup>115</sup> a political theory such as Zhuangzi's renders freedom "not a means for guaranteeing the

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<sup>110</sup> Kung-chuan Hsiao describes the *Daodejing* and *Zhuangzi* as "the most systematic example of egocentric thought of the pre-Ch'in era. Kung-chuan Hsiao, 283.

<sup>111</sup> Kung-chuan Hsiao, 316.

<sup>112</sup> Fung Yu-Lan, 100-101.

<sup>113</sup> Kung-chuan Hsiao, 309.

<sup>114</sup> Fung Yu-Lan, 102.

<sup>115</sup> Julie Ching, *Chinese Religions* 99 (1993), quoted in J.J. Clarke, 35.

growth of knowledge and human capacities, but ... in itself the ultimate goal.”<sup>116</sup> Zhuangzi’s political theories “display unconditional confidence in the individual, but they hold unconditional contempt for organization. For no matter whether they are good or bad, institutions and systems can contribute nothing to the individual’s freedom.”<sup>117</sup>

This most extreme version of Daoist political theory never developed into a real political movement, as anarchists tend to have a conceptual difficulty with serving in positions of power within governments.<sup>118</sup> After the collapse of the Ch’in Dynasty in 206 B.C., which for a time discredited both the Confucian and Legalist scholars with whom it had been associated, Daoism was for a short period adopted as the predominant political theory. But in order to actually hold political positions, Daoists “could no longer rely purely on the doctrine of taking no action. Consequently, they borrowed heavily from other schools to meet the demands introduced by these changed circumstances.”<sup>119</sup>

In the third century A.D., a famous Commentary on the Zhuangzi further synthesized Daoist metaphysics with Confucian political theory. It largely eliminated the distinction classical Daoism had drawn between the world of “Nature” and the “artificial” world of man, asserting that social phenomena were as much a part of “Nature” as anything else.<sup>120</sup> This set the stage for a wholesale integration of Daoist metaphysics and Confucianist views on social ordering and governance into neo-Confucianism, as described above, and has resulted in a modern East Asian view of the self that is seamlessly integrated not only into a holistic view of nature, but also of society; in short, a “socially-situated self.”

Indeed, the Western-style self is virtually a figment of the imagination to the East Asian. As philosopher Hu Shih writes, “In the Confucian human-centered philosophy man cannot exist alone; all action must be in the

<sup>116</sup> Kung-chuan Hsiao, 318.

<sup>117</sup> Kung-chuan Hsiao, 317.

<sup>118</sup> As Kung-chuan Hsiao explains, “For an individualism to develop into a revolutionary democratic thought system, it must possess an attitude not only positive with regard to the individual, but also not negative with regard to society and government. That against which it is in protest cannot be all institutions as such, but only those institutions at the time confronting it which fail to satisfy people.” Kung-chuan Hsiao, 316.

<sup>119</sup> Kung-chuan Hsiao, 550.

<sup>120</sup> Fung Yu-Lan, quoting the Commentary as saying, “There is nothing which is not natural... Peace or disorder, success or failure...are all the product of nature, not of man.” Fung Yu-Lan, at 223. The Commentary on the Zhuangzi might have been written by either Kuo Hsiang or Hsian Hsiu, or may be a synthesis of the work of both scholars. Fung Yu-Lan, at 220.

form of interaction between man and man.” The person always exists within settings—in particular situations where there are particular people with whom one has relationships of a particular kind—and the notion that there can be attributes or actions that are not conditioned on social circumstances is alien to the Asian mentality.... To the Westerner, it makes sense to speak of a person as having attributes that are independent of circumstances or particular personal relations. This self—this bounded, impermeable free agent—can move from group to group and setting to setting without significant alteration. But for the Easterner (and for many other peoples to one degree or another), the person is connected, fluid, and conditional. As philosopher Donald Munro put it, East Asians understand themselves “in terms of their relation to the whole, such as the family, society, Tao Principle, or Pure Consciousness.” The person participates in a set of relationships that make it possible to act and purely independent behavior is usually not possible or really even desirable.<sup>121</sup>

A somewhat morbid illustration of this difference in East-West thinking can be found in media responses to individuals who go on homicidal rampages. In 1991, a Chinese physics student at the University of Michigan shot his faculty adviser, several bystanders, and then himself after failing to obtain an academic job.<sup>122</sup> Two of Richard Nisbett’s students, Michael Moris and Kaiping Peng, noticed that in the Western press, the murderer was described as having psychological problems (i.e., had a “very bad temper” or was “darkly disturbed”), whereas the Chinese media focused on the student’s social problems and broader social context (using phrases like “did not get along well with his adviser,” “rivalry with slain student,” “isolation from Chinese community,” and “availability of guns in the United States”).<sup>123</sup> Moris and Peng began studying press coverage of similar incidents, involving both Asian and American perpetrators, and a pattern emerged: The Western coverage would always focus on whether certain innate, static psychological attributes had caused the murderer to act as he did, while the Eastern coverage would always describe situational factors.<sup>124</sup> Makoto Nakada, who teaches Information and Media Studies in Tsukuba, Japan, observed a similar phenomenon among his students in response to a 2004 homicide in nearby Tutiura, in which a 28-year-old killed his parents

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<sup>121</sup> Nisbett, 50-51.

<sup>122</sup> Nisbett, 111.

<sup>123</sup> Nisbett, 111-12.

and oldest sister. A leading newspaper published extensive and intimate details about the entire family, its interrelationships, and even a map of the household in which the murders had taken place, which became the topic of several class discussions. Most of Nakada's students insisted that "this kind of information is very important in order to know the 'truth' of this case. Some students explicitly said that this kind of news report provides them with frameworks through which they can share certain aspects of the meaning of this tragedy."<sup>125</sup> Just as East Asians tend to understand objects holistically and primarily in relation to other objects, it seems that they also seek to understand human motivation and behavior primarily in relation to other humans.

A more commonplace illustration of the socially-situated self can be found in how East Asians and Americans describe themselves. Japanese people surveyed by Nisbett's colleagues in one study found it difficult to describe themselves without specifying a particular context (at work, with friends, etc.), and were much more likely than Americans to make reference to social roles or to other people (e.g., "I am John's friend" or "I cook dinner with my sister"). By contrast, the Americans surveyed had no difficulty describing themselves generally, but tended to be "stumped" when asked who they are in a specific context, insisting simply, "I am what I am."<sup>126</sup> Another study indicates that Americans are much more likely than Koreans to believe that "someone's personality is something about them that they can't change very much"; according to the study, Koreans find personalities to be more malleable.<sup>127</sup> Notes Nisbett, "[t]his is consistent with the long Western tradition of regarding the world as being largely static and the long Eastern tradition of viewing the world as constantly changing."<sup>128</sup> It is also consist-

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<sup>124</sup> Nisbett, 112-13. Moris and Peng then gathered a group of Chinese and American students and asked them questions about such murders; specifically, whether they thought that the murders might not have occurred if circumstances had been different (for example, "if Lu had received a job" or "if McIlvane had many friends and relatives in Royal Oak"). The Chinese were much more likely than the Americans to respond that the murders would not have occurred, whereas the Americans, "because of their conviction that it was the murderer's long-established dispositions that were the key to his rampage, felt it was likely that the killings would have occurred regardless of whether circumstances had been different." *Id.*, 113-14.

<sup>125</sup> Makoto Nakada and Takanori Tamura, *Japanese Conceptions of Privacy: An Intercultural Perspective*, *Ethics and Information Technology* (2005) 7:27-36, 28.

<sup>126</sup> Nisbett, 53.

<sup>127</sup> Nisbett, 120.

<sup>128</sup> Nisbett, 120.

ent with the Kant/Weber/Habermas/Rawls view of the autonomous and largely static self that informs Western privacy theory.

The Daoist and Zen concepts of self, as reflected in modern Asian self-concepts, also influence feelings of both control and the necessity of control. East Asians, as compared to their Western counterparts, feel both less in control and less distressed about their inability to control situations; they tend to cope with situations by adjusting themselves to them. For Americans of European descent, the feeling of being in control of one's own life tends to be "strongly associated with mental health," to a much greater degree than for either Asians or Asian Americans.<sup>129</sup> This may well explain why "notice and choice" has been such a prominent staple of privacy regulation in the United States, despite copious evidence that Americans are not actually reading privacy notices and don't really have effective choices with regard to privacy preferences.<sup>130</sup> Americans are so convinced that the world is composed of discrete objects that **can** be controlled by individuals that they are more susceptible than East Asians to being satisfied with an "illusion of control," a term defined by social psychologist Ellen Langer as "an expectation that personal success is greater than the objective probability would warrant."<sup>131</sup> In one of her studies that illustrates this principle,

Langer approached people in an office building and asked whether they would like to buy a lottery ticket for a dollar. If the person said yes, she then either handed the person a lottery ticket or fanned out a bunch of them and asked the person to choose one. Two weeks later, she approached all those who had bought a ticket, saying that lots of people wanted to buy a ticket, but there were none left. Would the person be willing to sell the ticket back, and if so, what would the price be? On average, the people she had handed the ticket to were willing to sell the ticket back for about two dollars, but the people who had been allowed to choose their tickets held out for almost nine!<sup>132</sup>

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<sup>129</sup> Nisbett, 97, citing Sastry J. and Ross, C.E. (1998) "Asian ethnicity and the sense of personal control," *Social Psychology Quarterly* 61, 101-120.

<sup>130</sup> U.S. Federal Trade Commission, *Protecting Consumer Privacy in An Era of Rapid Change: A Proposed Framework for Businesses and Policymakers*, December 2010, available online at <http://www.ftc.gov/os/2010/12/101201privacyreport.pdf>, at iii and 26-28.

<sup>131</sup> Nisbett, 100, citing Langer, Ellen (1975) "The Illusion of Control," *Journal of Personality and Social Psychology* 56, 239-244.

<sup>132</sup> Nisbett, 100-101, citing Langer, E. (1975) "The Illusion of Control," *Journal of Personality and Social Psychology* 56, 239-244.



Despite all these differences, however, the notion of the individual self is not alien to East Asian culture (setting aside for the time being the modern influence of Western individualistic culture, which will be discussed in further detail below). As Hazel Rose Markus and Shinobu Kitayama point out, there is an element of selfishness in interdependence:

[I]n many cases, responsive and cooperative actions are exercised only when there is a reasonable assurance of the “good-intentions” of others, namely their commitment to engage in reciprocal interaction and mutual support. Clearly, interdependent selves do not attend to the needs, desires, and goals of all others. Attention to others is not indiscriminate; it is highly selective and will be most characteristic of relationships with “in-group” members. These are others with whom one shares a common fate, such as family members or members of the same lasting social group, such as the work group. Out-group members are typically treated quite differently and are unlikely to experience either the advantages or disadvantages of interdependence.<sup>133</sup>

Moreover, they add,

[a]n interdependent view of self does not result in a merging of self and other, nor does it imply that one must always be in the company of others to function effectively, or that people do not have a sense of themselves as agents who are the origins of their own actions. On the contrary, it takes a high degree of self-control and agency to effectively adjust oneself to various interpersonal contingencies.<sup>134</sup>

To truly understand the Daoist and Zen concept of the self requires dispensing with Western concepts of logic, and specifically, the Aristotelian syllogism that insists on everything being “A” or “not-A.” Daoism teaches, in typical paradoxical fashion, that one must lose oneself in order to find it.<sup>135</sup> Both the interaction between Masao Abe and Father de Weiridt discussed above and the Japanese practice of *Musi* indicate that what is sought in Zen

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<sup>133</sup> Hazel Rose Markus and Shinobu Kitayama, *Culture and the Self: Implications for Cognition, Emotion, and Motivation*, *Psychological Review* 1991, Vol. 98, No. 2, 224-253, at 229.

<sup>134</sup> Markus and Kitayama, at 228.

<sup>135</sup> Wing-Tsit Chan, 24.

is an abandonment of a superficial or surface “subjectivity” in favor of “the real Subjectivity,” in which one’s interconnectedness and independence are both realized simultaneously. This also appears to be the goal of Naikan, the form of psychotherapy developed in Japan, which, unlike Western therapies, emphasizes recognizing one’s relatedness and interdependence. According to anthropologist Chikao Ozawa-de Silva, who underwent a week of Naikan therapy, Naikan

does not negate individuality and psychological independence (in the sense of being one’s own person); it may actually be a precondition for it ... According to Buddhist thought, what makes something a distinct individual entity with its own characteristics is precisely its web of relationships with other entities; what makes a person who he or she is, is all the relationships he or she has with other persons and phenomena. Remove all those relationships—to nature, to one’s parents, friends, workplace, family, hobbies—and what person is left? Put them back, and one has a completely distinctive individual. Thus there is no conflict between individuality and interdependence.<sup>136</sup>

Or, as the Chinese Zen master Ch’ing yuan Wei-hsin explains it:

Thirty years ago, before I began the study of Zen, I said, “Mountains are mountains, waters are waters.”

After I got an insight into the truth of Zen through the instruction of a good master, I said, “Mountains are not mountains, waters are not waters.”

But now, having attained the abode of final rest [that is, Awakening], I say, “Mountains are really mountains, waters are really waters.”<sup>137</sup>

#### **4. EAST ASIAN CONCEPTS OF PRIVACY**

A Western reader might be poised to conclude at this point that a society in which Daoist, Zen and/or neo-Confucian notions of selfhood predominate would have a more collectivistic social structure, which in turn would result in generally less appreciation for privacy than is typically found in most

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<sup>136</sup> Chikao Ozawa-de Silva, 438-39.

<sup>137</sup> Quoted in Masao Abe, “Zen and its Elucidation,” in *Zen and Western Thought*, 4.

Western cultures. This would have serious ramifications for Julie Cohen's scholarship, since an embrace of the postmodernist scholarship she endorses, with its very similar conceptualizations of the self as interdependent and socially-situated, would presumably lead to a world with far less privacy. Fortunately for Cohen's scholarship, however, the studies of East Asian concepts of privacy undertaken thus far show nothing of the sort. While such studies are still very much in their infancy, there are no indications either that there is a consistent East Asian view of privacy, or that the degree of collectivism present in a society has any bearing upon the value it places on privacy. Despite numerous protestations from Western and Eastern scholars alike that "East Asia has no tradition of privacy," or "they don't even have a word for privacy,"<sup>138</sup> East Asian concepts of privacy easily rival their Western counterparts in historical depth, cultural breadth, nuance and psychological complexity.<sup>139</sup>

<sup>138</sup> See, e.g., Ruth Benedict, *The Chrysanthemum and the Sword* 288 (1946) ("Because there is little privacy in a Japanese community, too, it is no fantasy that 'the world' knows practically everything he does and can reject him if it disapproves"); Margaret Mead, *Coming of Age in Samoa* (1928), p. 145, 216 (suggesting that, because Samoan culture had no sense of privacy, there is "no sense of shame" and "none of the facts of sex...are regarded as unfit for children"). The notion that China, Japan or other East Asian countries don't have a "word" for privacy other than neologisms adopted from Western terms is a bit of a red herring. As Bonnie McDougall points out,

Although most anthropologists have now rejected it, the Sapir-Whorf hypothesis that thought is shaped by language also lingers in Western thinking about non-Western societies. According to this hypothesis, the concept of privacy in one language community will be uniform within and unique to that community; and since the terminology for privacy issues differs considerably from one language to another, cross-cultural studies compare different entities. This argument tends to be used selectively. Very few English speakers, for instance, would want to claim that in European countries with privacy terminologies that differ from English (e.g., the Netherlands, Sweden and Finland) there are radically different concepts of privacy, but it is quite commonly claimed (in the extreme form of this argument) that the Chinese language lacks an equivalent vocabulary for privacy and that therefore Chinese people do not have a sense of privacy.

Bonnie S. McDougall, "Particulars and Universals: Studies on Chinese Privacy," in Bonnie S. McDougall and Anders Hansson, eds., *Chinese Concepts of Privacy* 4 (2002).

Moreover, while it is true that Japan has adopted the paronym *puraihashii* for "privacy," this must be considered against the backdrop of a longstanding Japanese tendency to "import[] external concepts into law and social appearances while either using them as a mask for continued traditional practices or misunderstanding their original conception and producing a new Japanese custom with the same name as the external concept but a different meaning..." Andrew A. Adams, Kiyoshi Murata, and Yohko Orito, "The Japanese Sense of Information Privacy," *AI & Soc.* (2009) 24:327-341, at 327.

<sup>139</sup> Accord Andrew A. Adams, Kiyoshi Murata, and Yohko Orito, "The Japanese Sense of Information Privacy," *AI & Soc.* (2009) 24:327-341, at 330 ("...rather than being the poor cousin of the Western sense of information privacy, Japanese social interactions and linguistics demonstrate a nuanced awareness of flexing boundaries of information flow...").

For the Western reader to contemplate this counter-intuitive proposition requires dispensing once and for all with the notion that privacy is an expression of the individual's need for separation from others. In this regard, it is helpful to review the privacy definition developed by Irwin Altman, one of two privacy scholars (the other being philosopher Julie Inness) whose work has been found generally the most applicable and helpful for cross-cultural analysis by China scholars. As noted in the Introduction, Altman regards privacy, not as a form of enforced isolation, but as "an interpersonal boundary regulation process by which a person or group regulates interaction with others" and which "permits people to be open to others on some occasions and to be closed off from interaction at other times."<sup>140</sup> This is a departure from traditional Western ways of thinking about privacy in that it emphasizes that "privacy means changing boundary control, not merely 'keeping out' others or shutting off stimulation."<sup>141</sup> Altman portrays the dialectical interaction of openness and closedness with a yin and yang symbol, and he asserts that the idea of changing accessibility draws upon the ancient Chinese notion of yin/yang as "seeming opposites" that "lend meaning to each other," like "harmony and conflict, opposite processes [that] provide a unity to social relationships," and whose balance is "in a constant state of change" (a concept that he draws from the *Yijing*).<sup>142</sup>

A notion of privacy that emphasizes its fluid and inter-relational aspects can just as easily be recognized and appreciated within a culture that is focused on interpersonal harmony, as by those who are primarily concerned with individual autonomy and political liberty. Indeed, it is inconceivable that any culture that values modesty, etiquette and "saving face"—cultural attributes strongly associated with East Asia—would not also value the mechanisms that allow its members to regulate their relative openness and closedness with one another. Anthropologist Stephen Feuchtwang suggests that privacy operates as a facet of "the taboo on incest," insofar as it regulates what types of intimacy and disclosure are allowable between generations and siblings.<sup>143</sup> Privacy can be regarded as a duty just as easily as it can be considered a "right"; the wearing of the hijab or other forms of veiling in contemporary Arab and South Asian cultures, for example, seems to

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<sup>140</sup> Irwin Altman and Martin Chemers, eds., *Culture and Environment* 75 (1980).

<sup>141</sup> Altman, 78.

<sup>142</sup> Altman, 78.

<sup>143</sup> Stephan Feuchtwang, "Reflections on Privacy in China," 218.

embody both privileges and obligations simultaneously.<sup>144</sup> Refraining in certain social settings from revealing too much, either visually or verbally, can be grounded in either self-respect or respect for others.<sup>145</sup> It can be oppressive, or liberating.

Altman's work also prompts a greater open-mindedness towards the variety of mechanisms that are available to regulate interpersonal boundaries. Feuchtwang refers to privacy boundaries as "thresholds" and notes that they can be "made out of convention, ritual, rhetoric and time as well as doors and windows."<sup>146</sup> Altman describes a variety of verbal, nonverbal and "paraverbal" behaviors that can be used to communicate our desire for openness or closedness, such as "use of a 'cool' or 'warm' way of speaking... nodding or heads, smiling, opening our arms...[or] fidgeting with our clothing...and looking at our watches."<sup>147</sup> He also notes that, in some cultures in which dwellings offer very little physical privacy, as in Javanese culture, where walls are thin and "friends and acquaintances...wander freely in and out of houses," politeness, soft-spokenness and elaborate decorum

<sup>144</sup> Some contemporary Muslim women report that going outside without a head covering would make them feel "completely naked." Quoted in John R. Bowen, *Why the French Don't Like Headscarves* 77 (2007). Fadwa El Guindi asserts that "veiling in contemporary Arab culture is largely about identity, largely about privacy—of space and body." Fadwa El Guindi, *Veil: Modesty, Privacy and Resistance* xvii (1999). She asserts that those who see veiling as oppressive are viewing the practice through a Christian lens, noting that, while "[b]oth Islam and Christianity provide moral systems to restrain improper and disorderly behaviour that threatens the sociomoral order," "Christianity chose the path of desexualizing the worldly environment; Islam of regulating the social order while accepting its sexualized environment." *Id.*, 31. She further argues that veiling and other mechanisms designed to create a separate sphere for women constitutes a "source of support and even power," *Id.*, at 32 (quoting Makhoul, 1979:25), and that in general, the Islamic construction of space "enables women and men to enjoy privacy and be in public." *Id.* at 77-78. In several passages reminiscent of Bentham's Panopticon, El Guindi illustrates how the transparency of facial veils enables veiled women to see without being seen, which is ultimately empowering. *Id.* at 94, 102.

<sup>145</sup> Accord El Guindi, who quotes a man from the Awlad 'Ali culture of North Africa as stating that women tahashham [veil] "from respect for their tribe, their husband, and themselves." El Guindi, 90. More familiar to Americans is the expression "TMI" (too much information), an expression indicating that someone has revealed information about himself or herself that makes the recipient of the information uncomfortable. See, e.g., "Dealbreaker: the TMI Guy," Nov. 17, 2009, available online at <http://www.thefrisky.com/post/246-dealbreaker-the-tmi-guy/>; Elizabeth Bernstein, "How Facebook Ruins Friendships," *Wall Street Journal*, Aug. 25, 2009, available at <http://online.wsj.com/article/SB10001424052970204660604574370450465849142.html>. As noted above, Markus and Kitayama observe that, in interdependent cultures, "it takes a high degree of self-control and agency to effectively adjust oneself to various interpersonal contingencies." This "[a]lgentic exercise of control" is "directed primarily to the inside and to those inner attributes, such as desires, personal goals, and private emotions, that can disturb the harmonious equilibrium of interpersonal transaction." Markus and Kitayama, 228. This would seem to make privacy all the more important for an individual's proper functioning in an interdependent society.

<sup>146</sup> Feuchtwang, "Reflections on Privacy in China," 229.

<sup>147</sup> Altman, 79.

form a different sort of barrier.<sup>148</sup> In cultures in which facial veiling is prevalent and serves as a “literal boundary-regulation mechanism,” such as in the Tuareg culture of Mali, Niger, and the Sudan (in which men veil as well as women), “the veil does not remain in one position but is ever so slightly raised and lowered to fit various social relationships,” and people are “very sensitive to slight eye movements and to shifts of body posture as interaction progresses.”<sup>149</sup>

Julie Inness also differentiates between the functions, contents, mechanisms, and values of privacy, a framework that has generally been found helpful by China scholars in engaging in a cross-cultural analysis of privacy.<sup>150</sup> What such scholars have found is that while “[c]ross-cultural comparisons between instances and mechanisms of privacy (for example, the space observed by implicit consent between people in a queue) focus on differences in expression or awareness of privacy...more comprehensive discussions of privacy in terms of functions and values tend to reveal shared ground.”<sup>151</sup> Moreover, privacy can be equally valued in two different cultures, but for entirely different reasons; “in assessing how a culture (or groups within a culture) values privacy, we might ask whether it is because it promotes desired ends, such as intimate relations, self-respect and freedom from the scrutiny of other, or as an end in itself. It may well be the case that privacy is valued for other reasons by contemporary Chinese urbanites.”<sup>152</sup>

Inness also, like Altman, views privacy more as a matter of control than of separation, her primary objection to the separation-based account of privacy being that “it portrays privacy as essentially individualistic.” Specifically, she finds preposterous the implication that “only the individual who is fully separated from others with respect to these aspects of her life will have full privacy.”<sup>153</sup> Such a view “makes it impossible to experience shared pri-

<sup>148</sup> Altman, 88-89 (citing Geertz).

<sup>149</sup> Altman, 92. Sharma has made similar observations of women in Ghanyari, in North India, “who know how to draw the veil across the face in a dozen different ways to denote a dozen different degrees of respect or disrespect. I have seen the veil used insolently.” U. Sharma, “Women and their Affines: The Veil as a Symbol of Separation,” *Man* 13: 218-33, at 224 (1978)(quoted in El Guindi, at 98).

<sup>150</sup> See, e.g., discussion of Inness in Robin Visser, “Privacy and its Ill Effects in Post-Mao Urban Fiction,” 173.

<sup>151</sup> McDougall, “Particulars and Universals,” 6 (citing Irwin Altman, “Privacy as an Interpersonal Boundary Process,” in *Human Ethology*, ed. Mario von Cranach et al. (Cambridge: Cambridge University Press), pp. 95-132, esp. p. 131).

<sup>152</sup> Robin Visser, “Privacy and its Ill Effects in Post-Mao Urban Fiction,” 173.

<sup>153</sup> Julie Inness, *Privacy, Intimacy and Isolation* 45 (1992).

vacy" and leads to the conclusion that "I lose privacy when I willingly invite a close friend into my home, when I initiate mutual sexual activity with another, and when I allow a trusted friend to read a personal letter."<sup>154</sup>

Indeed, once the gauzy and distorting veil of Western individualism is lifted, privacy can be revealed in all of its universalist glory as an essential aspect of the human condition. The inscriptions on bronze vessels, called *jinwen*, dating from the pre-Ch'in era (16<sup>th</sup> century to 481 B.C.) indicate that they were used in conjunction with ancestral worship and were considered to be "private belongings" of a particular clan. They were "concealed from free public access."<sup>155</sup> This indicates a Chinese differentiation between *gong* and *si* (terms that are analogous to the English terms "public" and "private" in several respects)<sup>156</sup> comparable to the classic Aristotelian distinction between the public sphere of politics, or *polis*, and the domestic sphere, or *oikos*. "Contrary to the widespread assumption among sinologists that there is a 'seamless unity' between public and private life in traditional China (in distinction to a supposed separation of public and private in Western society), it is more appropriate to speak of public and private in both Chinese and Western societies as placed on a spectrum with a large

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<sup>154</sup> Inness, 45-46.

<sup>155</sup> Khayutina, "Studying the Private Sphere," 86-91.

<sup>156</sup> "Like the English 'public/private' dichotomy, 'the *gong/si* dichotomy can map onto either government/ non-government spheres, or to the sphere of the collective (including government and also most cooperative forms) and the sphere of the family and individual." Zar-row, "The Origins of Modern Chinese Concepts of Privacy," 132. According to Khayutina, the word *si* could have had any of the following meanings in ancient Chinese:

1. Private, particular, as opposed to *gong* [communal](identified with the interests of the state and society as a whole). A servant or an official of someone other than the head of the state.
2. Selfish, partial. In one's own interests. Without authorization.
3. Secret, clandestine, private. Illicit, especially used of bribery and smuggling. Without witness.
4. Private, particular, proper. Property of private persons or groups (*jia si*)[familial property]. Siren [members of a clan, relatives, friends; servants [p. 84], belonged to families of great seigneurs. Brother-in-law.]
5. To love or favour [someone] particularly. To consider [something] as one's own.
6. One's everyday clothes.
7. In one's mind.
8. To urinate.
9. Genitals.

Khayutina, "Studying the Private Sphere," 83-84. The Japanese language appears to use the terms *ohtake* and *watakusi* in ways roughly analogous to *gong* and *si*. See Makoto Nakada and Takanori Tamura, *Japanese Conceptions of Privacy: An Intercultural Perspective*, *Ethics and Information Technology* (2005) 7:27-36, at 32-33.

shared area poorly defined by fuzzy borders.”<sup>157</sup> And at least as early as the Tang dynasty (618-907 A.D.), literature and poetry celebrated withdrawal from public office and contentment in private or family life, suggesting “an early date for male consciousness as an emotional or interior need.”<sup>158</sup>

Certainly, the concept of secrecy is well established in China and Japan.<sup>159</sup> To be sure, there is a distinction to be drawn between secrecy and privacy. Carol Warren and Barbara Lislett describe privacy as “consensual,” and intended to protect behavior that is “socially legitimated and seen as nonthreatening to others,” whereas secrecy is nonconsensual; “the behaviours it protects are seen as illegitimate and as involving the interests of the excluded.”<sup>160</sup> However, in some instances, privacy and secrecy protect the same sorts of knowledge as a form of “guarded but known treasure,” the existence of which may be acknowledged, but the open revelation of which would “put this kind of knowledge in danger of dilution and defilement.”<sup>161</sup> This may be particularly the case with regard to the knowledge base of Daoists and Chinese doctors whose textual knowledge is only a guide to practice, the real knowledge base being “an embodied and hidden knowledge, revealed in the performance of treatment or of ritual that is mysteriously effective.”<sup>162</sup> Writes Feuchtwang,

The location of the Daoist’s effect is not just a body. It is also a place, the altar space for ascetic disciplines...At this spot the Daoist adjusts and harmonises the relation of that place, through his body, to the inner order of the

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<sup>157</sup> Bonnie McDougall, “Privacy in Modern China,” *History Compass* 2 (2004) AS 097, 1-8, at n.16.

<sup>158</sup> McDougall, “Particulars and Universals,” 16.

<sup>159</sup> The August Moon festival, during which round, palm-sized “moon cakes” are traditionally served, became instrumental to the overthrow of the Mongolian Yuan Dynasty in 1368, when the planners of the revolution distributed secret messages to their cohorts that were baked inside the cakes. (many exist online). In Japanese the word for secret is himitsu. “Kigyoo himitsu are what Japanese companies strive to keep from one another – ‘industrial secrets.’” Masahiko Mizutani, James Dorsey, and James H. Moore, “The internet and Japanese conception of privacy,” *Ethics and Information Technology* 6: 121-128, at 122 (2004).

<sup>160</sup> Carol Warren and Barbara Laslett, “Privacy and Secrecy: A Conceptual Comparison,” in *Secrecy: A Cross-Cultural Perspective*, ed. Stanton K. Tefft (1980), pp. 25-34, quoted in Bonnie McDougall, “Functions and Values of Privacy in the Correspondence Between Lu Xun and Xu Guangping, 1925-1929,” in McDougall and Hansson, eds., *Chinese Concepts of Privacy* 150-51 (2002).

<sup>161</sup> Stephan Feuchtwang, “Reflections on Privacy in China,” 215.

<sup>162</sup> Stephan Feuchtwang, “Reflections on Privacy in China,” in McDougall and Hansson, eds., *Chinese Concepts of Privacy* 214 (2002) (citing Kristopher Schipper, *The Daoist Body* (1993)).



universe. To reveal exactly the location of the head of the dragon of a territory is to risk malicious damage to it and therefore all who dwell in it.<sup>163</sup>

This sort of reverence for certain types of knowledge in traditional Chinese Culture applies to sexual intimacy as well, and is reflected in traditions relating to separation of the sexes that date back at least to the Confucian Book of Rites.<sup>164</sup> The relegation of women to the private sphere during the Song Dynasty (960-1279) was probably more focused on ensuring that women “did not intrude into the men’s sphere” than on protecting women’s dignity.<sup>165</sup> In Imperial China, “[t]he siting of privacy in women’s quarters and women’s bodies corresponds to the belief that women are closer to nature than men (i.e., ‘nature’ as distinct from man-made ‘culture’) and by further implication more often (or in more bodily parts) polluted.”<sup>166</sup> Nonetheless, “not all men could enter the spaces allocated to women,”<sup>167</sup> and the very existence of such a private sphere indicates an appreciation of privacy for intimate couples. During the Song Dynasty, “[t]he emotional attachments between husband and wife were private, and few writers of either sex expressed personal feelings about their own marriages in literary or biographical writings. Sexual intercourse between husband and wife was even more private; while gentry men wrote about their sexual experiences with courtesans they did not write about their wives and only rarely about their concubines.”<sup>168</sup>

<sup>163</sup> Stephan Feuchtwang, “Reflections on Privacy in China,” in McDougall and Hansson, eds., *Chinese Concepts of Privacy* 214 (2002) (citing Kristopher Schipper, *The Daoist Body* (1993)).

<sup>164</sup> The Book of Rites calls for the “separation of male and female.” Ssu-ma Kuang, in an elaboration of this rule in his work “Miscellaneous Proprieties for Managing the Family,” stated that “[i]n housing there should be a strict demarcation between the inner and outer parts, with a door separating them. The two parts should share neither a well, a washroom, nor a privy...During the day, the men do not stay in their private rooms nor the women go beyond the inner door without good reason. A woman who has to leave the inner quarters must cover her face (for example, with a veil). Men who walk around at night must hold a candle.” Quoted in Patricia Buckley Ebrey, *The Inner Quarters: Marriage and the Lives of Chinese Women in the Sung Period* 23-24 (1993).

<sup>165</sup> Ebrey, 24. Chu Hsi opined that “Men correctly establish themselves on the outside and are the rulers of states and families. Therefore, when they are wise they can establish states....Beautiful and talented women, by contrast, are evil omens, for through talking too much they can get things started on the road to disaster.” Quoted in Ebrey, at 25. As Furth notes, “[t]he privacy of sex, seemingly fundamental, may be understood by both women and men as important to their human dignity, but its cultural elaborations mark complex hierarchies of class and gender, hierarchies imposed by the socially-authorized gaze judging honor and shame.” Furth, “Solitude, Silence and Concealment,” 37. It should also be noted that the exclusion of women from the public sphere is typical of many traditional societies, including that of medieval Europe; see McDougall, “Particulars and Universals,” 11.

<sup>166</sup> McDougall, “Particulars and Universals,” 10.

<sup>167</sup> McDougall, “Particulars and Universals,” 10.

<sup>168</sup> McDougall, “Particulars and Universals,” 12.

There is also an evident appreciation for seclusion, dating at least to the Ming Dynasty (1368-1644), and experienced both spatially and temporally. In the households of Ming Dynasty nobility, the marital bedroom was both “the active centre of a woman’s home life”<sup>169</sup> and “the site of a man’s social duty to beget heirs”; consequently, men were encouraged to keep a separate studio or study that contained a bed or couch, in which they could not only study but sleep alone in order to “conserve their seminal qi”<sup>170</sup> (energy, or life force). In the late Ming, various meditative techniques proliferated, including several Daoist versions of *nei dan* (inner alchemy), a prerequisite for which was “a fudi [blessed site] in a secluded spot naturally configured to gather harmonious qi influences.”<sup>171</sup> Learned women pursued such endeavors as well as men, as is evidenced by women poets of the period, although they were far less likely than men to have access to a physical space of solitude (unless, perhaps, they were willing to make the same sacrifices as Sun Pu-Erh, discussed in the Introduction).

For those women and men—the majority, certainly—who did not have the luxury of places to retreat to, introspection was possible during quiet hours especially at night and early morning (a favourite prescribed time for meditation as well). Because others need not even be aware of these activities, or to license them, such privacy of moments could be understood as stolen.<sup>172</sup>

East Asian studies of privacy do underscore the fact that the individual is not the only conceivable unit of privacy. This is not news to Western scholarship—Alan Westin defined privacy in 1967 as “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others”<sup>173</sup>—but it becomes more evident in certain East Asian contexts. Khayutina’s study of bronze *jinwen* indicates that, in China, the unit of privacy could be as large as a clan, in the sense that “ritual observances are...confined to clansmen (with rare exceptions for non-clansmen or friends).”<sup>174</sup> It was often the case, in traditional Japan as well as China, that there was little or no privacy with-

<sup>169</sup> Furth, “Solitude, Silence and Concealment,” 40.

<sup>170</sup> Furth, “Solitude, Silence and Concealment,” 40-41.

<sup>171</sup> Furth, “Solitude, Silence and Concealment,” 47-48.

<sup>172</sup> Furth, “Solitude, Silence and Concealment,” 50-52 (citing Maureen Robertson, “Gendered Landscapes” (Paper presented to the panel “Nature, Culture, Text: Siting Feminine Values in Imperial China,” Association for Asian Studies, Chicago, March 2001).

<sup>173</sup> Alan Westin, *Privacy and Freedom* 7 (1967)(emphasis added).

<sup>174</sup> McDougall, “Particulars and Universals,” 22.

in members of a family, but that information flows outside the family unit were strictly controlled.<sup>175</sup> Illnesses, particularly those related to fertility, “aroused concern for the household as a social unit, proportionate to the significance of individual members to its prosperity and continuity, in keeping with the Confucian adage that one’s body belongs not to oneself but to the family”;<sup>176</sup> to this day, there are sensitivities regarding medical information that might reflect poorly on one’s family.<sup>177</sup>

As in Western culture, the designation of the family as the demarcation line between “public” and “private” can have rather drastic consequences for individual family members (particularly women), depending on who serves as the family’s spokesperson. An exasperated Chinese doctor making house calls in the 1640s complained,

If you ask about daixia [vaginal discharge] the doctor is in danger; if you don’t ask, the patient is in danger. However, if you do ask, the sick woman speaks to her maid and her maid speaks to the master. Before the master says a word his face is crimson, and when he does speak his language is roundabout.<sup>178</sup>

Social etiquette is also quite visible in traditional Japanese culture as a mechanism for obtaining privacy. Japan has a longstanding tradition

<sup>175</sup> Accord Lü Yao-Huai, “Privacy and Data Privacy Issues in Contemporary China,” *Ethics and Information Technology* (2005) 7:7-15, at 14 (“...many Chinese still think that matters of shame within the family should not be made public. At the same time, they are also inclined to think there is no privacy within the family—that is to say, there is nothing that should be hushed up between husband and wife, and the parents are thought to have a right to know everything about their sons and daughters (at least, as long as they are minors and not adults”); Francis L.K. Hsu, *Americans and Chinese: Passage to Difference* (3<sup>rd</sup> Edition, 1981; originally published 1953) (“Within the Chinese home...privacy hardly exists at all, except between members of the opposite sexes who are not spouses. Chinese children, even in homes which have ample room, often share the same chambers with their parents until they reach adolescence. Not only do parents have freedom of action with reference to the children’s belongings, but the youngsters can also use the possessions of the parents if they can lay their hands on them”).

<sup>176</sup> Furth, “Solitude, Silence and Concealment,” 29.

<sup>177</sup> In a recent comparative study of individuals’ willingness to share personal information on different types of websites, participants from Taiwan, the USA, China and the Netherlands all showed a comparable tendency to regard genetic information as “very sensitive.” Chiung-wen (Julia) Hsu, *Privacy Concerns, Privacy Practices and Web Site Categories: Towards a Situational Paradigm*, *Online Information Review*, Vol. 30, No. 5, 2006, pp. 569-586, available at <http://assets.emeraldinsight.com>. Adams, Murata and Orito assert that, “while temporary physical conditions may be discussed [in Japan] with a broader circle than in other cultures, permanent physical disability and mental health problems are mostly taboo subjects, and hence one of those pieces of information which is strongly held by the Japanese to be private.” Adams, Murata and Orito, at 335.

<sup>178</sup> Min Qiji, 1640 preface to *Qi Zhongfu, Nüke baiwen* (Shanghai: Shanghai guji shudian, 1983 reprint, quoted in Furth, “Solitude, Silence and Concealment,” 36. The Qing Dynasty (1644-1911) attempted to outlaw the practice of footbinding, but found its edicts impossible to enforce “since women who had bound feet were usually cloistered and women who did the binding did it in private...” McDougall, “Particulars and Universals,” 13.

known as “as-if,” which “requires that information overheard but not explicitly given, is treated as if one did not have it.”<sup>179</sup> In traditional Japanese housing, which consisted literally of paper-thin walls, the “as-if” tradition “allowed, for example, spouses to have arguments without the rest of the household treating them as though their marriage was in trouble, unless one or both partners approached a third party for help or advice in the matter.”<sup>180</sup>

In traditional Chinese family life, individual emotional needs often yield to those of the family, but not always. In a scene from the 18<sup>th</sup>-century classic novel *Dream of the Red Chamber*, widely considered to be emblematic of the daily life of Chinese aristocracy at that time, a young woman named Xifeng is humiliated by her mother-in-law, and flees to her own apartment, weeping. When she is called back, she wipes her tears, applies makeup, and then denies she has been crying, insisting that her eyes are simply itchy. Robin Silber finds in this instance four distinct mechanisms of control used to establish privacy: “withdrawal (leaving), concealment (new make-up), deception (itching, rubbing) and denial. For Xifeng to have been caught crying in the context of her humiliation would have only deepened it; this is why Xifeng wants privacy to cry.”<sup>181</sup>

There is also sufficient evidence from the early to mid-twentieth century of both an appreciation for and expectation of privacy in diaries and correspondence, in both China and Japan. In the correspondence between the prominent Chinese writer Lu Xun and his paramour Xu Guangping (who jointly published an edited version of their love letters in 1933), several passages evince an assumption that their correspondence will not be opened and read by third parties (and indeed, it was not until 1933 that the Chinese Post Office began engaging in censorship).<sup>182</sup> Lu Xun at one point expresses agitation when he discovers that a cousin has been reading his old diaries.<sup>183</sup> It is clear that the secrecy between the two had the function of “creating

<sup>179</sup> Andrew A. Adams, Kiyoshi Murata and Yohko Orito, “The Japanese Sense of Information Privacy,” *AI & Soc.* (2009) 24:327-341, at 329.

<sup>180</sup> Adams, Murata and Orito, at 329. The “as-if” tradition is also discussed in Masahiko Mizutani, James Dorsey, and James H. Moore, “The internet and Japanese conception of privacy,” *Ethics and Information Technology* 6: 121-128, at 121 (2004). Mizutani, Dorsey and Moore use this example to distinguish between “descriptive privacy; i.e., absence of privacy as a matter of fact, and...normative privacy” (normative protections from certain intrusions and information gathering). *Id.*

<sup>181</sup> Silber, “Privacy in *Dream of the Red Chamber*,” 65-66.

<sup>182</sup> Bonnie McDougall, “Functions and Values of Privacy in the Correspondence Between Lu Xun and Xu Guangping, 1925-1929,” 153.

<sup>183</sup> Bonnie McDougall, “Functions and Values of Privacy,” 155.

or confirming intimacy between them," such that they continued to preserve their "secret world" even after they became a publicly accepted couple.<sup>184</sup>

The diaries of Japanese soldiers kept during World War II similarly reflect both a desire and an expectation of privacy. Even though they were created during service to a totalitarian regime capable of inspiring kamikaze acts of self-sacrifice, Aaron William Moore finds no real difference between Japanese soldiers' wartime diaries and those of their American counterparts.<sup>185</sup> The diaries sometimes display what Moore calls "self-mobilization"; i.e., incorporation of popular patriotic discourse to direct oneself towards "state and military mobilization goals" (e.g., "[We] have taken up [our] path as soldiers....This gives us joy. We are sent off by shouts of 'Ban-zai' by our enthusiastic countrymen").<sup>186</sup> But as the reality of war sets in, and units begin to participate in the massacres of Chinese civilians and POWs, the diaries take on a tone decidedly unsuitable for wartime propaganda ("...some of them, who had only feigned death, started to run, so we stabbed them one by one. It felt horrible, like the 'living hell'"; "On the bank of an irrigation canal, there was a dead child, and a bit further down, two adults' bodies with no heads had been carried to the bank by the stream. It is so horrible, I can't look").<sup>187</sup> The Japanese soldier typically "wrote his self-narrative in a manner that he found personally compelling, not appealing to military, state, and media authorities, because they were not reading it."<sup>188</sup> And in fact, despite some efforts by the Japanese military to confiscate or destroy soldiers' wartime diaries (an operational necessity in some circumstances, due to their value to foreign intelligence), soldiers had "sundry tricks for avoiding possible confiscation of one's personal records:

<sup>184</sup> Bonnie McDougall, "Functions and Values of Privacy," 155.

<sup>185</sup> Aaron William Moore, "The Chimera of Privacy: Reading Self-Discipline in Japanese Diaries from the Second World War," *Journal of Asian Studies*, Vol. 68, No. (February 2009), 165-198, at 175, 175 n.25, 185, 185 n.45. The existence of these diaries is reminiscent of the classic wartime diary of dissident Kiyosawa Kiyoshi, which he maintained secretly under wartime surveillance between 1942 and 1945, and which caused a sensation in Japan when it was published posthumously in 1948. See generally Eugene Soviak, ed., *A Diary of Darkness: The Wartime Diary of Kiyosawa Kiyoshi* (1999).

<sup>186</sup> Moore, 185 (citing passages from the diary of Nagatani Masao, written in August 1937). Moore finds comparable passages in the diary of American Captain Ralph T. Noonan and in war reportage such as Richard Tregaski's *Guadalcanal Diary*, describing the events of 1943 ("It's the first time in history we've ever had a huge expedition of this kind accompanied by transports. It's of world-wide importance. You'd be surprised if you knew how many people all over the world are following this. You cannot fail them"). Moore, 185-86 n.45.

<sup>187</sup> Moore, 190 (citing the diaries of and Nagatani Masao and Yamamoto Kenji, respectively)

<sup>188</sup> Moore, 189.

tying the diary to the inside of one's thigh, sending it through civilian mail during temporary furlough, or entrusting the diary to a friend who was being sent home through a military hospital (where no inspections occurred)."<sup>189</sup> Pilot Nishimoto Masaharu flatly disobeyed an order at the end of the war to burn his diaries, writing in the forward to one notebook that he later published that it was his personal record, "which I held close to my heart without thinking—it brought tears to my eyes."<sup>190</sup>

East Asians have no apparent difficulty discerning the link between government surveillance and oppression, or appreciating the dehumanizing effects of data collection. The movement of ethnic Koreans in Japan (the *Zainichi*) towards greater acceptance and an end to legal discrimination was galvanized in September 1980 by a single Tokyo resident named Han Chongsok, who refused to submit to fingerprinting under penalty of imprisonment. Regular fingerprinting of "foreigners" was a legal requirement under the Alien Registration Law that was eventually abolished following a widespread anti-fingerprinting civil disobedience campaign inspired by Han Chongsok.<sup>191</sup>

Finally, one can find among East Asians an acute sensitivity to new technologies and forms of modernization that shift the boundaries between public and private, often with extreme psychological consequences for the individual. Yunxiang Yan analyzes the effects of Chinese socialism on the small village of Xiajia between 1949 and 1999, and concludes that the Communists' destruction of the old patriarchal order (in an attempt to replace familial authority with state authority) "has opened up new horizons for the individual-centered development of romantic love, intimacy, conjugality, and the pursuit of personal space and privacy."<sup>192</sup> This particularly has been the case in the post-Mao era, in which capitalism has largely replaced communism as the dominant organizing principle. After the "decollectivization" reforms of 1983, village-wide cultural activities largely came to an end, and leisure activities in Xiajia shifted to the private home, chief among

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<sup>189</sup> Moore, 169.

<sup>190</sup> Nishimoto Masaharu, *Yokaren nikki* (2003, 6), quoted in Moore, at 171-72.

<sup>191</sup> John Lie, "Zainichi Recognitions: Japan's Korean Residents' Ideology and Its Discontents, *Asia-Pacific Journal: Japan Focus*, Nov. 10, 2008, available online at <http://www.britannica.com/bps/additionalcontent/18/35374468/Zainichi-Recognitions-Japan> See also generally <http://www.mindan.org>.

<sup>192</sup> Yunxiang Yan, *Private Life Under Socialism: Love, Intimacy, and Family Change in a Chinese Village 1949-1999*, 218 (2003).

them, television viewing.<sup>193</sup> These changes have had an enormous effect on the civic-mindedness of the community.

The new individualism of modern Chinese society, with its “shifting urban configurations,” reshape Chinese conceptions of privacy in ways that are often deeply unsettling, as reflected in modern dystopic urban fiction. Protagonists in such works often express a “sense of repulsion and alienation” from the city’s anonymous masses.<sup>194</sup> In the 1988 novel *Hei de xue* (Black Snow), for example, the main character has only a few friends who “show little concern for his well-being; they instead demonstrate the classic utilitarian traits of social relations in a market economy.”<sup>195</sup> Paradoxically, such protagonists find the changes that come with urban modernity, including spatial changes such as the broadening of the streets of Beijing and the destruction of its old quarters with “secluded back alley communities,” invasive of their privacy, and become desperate for a form of seclusion that will help restore their sense of self.<sup>196</sup> In Chen Ran’s controversial 1996 novel, *Siren shenghuo* (Private Life), the protagonist (who eventually suffers a breakdown) “cloisters herself within her house,” becoming particularly obsessed with the bathroom,<sup>197</sup> but “the exterior space of the city constantly threatens to intrude on her privacy: ‘the solemn and heavy breath of Beijing spreads through the room and fills her lungs, like grey, dirty time.’”<sup>198</sup> In each of these novels, “privacy is valued as a means of recuperating losses inherent in the urban transformations of contemporary China: loss of meaning, intimacy, self-respect, individuality, boundaries, space and ethical norms.”<sup>199</sup> At the same time, “[t]he privileging of interiority over exteriority and of withdrawal into the self over social engagement speaks more to a disenfranchisement and loss of agency than the seeming rational autonomy afforded by privacy.”<sup>200</sup>

<sup>193</sup> Yunxiang Yan, 36.

<sup>194</sup> Robin Visser, “Privacy and its Ill Effects in Post-Mao Urban Fiction,” in McDougall and Hansson, eds., *Chinese Concepts of Privacy* 171 (2002).

<sup>195</sup> Robin Visser, “Privacy and its Ill Effects in Post-Mao Urban Fiction,” 174.

<sup>196</sup> Robin Visser, “Privacy and its Ill Effects in Post-Mao Urban Fiction,” 186.

<sup>197</sup> Id. Redecorating bathrooms actually became a Chinese obsession in cities in the mid-1990s; Shanghai residents spent an average of \$1250 modernizing their bathrooms in 1996. Robin Visser, “Privacy and its Ill Effects in Post-Mao Urban Fiction,” 185.

<sup>198</sup> Robin Visser, “Privacy and its Ill Effects in Post-Mao Urban Fiction,” 180 (quoting Chen Ran, *Siren shenghuo* 37 (1996)).

<sup>199</sup> Robin Visser, “Privacy and its Ill Effects in Post-Mao Urban Fiction,” 193.

<sup>200</sup> Robin Visser, “Privacy and its Ill Effects in Post-Mao Urban Fiction,” 183.

One would therefore fully expect that East Asians would be just as attuned as Westerners to the shifting of social boundaries brought about by automated data processing and Internet-based communications. This expectation is more or less borne out by contemporary research. Sometimes the change is a welcome one. On the wildly popular social network Cyworld (on which nearly 90% of 24-to-29-year old South Koreans have accounts), users report that they are often able to resolve interpersonal conflicts on each other's home pages by expressing thoughts and feelings in a way they cannot do face to face.<sup>201</sup> Particular aspects of Korean collectivistic culture and its "high-context" communicative style can render it difficult to express thoughts and feelings in detailed or explicit ways, but the asynchronous nature of communication on social networks has the advantage of allowing reviewability. As one user puts it, "When the word is out, it belongs to another. It is not always easy to articulate my thoughts in spoken words, and I often make mistakes in speaking. In writing, I can review and revise my words as many times as I want before they get to another person. That is the best part of cying."<sup>202</sup> The same phenomenon is seen in Japan, where web diaries allow individuals to "write about things that they can't talk about in their real communities."<sup>203</sup>

But East Asians have also experienced the negative side of the Internet's tendency to shrink geographic and other boundaries, and their concerns are publicly articulated and discussed, sometimes leading to new legislative proposals. A phenomenon unique to China is that of the *renrou sousou* ("human flesh search engines"), a combination of Internet-based crowdsourcing and real-world vigilantism. In 2007, the wife of a Saatchi & Saatchi advertising executive named Wang Fei, despondent over her husband's extramarital affair, kept a meticulous online diary documenting her deepening despair and then leaped to her death from their 24<sup>th</sup>-floor apartment. The woman's sister then found the diary, which the deceased woman had wanted to make public after her death, and published it on the web, later

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<sup>201</sup> Kyung-Hee Kim and Haejin Yun, *Cying for Me, Cying for Us: Relational Dialectics in a Korean Social Network Site*, *Journal of Computer-Mediated Communication*, 13(1), Art. 15, available online at <http://jcmc.indiana.edu/vol13/issue1/kim.yun.html>.

<sup>202</sup> *Cying for Me, Cying for Us*.

<sup>203</sup> Makoto Nakada and Takanori Tamura, *Japanese Conceptions of Privacy: An Intercultural Perspective*, *Ethics and Information Technology* (2005) 7:27-36, at 33-34.



participating in discussions about her sister's death at an online community forum.<sup>204</sup>

Almost instantly, an online mob--the human flesh search engine--enraged at Wang's philandering, exploded into life. Within days, photographs of Wang appeared on numerous Internet forums alongside his phone numbers, address and national ID number. Slogans were painted on his front door. One read: "A blood debt must be repaid with blood."<sup>205</sup>

Wang was eventually forced to resign after his employer's Beijing office became the target of harassment. He subsequently sued two Internet portals that had hosted the hunt for his identity.<sup>206</sup> In August 2008, a new law was proposed in China that would impose a three-year jail sentence on government officials who leak data that could be "snapped up by the human flesh search engine."<sup>207</sup>

To the extent the Japanese have been slow to react to the privacy challenges posed by the automated processing of personal data, this may be in large part attributable to the use of kanji characters, which did not lend itself well to data processing in interoperable systems until the 1990s.<sup>208</sup> The Japanese style of "insular collectivism," or "groupism," which produces social norms requiring one to control both information flow and manner of speaking in a way that differentiates one's inner circle of family and close friends (*uchi*) and outer circle of acquaintances (*soto*), traditionally left the Japanese with little concern for whether their private information was revealed to total strangers (*tanin*). This was because a total stranger was seen as having no continuing contact with the individual, thus "depriving such revelations of their danger."<sup>209</sup> Moreover, the "as-if" tradition remained strong, and "[t]he expectation that organizations would honour the as-if tradition of discounting known information (such as that necessarily collected

<sup>204</sup> Tom Downey, "China's Cyberposse," *New York Times Magazine*, March 3, 2010, available at <http://www.nytimes.com/2010/03/07/magazine/07Human-t.html?pagewanted=1>.

<sup>205</sup> Chris O'Brien, "The Human Flesh Search Engine," *Forbes.com*, Nov. 21, 2008, available at [http://www.forbes.com/2008/11/21/human-flesh-search-tech-identity08-cx\\_cb\\_1121obrien.html](http://www.forbes.com/2008/11/21/human-flesh-search-tech-identity08-cx_cb_1121obrien.html).

<sup>206</sup> Downey. He was awarded "very minor damages" from one of the ISPs. *Id.*

<sup>207</sup> Chris O'Brien, "The Human Flesh Search Engine."

<sup>208</sup> Andrew A. Adams, Kiyoshi Murata and Yohko Orito, *The Japanese Sense of Privacy*, *AI & Soc* (2009) 24:327-341, at 335.

<sup>209</sup> Adams, Murata and Orito, at 331.

in dealing with customers)" lasted well into the 1990s.<sup>210</sup> However, once it became evident that automated data processing could easily transmit personal data between soto entities (such as local government, telecom providers, and other entities formerly regarded as tanin before they became interconnected with the individual), there was a "rapid awakening amongst the Japanese that social norms are no longer sufficient to regulate the protection of information privacy."<sup>211</sup>

A comparative study of Internet privacy practices revealed no real difference in the overall concern for privacy among users in the U.S., the Netherlands, China and Taiwan; if anything, the East Asians demonstrated more concern about improper data sharing and usage. There were pronounced differences between the subjects, but they were quite context-specific and attributable to any of a variety of cultural factors. For example, the Americans were more comfortable sharing personal data with commercial websites than with government websites, whereas the Chinese subjects were more likely to disclose data to either government websites or community websites, and were less comfortable than either the Americans or the Taiwanese with disclosing data to commercial websites.<sup>212</sup>

In short, there is no discernible link between a culture's tendency towards individualism and the value it places on privacy. "Individual autonomy" appears to be simply the language through which Westerners articulate privacy concerns that are actually more universal in nature. Collectivist thinking may affect certain privacy practices or mechanisms in particular contexts, but if one were to envision a spectrum running from extreme individualism to extreme collectivism, there simply is no basis on which to place "concern for privacy" anywhere along that spectrum. Again, what this indicates is that the Altman/Inness conceptualization of privacy, both of which share with postmodernism the interdependent and socially-situated notion of the self, has the potential not only to deepen and add nuance to the Western understanding of privacy, but to form the basis of a privacy standard with a more cross-cultural appeal and the potential for global acceptance. Nonetheless, there are many questions left unanswered, some of which are the subject of the next section.

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<sup>210</sup> Adams, Murata and Orito, at 339.

<sup>211</sup> Adams, Murata and Orito, at 335.

<sup>212</sup> Chiung-wen (Julia) Hsu, Privacy Concerns, Privacy Practices and Web Site Categories, *Online Information Review*, Vol. 30, No. 5 (2006), pp. 569-586.

## 5. DAOISM, INDIVIDUALISM AND THE RULE OF LAW

If East Asians have as deep an appreciation for privacy as Westerners, then what explains the widespread perception among Easterners and Westerners alike that privacy rights are a Western construct? Why would Japan have problems with the “overprotection” of personal data, as suggested in the Introduction? And what explains the relatively “weak” privacy framework developed by APEC? The answers lie in the connection between individualistic thinking and a tendency towards legalistic solutions, and they have serious ramifications for the development of a global legal regime to protect privacy as an individual human right. Just as the Daoist metaphysical foundation leads to certain views of the nature of selfhood, it also provides the basis for conclusions about the ideal manner in which to resolve interpersonal disputes. To understand this connection, we must return to ancient Daoism and its interactions with another school of Chinese thought, a school known today as “Legalism.”

Legalism has some ties to Daoism, but Daoism and Legalism ultimately came to represent “the two extremes of Chinese thought. The Taoists maintained that man originally is innocent; the Legalists, on the other hand, that he is completely evil. The Taoists stood for absolute individual freedom; the Legalists for absolute social control.”<sup>213</sup>

Legalism, like the other major schools of Chinese philosophy, came about in the wake of the disintegration of feudalism, and was embraced wholeheartedly by the Ch’in Dynasty as a means of consolidating power in a complex governmental structure seeking to assert absolute control over a vast geographic area.<sup>214</sup> At that time, “[w]hat the rulers needed were not idealistic programs for doing good to their people, but realistic methods for dealing with the new situations faced by their government.”<sup>215</sup>

The main proponents of Legalism, Shang Yang (“Lord Shang”) and Han Fei Tze, saw strict and uniform enforcement of the law not a means of obtaining justice and equality, but as a highly effective method of consolidating power in the supreme sovereign. Lord Shan advised that punishments should know no degree or grade, but...from ministers of state and generals down to great officers and ordinary folk, whosoever does not obey the king’s commands, violates the interdicts of the state, or rebels against

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<sup>213</sup> Fung Yu-Lan, 162-63.

<sup>214</sup> Fung Yu-Lan, 156-57.

<sup>215</sup> Fung Yu-Lan, 156.

the statutes fixed by the ruler, should be guilty of death and should not be pardoned. Merit acquired in the past should not cause a decrease in the punishment for demerit later, nor should good behaviour in the past cause any derogation of the law for wrong done later.<sup>216</sup>

Han Fei Tze advised against "arbitrary regulation," arguing that "the intelligent sovereign makes the law select men and makes no arbitrary promotion himself."<sup>217</sup> The Legalists believed strongly that "[t]he rule of man depends upon his judgment but his judgment can never be as well-defined and as reliable as law."<sup>218</sup> Moreover, uniformity of application was essential to the rule of law; Han Fei Tze related the following story as an example of good bureaucratic decision making:

Once in bygone days, Marquis Chao of Han was drunk and fell into a nap. The crown-keeper, seeing the ruler exposed to cold, put a coat over him. When the Marquis awoke, he was glad and asked the attendants, "Who put more clothes on my body?" "The crown-keeper did," they replied. Then the Marquis found the coat-keeper guilty and put the crown-keeper to death. He punished the coat-keeper for the neglect of his duty, and the crown-keeper for the overriding of his post.<sup>219</sup>

The Legalists advised that "in order to rule a country, it is better to depend upon laws than upon men, because men will come and go, but law is the measure which remains for ever."<sup>220</sup> Unfortunately for them, the Ch'in Dynasty, in following their advice, collapsed in 206 B.C. after having unified China only fifteen years prior. In the wake of the collapse, "commentators placed all the blame on Ch'in's reliance on the laws," and Daoism (Huang-Lao) and later Confucianism became the official state ideology.<sup>221</sup>

This brief experiment with the rule of law (perhaps more accurately termed "rule by law") appears to have left a rather bad taste for it throughout the Confucian world. Man-made law, or *fa*, became associated with harshness and cruelty, something "soulless" that "aims only at regimenta-

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<sup>216</sup> The Book of Lord Shang (Shang Chün Shu), reproduced in *Masters of Chinese Political Thought*, Sebastian de Grazia, ed. 342 (1973).

<sup>217</sup> The Han Fei Tzū, reproduced in *Masters of Chinese Political Thought*, Sebastian de Grazia, ed. 354 (1973).

<sup>218</sup> Chou Hsiang-Kuang, *Political Thought of China* 59 (1954).

<sup>219</sup> The Han Fei Tzū, reproduced in *Masters of Chinese Political Thought*, Sebastian de Grazia, ed. 354 (1973).

<sup>220</sup> Chou Hsiang-Kuang, *Political Thought of China* 59 (1954).

<sup>221</sup> Kung-chuan Hsiao, *A History of Chinese Political Thought*, 548.

tion.”<sup>222</sup> Law certainly existed and was sometimes considered a small sub-component of ethics,<sup>223</sup> but it was not used either to limit the ultimate power of the sovereign or, by and large, as a means of civil dispute resolution. “To Confucian thinkers, law was for barbarians, not for Confucians.... ‘[L]aw’ was considered punitive and identical to criminal law; a ‘lawsuit’ was concerned with crime and, thus, was disgraceful, and ‘litigation’ was perceived as a humiliating process. People simply knew that when they violated the law, they would be punished. They did not think law could protect their civil interests.”<sup>224</sup>

This is not to say that the central government provided no means of bringing grievances against the government. To the contrary, in China there were well-established and often elaborate procedures for lodging grievances, appeals therefrom and general criticisms or remonstrations of the ruler, dating from the Zhou Dynasty, when even the most humble commoners were allowed to beat a drum outside the innermost palace gate to have their case reported directly to the king.<sup>225</sup> Under the theory of the Mandate of Heaven, “Chinese governments claimed authority based on the natural mandate that was revealed, in part, by the attitudes of the people,” and if such grievances were ignored or the complainants punished, it was feared that “[t]he ruler would thus be deprived of information that might enable him to hold on to the mandate to rule.”<sup>226</sup> But such grievance procedures did not provide a means of invalidating decisions made by the supreme ruler, and in fact, the Empress Wu Zetian (r. 690-705) used the grievance

<sup>222</sup> Chou Hsiang-Kuang, *Political Thought of China* 65 (1954).

<sup>223</sup> Richard H. Minear, *Japanese Tradition and Western Law: Emperor, State and Law in the Thought of Hozumi Yatsuka* 155 (1970). The legal codes developed in China during the T’ang Dynasty were studied by visiting Japanese envoys and later formed the basis for the Japanese legal codes known as *ritsuryo* in the seventh century A.D. The *ritsuryo* remained on the books until the mid-19<sup>th</sup> century, but had become increasingly irrelevant after nobles came to rule the country in the 10<sup>th</sup> century. Hiroshi Oda, *Japanese Law* 13-14 (2d Ed. 1999).

<sup>224</sup> Shin-yi Peng, *The WTO Legalistic Approach and East Asia: From the Legal Culture Perspective*, 1 *Asian-Pacific L. & Pol’y* J. 13, (2000). In Korea, throughout the 600-year rule of the Yi Dynasty, “the vast majority of the people viewed the law as a means of oppression, while the upper class saw the law as a convenient tool to perpetuate their status and privileges.” Chan Jim Kim, *Korean Attitudes Towards Law*, 10 *Pac. Rim L. & Pol’y* 1, 6-7 (2000). This view of the law among average Koreans was only exacerbated when Japan imposed Western-style law (primarily German in inspiration) on Korea during its 35-year occupation (1910-1945). Once again, law was simply “an instrument of exploitation and was used to justify a systematic destruction of traditional Korean society....[L]aw itself came to symbolize the colonial rule.” *Id.* at 7.

<sup>225</sup> Qiang Fang, “Hot Potatoes: Chinese Complaint Systems from Early Times to the Late Qing (1898),” *Journal of Asian Studies* Vol. 68, No. 4 (November) 2009: 1105-1135, at 1107.

<sup>226</sup> Qiang Fang, 1107.

process primarily to receive secret reports about her enemies.<sup>227</sup> Allowing commoners to lodge grievances against lower-level officials was an effective means of ensuring their loyalty and commitment to the prerogatives of the sovereign, but it did not constitute a check on the power of the ultimate sovereign in the Western sense of independent judicial review. The reluctance of any court or judicial body to question the ultimate head of government is evident even in very recent decisions of the Taiwanese council of Grand Justices of the Judicial Yuan and the Korean Constitutional Court, widely considered success stories for the notion of the rule of law in East Asia.<sup>228</sup> While such courts have been “quite eager to challenge lower authorities that have violated principles of legality and constitutionality,” “[w]hen confronted with questions involving the personal authority of the president, they play a role similar to magistrates remonstrating the emperor, sometimes suggesting or advising but not demanding action.”<sup>229</sup>

Civil disputes in the traditional cultures of Northeast Asia were generally seen as private affairs, to be informally resolved by a mediator known to the parties, such as a family friend.<sup>230</sup> During the Tokugawa Shogunate in Japan (1600-1867), for example, there was a civil procedure administered by the government known as *ginmi-suji*, available for disputes between private individuals, but

[s]uch disputes were expected to be settled without the involvement of the authority if possible, and it was thought to be a favour on the part of the

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<sup>227</sup> Qiang Fang, 1112.

<sup>228</sup> See generally Tom Ginsburg, *Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan*, 27 *Law & Soc. Inquiry* 763 (2002). The Council of Grand Justices was established and granted the power of judicial review in the late 1940s as part of the establishment of the Republic of Korea. *Id.* at 768. Chiang Kai-shek ruled Taiwan with “an iron hand,” primarily relying on martial law, but his son and successor, Chiang Ching-kuo, began to dramatically liberalize Taiwan starting in the mid-1980s, and starting in 1990, the Council became instrumental in “dismantling the tools of authoritarianism” and serving as a “vehicle for the importation of foreign norms into the constitutional system,” particularly in the area of criminal procedure and the military. *Id.* at 769-773. The Korean Constitutional Court was established by constitutional amendment in 1987 following several decades of military rule, and has issued several important decisions regarding citizens’ constitutional rights. For example, in 1989, the court found an implied “right to know” in the constitution, finding it “indisputable that public information must be released to those with a direct interest in it...” *Id.* at 781 (quoting Judgment of September 4, 1989, 88 HonMa 22). This finding is “quite radical in the context of the developmental state of Northeast Asia. For the first time, citizens can make affirmative demands for information from the Korean state and need not rely on the ‘benevolent paternalism’ of the past.” *Id.* at 781.

<sup>229</sup> Ginsburg, 792.

<sup>230</sup> Shin-yi Peng, *The WTO Legalistic Approach and East Asia: From the Legal Culture Perspective*, 1 *Asian-Pacific L. & Pol’y J.* 13 (2000).

authority to trouble themselves with such trivial matters. Therefore, informal settlement of disputes (*nasai*) by conciliation arranged by local officials or elders was encouraged. In fact, the Shogunate, as a rule, dispensed without hearing and sometimes even forced the parties to reach a compromise under pain of punishment.<sup>231</sup>

Moreover, civil dispute resolution aimed not so much at establishing the objective rightness or wrongness of one party or the other's position, as simply providing a process in which mutual concession was expected.<sup>232</sup> This is in perfect keeping with underlying Daoist metaphysical beliefs about the nature and discoverability of truth, as reflected in this passage from the Zhuangzi:

Suppose you and I have had an argument. If you have beaten me instead of my beating you, then are you necessarily right and am I necessarily wrong? If I have beaten you instead of your beating me, then am I necessarily right and you are necessarily wrong? Is one of us right and the other wrong? Are both of us right or are both of us wrong? If you and I don't know the answer, then other people are bound to be even more in the dark. Whom shall we get to decide what is right? Shall we get someone who agrees with you to decide? But if he already agrees with you, how can he decide fairly? Shall we get someone who agrees with me? But if he already agrees with me, how can he decide?...[W]aiting for one shifting voice to pass judgment on another is the same as waiting for none of them....Right is not right; so is not so. If right were really right, it would differ so clearly from not right that there would be no need for argument.<sup>233</sup>

Japan, Korea, China and Taiwan have each taken radically different historical, geopolitical and ideological paths towards their present legal regimes and political orders; "[i]t is indeed meaningless to put Japanese and Chinese law in the same category on any basis except geographical."<sup>234</sup> Thus, the remarkable similarities in how individuals from each of these

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<sup>231</sup> Hiroshi Oda, *Japanese Law* 20 (2<sup>nd</sup> Ed. 1999).

<sup>232</sup> Shin-yi Peng

<sup>233</sup> Zhuangzi, reproduced in *Masters of Chinese Political Thought*, 287-88.

<sup>234</sup> Hiroshi Oda, *Japanese Law* 5 (2d Ed. 1999).

countries' respective cultures interact with the law<sup>235</sup> render it difficult to draw any conclusion other than that these similarities correlate to Daoist metaphysical presumptions and notions of the socially-situated self. International business experts Charles Hampton-Turner and Alfons Trompenaars have conducted dozens of surveys of middle managers taking their seminars across the world, asking questions that reveal what a marked difference exists among cultures in their preference for universally applicable rules vs. special consideration of cases based on their distinctive aspects. One of their questions deals with how to handle the case of an employee whose work for a company, though excellent for fifteen years, has been unsatisfactory for a year. If there is no reason to expect that performance will improve, should the employee be (a) dismissed on the grounds that job performance should remain the grounds for dismissal, regardless of the age of the person and his previous record; or (b) is it wrong to disregard the fifteen years the employee has been working for the company?...

More than 75 percent of Americans and Canadians felt that the employee should be let go. About 20 percent of Koreans and Singaporeans agreed with that view. About 30 percent of Japanese, French, Italians, and Germans agreed and about 40 percent of British, Australians, Dutch and Belgians agreed. (Atypically for this question, the British and the Australians were closer to the continental Europeans than to the North Americans).<sup>236</sup>

Virtually any Westerner who enters into legal contracts with East Asian entities on a regular basis can attest to the pronounced differences in business cultures. "To the Western mind, once a bargain is struck, it shouldn't be modified; a deal is a deal. For Easterners, agreements are often regarded as tentatively agreed-upon guides for the future."<sup>237</sup> In China, it is well known that the economy is based on relationships, and "business transactions are made on the strength, not of contracts, but of personal agreements which are neither verifiable nor enforceable in the public sphere."<sup>238</sup> One might anticipate more respect for the sanctity of a legal contract in cosmo-

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<sup>235</sup> Shin-yi Peng harbors no doubt that there is a "single Asian approach to law" that applies to most countries that were strongly influenced by Confucianism. Shin-yi Peng,

<sup>236</sup> Nisbett, at 65 (citing to Charles Hampton-Turner and Alfons Trompenaars, *The Seven Cultures of Capitalism: Value Systems for Creating Wealth in the United States, Japan, Germany, France, Britain, Sweden and the Netherlands* (1993)).

<sup>237</sup> Nisbett, at 196.

<sup>238</sup> Hudson N. Janisch, "Administrative process and the rule of law," in *China and the Long March to Global Trade: The Accession of China to the World Trade Organization*, Sylvia Ostry, Alan S. Alexandroff, and Rafael Gomez, eds. 192 (2002).



politan, Westernized and capitalistic Japan than in Communist China, but this is not necessarily the case. In a well-known case from the 1970s, for example, Japanese sugar refiners had entered into a contract with Australian suppliers to provide them with sugar at a certain price. After the value of sugar on the world market dropped dramatically, the Japanese company sought a renegotiation of the contract "on the grounds that circumstances had changed radically," which the Australians refused to entertain.<sup>239</sup> Nisbett insists that

[t]he Japanese were not being hypocritical or purely self serving. Japanese suppliers take such matters under consideration with their own customers. If it snows in Tokyo, film distributors are likely to compensate theater owners for their diminished audiences. As...Hampton-Turner and Trompenaars note, "Looked at analytically on an item-by-item basis, [such accommodating behavior] is not cost effective. But looked at as strengthening the relationship between customer and supplier, it makes very good sense." In short, the Japanese take a holistic view of the business relationship, including its context over time.<sup>240</sup>

Such a view of interpersonal relationships leaves little room for the notion of individual legal "rights," and the relative novelty of both legal rights and human rights is another constant throughout China, Korea and Japan. In Japan, early in the Meiji Restoration (1867-1912), a scholar who had been commissioned to translate the French Civil Code "racked his brain to find a Japanese equivalent of 'droit' and finally came up with a Japanese coinage 'kenri.'"<sup>241</sup> The Chinese equivalent, *quanli*, first appeared during the same time frame in a Chinese translation of Henry Wheaton's *Elements of International Law*.<sup>242</sup> The exposure to Western thought in the late 19<sup>th</sup> and early 20<sup>th</sup> century, which often came to China circuitously via Japan, set off a furious debate about human rights and a mad scramble for additional neologisms, including the Chinese term *tianfu renquan* ("heaven-endowed human rights"); the Japanese term *tenzen no kengi* (*tianran zhi quanyi* in Chinese), introduced in an 1876 Japanese translation of the French Declara-

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<sup>239</sup> Nisbett, at 66.

<sup>240</sup> Nisbett, at 197.

<sup>241</sup> Hideo Tanaka, ed., *The Japanese Legal System* 305 (1976).

<sup>242</sup> Angle, at 3.

tion of the Rights of Man as corresponding to “natural rights”;<sup>243</sup> and the Chinese term *renge* (meaning both “personality” and “dignity of the human person”).<sup>244</sup>

Even where Western concepts of human rights and “freedom” were wholeheartedly embraced (as with prominent reformer Liang Qichao, who enthusiastically quoted Patrick Henry’s “give me liberty or give me death”),<sup>245</sup> they were more often than not imbued with a collective understanding when applied to the East Asian context. The Western political theorists who held the greatest appeal were those, like John Dewey, who stressed community values (as well as, of course, that other great Western thinker, Karl Marx).<sup>246</sup>

The Chinese who were writing on human rights invoked them against a despotic ruler, the Manchus, in much the same way as the Americans earlier had used the idea against the English, and the French against *l’ancien régime*. But...the Chinese context was different from that of the West in that the main worry for most Chinese people was the encroachment of the Western powers and the possible extinction of their race and nation. National survival rather than freedom of the individual from an oppressive state was the main preoccupation.<sup>247</sup>

This understanding of “freedom” is reflected in the 1982 Constitution of the People’s Republic of China, which mentions freedom twelve times, but is understood to refer to “‘organic sovereign freedom,’ the freedom of the entire community from external oppression ....”<sup>248</sup> It does not necessarily correspond to an individual’s legal entitlement to certain civil liberties or political freedoms vis-à-vis the state.

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<sup>243</sup> Svensson, 79.

<sup>244</sup> Svensson, 104-05.

<sup>245</sup> Svensson, 101.

<sup>246</sup> Alan Ryan, *John Dewey and the High Tide of American Liberalism* (1995), p. 206, quoted in Svensson, at 132. Both Dewey and Bertrand Russell lectured in China between 1919 and 1921, but Dewey’s holistic liberalism held greater appeal than Russell’s fierce individualism. *Id.* Dewey regarded the right to property as “a rather empty right for those who did not own any property,” and he “supported the idea that the government should provide old-age pensions and unemployment relief; throughout his life he was active in efforts to provide education for socially disadvantaged people.” Svensson, at 133. At the Paris Peace Conference in 1919, the Allies supported the transfer of the German concessions in Shandong to Japan. This prompted the May Fourth protests in China, radicalized many Chinese intellectuals and soured them on Western liberalism, to some degree prompting a gravitation towards Communism and the political system of Russia as a viable alternative. *Id.* at 129-30.

<sup>247</sup> Svensson, 98.

<sup>248</sup> David Kelly, “The Chinese Search for Freedom as a Universal Value,” in *Asian Freedoms: The Idea of Freedom in East and Southeast Asia* 94 (1998).

Thus, when East Asians insist that East Asian cultures have no “tradition of privacy,” what this should be taken to mean is, as Professor Zhou Han-hua states, “there had not been any legal tradition in China to emphasize the privacy right to confront with state power”<sup>249</sup>—because, in fact, there was not a tradition of emphasizing any legal right to confront state power. Nor was there, or is there, a tendency to invoke legal rights as the primary means of asserting one’s interests vis-à-vis governmental, commercial or other private entities, even where they clearly exist. In Korea, for example, the Korean Criminal Procedure Code provides for full Miranda-type rights, but “police officers tend to omit or abbreviate the reading of such rights,” and “criminal suspects often do not object to the violation of those rights.”<sup>250</sup> In the Confucian mindset, it is “not virtuous for one to assert one’s rights.”<sup>251</sup>

Tracing the philosophical lineage of Western Enlightenment thinking from Kant to Rawls, as Julie Cohen suggests, reveals just how essential the notion of the autonomous, disembodied self and the tendency towards abstract objectification has been to modern Western legal thought (including scholarship and jurisprudence on human and civil rights). It also becomes apparent how incompatible this tradition can be with Daoism and Confucianism, at both a sociopolitical and metaphysical level. Kant followed up *A Critique of Pure Reason* with *The Groundwork of the Metaphysics of Morals* (1785), in which he introduced the notion of the “categorical imperative,” the notion that that a person acts morally only if his or her conduct would be the “right” conduct for any person in similar circumstances; i.e., could form the basis of a universal law. “What is required is a notion of rationally informed action that is unconditional (not relating to concrete circumstances), objective, not relating to particular desires), and universal (applicable to all rational agents).”<sup>252</sup> Otherwise, there is no real basis on which Kant can locate a free will sufficient to ascribe moral responsibility. Hegel’s *Philosophy of Right* (1820) locates the real-world embodiment of the free

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<sup>249</sup> Zhou Hanhua, *Personal Information Protection Enforcement in China: Status Quo and Trend toward its Reform* (paper on file with author; I am thankful to Marty Abrams for sharing this paper with me) (emphasis added). Professor Zhou is a professor of law at the Institute of Law at CASS. [Look up Svensson for explanation of what CASS is—is it affiliated with the PRC?]

<sup>250</sup> Chan Jin Kim, *Korean Attitudes Towards Law*, 10 *Pac. Rim L. & Pol’y* 1, 11 (2000).

<sup>251</sup> Shin-yi Peng, Accord Hideo Tanaka, ed., *The Japanese Legal System* 302 (1976) (“Ordinary Japanese...feel ashamed of being subpoenaed by, or of taking somebody to, a court.”).

<sup>252</sup> Peter Halewood, *Law’s Bodies: Disembodiment and the Structure of Liberal Property Rights*, 81 *Iowa L. Rev.* 1331, 1353-54 (1996).

will in property and contract law, insofar as they articulate the relationship between two free wills.<sup>253</sup> John Rawls draws further upon Kant's categorical imperative in promoting the notion of justice as a "fairness" that is arrived at "when persons, as pure wills without bodies or context, choose the rules to govern justice in society from behind the 'veil of ignorance.'"<sup>254</sup> These theories are all quite wedded to Cartesian mind/body dualism.

The problem with tossing out the entire Kantian line of thought is that it can then be difficult to assign either moral or legal responsibility to particular persons. Individual autonomous "personhood" may be a fiction, but as a legal fiction, it is quite useful to the functioning of Western law. Without the notion of a freely exercised will, the concept of responsibility can be rather hard to pin down.

A case in point is the Japanese attitude towards its involvement in World War II. As the Japanese viewed it, the Pacific War just happened to break out. None of the former government leaders who were tried at the International Military Tribunal for the Far East as first-class war criminals identified himself as someone responsible for having started the war. This is in sharp contrast with the Nazi leaders who positively identified themselves as the ones who had deliberately started the war in Europe....In Japan, even her declaration of war against the Allied Powers is regarded as an incident that happened "in some way or another" without any premeditated design.<sup>255</sup>

Rawls' theories have been found particularly difficult to apply to East Asian societies by human rights scholars, for the precise reason that his concept of political and moral legitimacy "rules out any number of regimes in which order and legitimacy are established through means other than a modern legal system."<sup>256</sup> While Westerners "prefer to live by abstract principles and like to believe these principles are applicable to everyone...to insist on the same rules for every case can seem at best obtuse and rigid to the Easterner and at worst cruel."<sup>257</sup> While most East Asian countries have established or are well on their way to establishing Western-style legal institutions, due in no small part to 50 years of Western insistence that the rule of law is their ticket to modernity, economic development, and integration into

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<sup>253</sup> Halewood, 1362.

<sup>254</sup> Halewood, 1340 (quoting John Rawls, *A Theory of Justice* 11-15 (1971)).

<sup>255</sup> Hideo Tanaka, ed., *The Japanese Legal System* 300 (1976).

<sup>256</sup> Angle, Stephen C., *Human Rights and Chinese Thought* 14 (2002).

<sup>257</sup> Nisbett, 64-65.

the global community,<sup>258</sup> the Chinese tradition of governance by scholar-gentlemen has given China “a tremendous handicap in her transition from government by men to government by law.”<sup>259</sup> Indeed, it is particularly difficult to envision how U.S.-style litigation, with its emphasis on broad discovery, open and vociferous airing of arguments, and definitive rulings based on “objective” evidence and reference to uniformly applied abstract legal principles, could effectively be implemented in a society in which individuals by and large do not believe that ultimate truth can be articulated in words, have difficulty airing interpersonal conflict openly, and find insistence upon logical consistency to be a sign of emotional immaturity.

Indeed, if there is a legitimate criticism of Western postmodernism, it is that in its wholesale rejection of the Enlightenment tradition, it can sometimes display a naiveté towards how non-Western cultures actually function, perhaps most clearly exemplified by the unmitigated adoration expressed by Michel Foucault towards the 1979 Iranian revolution. In a meeting with Iranian writer Baqir Parham in Iran in 1978, Foucault denounced capitalism as “the harshest, most savage, most selfish, most dishonest, oppressive society one could possibly imagine,” and told Parham that revolutionary religious movements could provide a new point of departure for Western thought and that he “hoped to take back to Europe something from the revolutionary movement of Iran.”<sup>260</sup> His enthusiasm for the Iranian revolution continued even after the anonymous Iranian feminist “Atoussa H.” warned the West about the realities of rule by Islamic law,<sup>261</sup> and he refused to respond to rebuttals in the French press that started appearing around

<sup>258</sup> See generally John K. M. Ohnesorge, *Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience*, 28 U. Pa. J. Int'l. Econ L. 219 (2007). Ohnesorge criticizes the “Washington Consensus” that he associates with “rule of law orthodoxy” and “the energetic neoliberalism of the 1990s.” *Id.* at 243. This orthodoxy posits that “[w]ithout the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible. A government must ensure that it has an effective system of property, contract, labor, bankruptcy, commercial codes, personal rights laws and other elements of a comprehensive legal system that is effectively, impartially and cleanly administered by a well-functioning, impartial and honest judicial and legal system.” *Id.* at 256 (quoting James D. Wolfensohn, *A Proposal for a Comprehensive Development Framework* (January 21, 1999)).

<sup>259</sup> Chan Wing-Tsit, 22.

<sup>260</sup> Janet Afary and Kevin B. Anderson, *Foucault and the Iranian Revolution: Gender and the Seductions of Islamism* 75-76 (2005). The quote about capitalism is a direct quote from “Dialogue between Michel Foucault and Baqir Parham,” conducted in September 1978 and originally published in *Nameh-yi Kanun-i Nevisandegan* (Publication of the Center of Iranian Writers), no. 1 (Spring 1979): 9-17, translated and reproduced in Afary and Anderson, Appendix, pp. 183-194.

<sup>261</sup> Quoted in Afary and Anderson.

March 1979, which highlighted the new regime's executions of homosexual men and compulsory veiling of women.<sup>262</sup> Jürgen Habermas has criticized Foucault's disregard for the importance of Enlightenment thinking to the establishment of democratic and constitutional rule, and Afary and Anderson point out that, while Foucault was willing to "exoticize[] and admire[] the East from afar," he preferred to remain a Westerner in his own life.<sup>263</sup>

## 6. IMPLICATIONS FOR GLOBAL PRIVACY STANDARDS

The mystery of why APEC promulgated comparatively "weak" standards for transborder data protection in 2004 is now quite easily solved: It was fully consistent with APEC's work in other areas, and had little or nothing to do with APEC being hijacked by U.S. business interests. As Shin-yi Peng explains,

APEC's Asian members [China, Taiwan, Hong Kong, Japan, Korea and Singapore] insist that APEC should be defined as a loose, consultative forum, not as a treaty-based organization, and that APEC should be characterized by a spirit of pragmatism. Asian members do not like the idea of setting up any regional bureaucratic or judicial institutions with powers of regulation or enforcement over individual APEC governments. They do not want to make any formal commitments, because they are pursuing a process based on "consensus" and "joint encouragement." The paradigm of APEC is essentially a mechanism based on voluntary consensus and peer pressure. This kind of "soft" law, consisting of a set of commonly agreed skeletal principles stated in broad terms, is the preferred Asian way. For Asians, vague language is often necessary to ensure consensus on sensitive issues. Ambiguity is almost an art form; it is viewed as a useful device in mitigating conflict and building common positions and confidence. For Westerners, in contrast, ambiguity is a weakness—a reflection of weak resolve or a feeble mind. Asians prefer flexibility, which they view as a virtue. Westerners, on the other hand, prefer concrete agreements and view ambiguity as creating loopholes. Westerners tend to focus on procedures and regard disputes and negotiations as natural, inevitable, and even productive or beneficial. Asians tend to avoid legalism and emphasize group "har-

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<sup>262</sup> Afary and Anderson, 6.

<sup>263</sup> Afary and Anderson, 16-17 (citing Jürgen Habermas, *The Philosophical Discourse of Modernity: Twelve Lectures* 289 (1995)).

mony” and consensus. To most Asians, disputes and negotiations disturb group harmony.<sup>264</sup>

Ironically, it is usually the Americans who are most unnerved by the East Asian approach to multilateral relations, as they prefer to “start with legally binding commitments covering a wide range of issues” rather than agreeing on broad principles and then letting things “evolve and grow gradually.”<sup>265</sup> But on privacy issues, it is the Europeans who have a problem with the APEC model. The predominantly European-led models for transborder data protection are generally characterized by a particularly rigid adherence to Enlightenment-style legalistic thinking. Amartya Sen criticizes Rawls’ approach to justice as being far too preoccupied with the question of with identifying the societal institutions that epitomize “perfect” justice in an ideal society, rather than examining actual behaviors of people within real societies (a tendency Sen calls “transcendental institutionalism”).<sup>266</sup> The predominantly European global privacy advocates are more Rawlsian than Rawls in their rigidity and preoccupation with form. The 1995 EU Data Directive, often promoted as the global gold standard, severely restricts the transfer of data outside the EU to any country that does not have “adequate” data protection, and a country’s “adequacy” is measured solely by the existence of an omnibus data protection law and the existence of an “independent” data privacy commissioner.<sup>267</sup> The Council of Europe Convention No. 108 similarly appears to require all parties to the Convention to adopt an omnibus data processing law; an additional Protocol requires an independent data privacy commissioner.<sup>268</sup> Such instruments rest entirely upon the presumption that more law equals more privacy. Where there is a law governing data processing, there is privacy; where there is no law, there is no privacy, or the privacy is not “adequate.” Privacy is typically de-

<sup>264</sup> Shin-yi Peng.

<sup>265</sup> Amitav Acharya, *Multilateralism: Is There an Asia-Pacific Way?* 12-18 (1997).

<sup>266</sup> Amartya Sen, *the Idea of Justice* 6-8.

<sup>267</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, available online at [http://ec.europa.eu/justice\\_home/fsj/privacy/law/index\\_en.htm](http://ec.europa.eu/justice_home/fsj/privacy/law/index_en.htm).

<sup>268</sup> Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, ETS No. 108, Strasbourg, 28.I.1981, Article 4; and Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows, Strasbourg, 8.XI.2001, Article 1; both instruments are available at <http://conventions.coe.int/Treaty/en/Treaties/Html/108.htm>. Convention 108 is in the process of being formally renegotiated; see [http://www.coe.int/t/dghl/standardsetting/dataprotection/modernisation\\_en.asp](http://www.coe.int/t/dghl/standardsetting/dataprotection/modernisation_en.asp).

scribed in European circles in absolutist terms, often with reference to “levels,” certain countries being deemed to have a “lower level” of privacy protection than European countries.

The International Conference of Data Protection and Privacy Commissioners (ICDPPC), a body consisting largely of privacy commissioners whose offices were created pursuant to EU member states’ obligations under the 1995 EU Data Directive, has a strict membership requirement: any voting member must be “independent” from the rest of the government, and must hail from a state that has data protection laws covering every corner of the private sector has strict and somewhat unclear membership standards that the U.S. Federal Trade Commission initially had some difficulty meeting; meanwhile the Commission for Informatics and Freedom for Burkina Faso (a nation with a 26% literacy rate)<sup>269</sup> has already been accepted as a full voting member.<sup>270</sup> It is the ICDPPC that now seeks to make its 2009 joint proposal on “International Standards for the Protection of Privacy and Personal Data” into a “universal, binding legal document,” such as an additional protocol implementing Article 17 of the International Convention on Civil and Political Rights (ICCPR).<sup>271</sup> Nothing could be more classically Kantian or Rawlsian than the notion that the entire world might one day submit to a global juridical order—except that even Kant recognized the dangers of Western ethnocentrism and “reject[ed] all arrogant European perspectives” that saw Europe as the vanguard of civilization and looked down with contempt upon the non-Western “savages.”<sup>272</sup>

East Asian countries would most likely respond to such a proposal in one of the following ways. First, some or all might simply ignore it. The International Covenant on Civil and Political Rights, adopted by the U.N. General Assembly in 1966, was signed by China in 1967 but has never been

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<sup>269</sup> U.S. Department of State, “Background Notes, Burkina Faso,” February 2010, available online at <http://www.state.gov/r/pa/ei/bgn/2834.htm>.

<sup>270</sup> See <http://www.privacyconference2009.org/program/Presentaciones/index-iden-idweb.html>.

<sup>271</sup> <http://www.privacyconference2009.org/home/index-iden-idweb.html>. Interestingly, the former United Nations Human Rights Council’s Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, never recommended the adoption of an additional protocol, following his in-depth analysis of ICCPR Article 17 and counter-terrorist-related surveillance in his 2009 Annual Report. See Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, A/HRC/13/37, 28 December 2009.

<sup>272</sup> Otfried Höffe, *Kant’s Cosmopolitan Theory of Law and Peace*, 16-17 (Alexandra Newton, trans., 2006).



ratified.<sup>273</sup> Second, they might sign a multilateral treaty but treat its legal obligations with the same respect and sanctity that many East Asians extend to private contracts (i.e., not very much).<sup>274</sup> Third, they might sign it fully intending to implement its legal obligations but then find themselves unable to honor that commitment due to domestic realities. In the talks leading up to China's accession to the World Trade Organization (WTO) in 2002, in which China agreed to "administer its laws affecting trade in a uniform and impartial manner," former U.S. Undersecretary of Commerce Robert Herzstein opined that "it is not likely that the globally oriented and well-intentioned trade officials in Beijing who negotiated these commitments will be able to control the protectionist behaviour of countless officials and Communist Party leaders with their own agendas."<sup>275</sup>

Finally, the unique relationship East Asians enjoy with legal institutions might lead to the result that they join a global privacy convention and enforce its provisions a little too well. The Japanese problem of over-protecting data, described by Orito and Murata, is most likely attributable not to a lack of understanding of privacy in Japan, but to an "instinctive abhorrence of the very idea of law"<sup>276</sup> and a deep desire to avoid entanglement in a legal proceeding at all costs.<sup>277</sup> Law, after all, is for criminals and barbarians, not Confucian gentlemen. China has upped the ante in this regard by creating criminal sanctions for the unlawful disclosure or acquisition of certain kinds of personal data. In January 2010, a Chinese citizen was sentenced to one and a half years in prison for purchasing a detailed log of telephone calls made and received by high-ranking local government officials.<sup>278</sup>

<sup>273</sup> See United Nations Treaty Collection web page at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en).

<sup>274</sup> Although North Korea in many respects represents an entirely different kettle of fish, it is worth pointing out that North Korea ratified the multilateral Treaty on the Non-Proliferation of Nuclear Weapons in 1985 but withdrew from it in 2003, the first nation ever to withdraw from the treaty. This followed U.S. allegations that it had started an illegal enriched uranium weapons program and the U.S. decision to stop shipping fuel oil pursuant to an Agreed Framework that had supposedly resolved plutonium enrichment issues in 1994, following North Korea's previous threat to withdraw from the non-proliferation treaty in 1993.

<sup>275</sup> Robert Herzstein, *Wall Street Journal*, Nov. 16, 1999a, quoted in Hudson N. Janisch, "Administrative Process and the Rule of Law," in *China and the Long March to Global Trade: The Accession of China to the World Trade Organization* 201 (2003).

<sup>276</sup> Hideo Tanaka, *the Japanese Legal System* 302 (1976).

<sup>277</sup> Orito and Murata describe Japanese firms' efforts at personal data protection as "a form of 'cold feet' compliance; firms hesitate to do anything that is questionable...Indeed, since [the] enforcement [of the APPI] on 1 April 2005, no for

<sup>278</sup> Arthur Dicker, Paul D. McKenzie, Gordon Milner, *Data Privacy in China: Civil and Criminal Law Developments*, January 2010, available at <http://www.mofo.com/tools/print.aspx>.

Thus, the prospects for a global legal regime governing privacy protection do not look particularly promising—except that things are never that simple. First, it cannot be emphasized enough how malleable, even contagious, individualistic and collectivistic cultural influences can be. Studies indicate that “simple laboratory manipulations of social orientation” can effectively “prime” either an interdependent, collectivist orientation or an individualistic orientation (for example, by having the subjects read a paragraph and circle all first-person plural pronouns (“we, us our”) versus “I, me, mine”).<sup>279</sup> Some of Kitayama’s studies involving Americans living in Japan and Japanese living in America show a shift in cognitive processes after just a few months, with Americans living in Japan shifting “in a decidedly Japanese direction” and vice versa.<sup>280</sup> Then there’s the story of the young Canadian psychologist who lived for several years in Japan. When he began applying for academic jobs back home, “[h]is advisor was horrified to discover that his letter began with apologies about his unworthiness for the jobs in question.”<sup>281</sup>

Moreover, anthropologists are already pushing back against the strict binary construct established by social psychologists like Markus, Kitayama, and Nisbett, to the extent Western cultures are deemed “individualistic” or “egocentric” and non-Western cultures more “collectivistic.” A study of the Ijo people of southern Nigeria, for example, found “elements of both models present in the way individuals defined themselves and their social relationships” and concluded that “the two models are not necessarily exclusive nor are they conflicting, but may coexist in the self-definitions and motivations of individuals within the same society.”<sup>282</sup> Certainly, there are collectivistic sub-cultures within the United States; chief among them, the U.S. Armed Forces. Anthropologist Alan Fiske counsels his social psychologist colleagues not to equate nations with cultures, or to treat culture as a continuous quantifiable variable, as a culture has many moving parts, and we still do not know which components might be causally determinative and/or mutually constitutive of other components.<sup>283</sup>

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<sup>279</sup> Nisbett, 228.

<sup>280</sup> Nisbett, 227.

<sup>281</sup> Nisbett, 68.

<sup>282</sup> Marida Hollos and Philip E. Leis, *Remodeling Concepts of the Self: An Ijo Example*, *Ethos* 29(3):371-387, available online at <http://www.jstor.org/pss/640629>.

<sup>283</sup> Alan Page Fiske, *Using Individualism and Collectivism to Compare Cultures—A Critique of the Validity and Measurement of the Constructs: Comment on Oyserman et al. (2002)*, *Psychological Bulletin* 2002, Vol. 128, No. 1, 78-88, at 78, 85.

Rule of law is also not an either/or proposition, and there are other compelling advocates of global justice besides John Rawls—chief among them Nobel Prize winner Amartya Sen. In *The Idea of Justice*, Sen advocates moving away from Rawls' preoccupation with what Sen calls "transcendental institutionalism" in favor of "realization-focused comparison." Sen argues that Adam Smith, John Stuart Mill, Jeremy Bentham, Karl Marx, and other 19<sup>th</sup> and 20<sup>th</sup> century theorists were, in contrast to Rawls, far more preoccupied with "comparisons of societies that already existed or could feasibly emerge, rather than confining their analyses to transcendental searches for a perfectly just society."<sup>284</sup> His criticism of Rawlsian "transcendental institutionalism" is that it "concentrates primarily on getting the institutions right, and it is not directly focused on the actual societies that would ultimately emerge."<sup>285</sup> The term "transcendental institutionalism" perfectly epitomizes the problem with the largely European Union-led drive for global homogenization of privacy protections; the entire endeavor seems premised on the notion that, if a nation has an omnibus data protection law and an "independent" data protection commissioner, then it has good privacy protection, and if it lacks either of these institutions, then it has poor or "inadequate" privacy protection. There is little or no evaluation of the enforcement or enforceability of various legal regimes. Sen's exploration of "realization-focused comparison" opens the door for a more flexible approach to evaluating which nations have real problems providing data protection, and which ones simply have unique or complex privacy enforcement mechanisms.

There is plenty of law in East Asia, and the number and variety of privacy laws grow with each passing year,<sup>286</sup> as do popular notions of a more individualistic brand of privacy. Lü Yao-Huai notes that the 2002 book *Chinese Concepts of Privacy* fails to address "important transformations in widely shared Chinese ideas of privacy since the 1980s," and he argues that the market economy (in which China is now a quite enthusiastic participant) "needs the individual as an independent subject."<sup>287</sup> He reports that 55 percent of Chinese citizens think that privacy should be protected and respected, that the sense of physical personal space is rapidly expanding, and that high school students are even insisting upon a greater respect for their privacy from their own parents, something virtually unheard of in tradi-

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<sup>284</sup> Amartya Sen, *The Idea of Justice* 7 (2009).

<sup>285</sup> Sen, 6.

tional Chinese culture.<sup>288</sup> He credits “the supra-national and international character of the Internet and the WTO” with most of these cultural changes.<sup>289</sup> There is also a growing interest in the emerging field of “information ethics,” in which some of the most interesting cross-cultural conversations about privacy, particularly those involving Japanese scholars, are currently playing themselves out.<sup>290</sup>

And on the other side of the globe, Americans are slowly, in fits and starts, coming to the realization that the rule of law doesn’t always have to be formalistic, that “objective” fact-finding is to a large degree a fiction, and that sometimes judges are affected by their own, phenomenal life experiences and should strive to be “empathetic.” For every dispute between East Asian countries that is settled in the formalistic processes of the World

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<sup>286</sup> Several of these laws seem loosely modeled after the European model of a single data processing law that governs both the public and private sector, enforced by an independent data commissioner. See, e.g., Hong Kong’s Personal Data (Privacy) Ordinance (Cap. 486), available online at <http://www.pco.org.hk/english/ordinance/ordfull.html>. Chen Yongxi criticizes the Hong Kong privacy regime as being too leniently enforced and not providing harmed parties with effective remedies. See Chen Yongxi, “Strengthening personal data protection during the construction of electronic government: Reactions and limits of Hong Kong privacy laws.” Taiwan has the 1995 Computer-Processed Personal Data Protection Law (CPPDPL), <http://www.privacyexchange.org/legal/nat/omin/taiwan.html>, which is enforced by several different federal agencies. See [http://www.privacyinternational.org/article.shtml?cmd\[347\]=x-347-83551](http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-83551). Japan, as discussed supra, has the APPI. Japan, like the U.S., has a constitution that does not explicitly the right to privacy but implicitly includes such a right by virtue of supreme court jurisprudence. Korea has constitutional provisions protecting privacy at home and in correspondence. See South Korea Constitution, arts. 16-18, [http://www.oefre.unibe.ch/law/icl/ks00000\\_.html](http://www.oefre.unibe.ch/law/icl/ks00000_.html). Laws implementing this constitutional right include the Protection of Personal Information Maintained by Public Agencies (1994, amended 2002), the Electronic Transaction Basic Act (1999), the Act on the Promotion of Information and Communications Network Utilization and Data Protection (2000); and the Framework Act on Electronic Signatures Act. See [http://www.bakercyberlawcentre.org/2003/Privacy\\_Conf/papers/Day2/Chung.doc](http://www.bakercyberlawcentre.org/2003/Privacy_Conf/papers/Day2/Chung.doc); [http://www.bakerinfo.com/apec/koreaappec\\_main.htm](http://www.bakerinfo.com/apec/koreaappec_main.htm); [http://www.privacyknowledgebase-con/document.jsp?docid\\_REFDPASP#Republic%20of%20Korea](http://www.privacyknowledgebase-con/document.jsp?docid_REFDPASP#Republic%20of%20Korea); [http://www.ecommerce.or.kr/about/ec\\_policy1.asp](http://www.ecommerce.or.kr/about/ec_policy1.asp).

<sup>287</sup> Lü Yao-Huai, Privacy and data privacy issues in contemporary China, *Ethics and Information Technology* (2005) 7:7-15, at 7.

<sup>288</sup> *Id.*, 8, 14.

<sup>289</sup> *Id.*, 9.

<sup>290</sup> In addition to the above cited articles, see also, e.g., Toru Nishigaki, “The ethics in Japanese information society: Consideration on Francisco Varela’s The Embodied Mind from the perspective of fundamental informatics,” *Ethics and Information Technology* (2006) 8:237-242. Lü Yao-Huai finds that in China, “ethical reflection concerning privacy and the right to privacy is relatively behind the times” and “lacks academic depth,” although he does cite a few Chinese language articles as exploring such issues. Lü Yao-Huai, at 11 (citing R.-Z. Liu and D. Wei, The ethical and legal standardization to gene privacy, *Studies in Dialectics of Nature*, 9:77-81, 2004; Y.-F. Yu, On the ethics of protection of right to privacy in networks, *Guangxi Social Sciences*, 7:52-53, 2004; R.F. Li and Y. Na., A Philosophical reflection on the loss of privacy. *Science, Technology and Dialectics*, 5: 38-41, 2003). See also Guoliang GU, The Best Protection for Personal Information—Legitimate and Effective Use.

Trade Organization (and the number grows every year),<sup>291</sup> there are Westerners turning to mediation and other forms of alternative dispute resolution, that seek not so much an objective determination of who is right and who is wrong as simply a means of restoring harmonious interpersonal relations.<sup>292</sup> The last few centuries might have been characterized by Western cultural imperialism, but it appears that as Western civilization and its legalistic nation-state has confidently stamped its mark on the rest of the world, Daoism has all the while been quietly seeping in through its foundation, softening it from within.

## 7. CONCLUSION

Global privacy standards are not dead in the water, but their proponents could stand to take a few cues from Daoism and hew more closely to the principle of *wu wei*, of not forcing. The Huang He, or Yellow River, is known as “China’s Sorrow,” for its tendency to both flood and drastically change course, with often devastating human consequences. But it is also called “the Mother River” and “the cradle of Chinese civilization,” because harnessing its power required very early social organization on a massive scale.<sup>293</sup> While this consolidation of political power in the supreme ruler led to the brutal regimentation of the Ch’in and many other instances of despotism, it also positioned China as the primary source of political and cultural influence in East Asia for thousands of years to come. It is small wonder, then, that Laozi and the other great classic philosophers, in their attempts to explain the Dao, would become so seized with water and its paradoxical properties.

<sup>291</sup> Shin-yi Peng (“Although the United States is still the most frequent user of the system, and the contrast is still relatively sharp, the statistics are encouraging...[S]ome countries, such as Korea, Indonesia, Malaysia, and Singapore, which have never invoked the GATT’s dispute settlement procedure, began to bring cases to the WTO. The WTO experience to date reveals progress in East Asia’s ability and willingness to cope with the trend toward legalism.”)

<sup>292</sup> See also generally Mark C. Modak-Turan, A Process Theory of Natural Law and the Rule of Law in China, 26 Penn St. Int’l. L. Rev 607 (2008)(incorporating Whitehead’s process philosophy into a proposal for “a constructive, post-modern normative theory of law”). See, e.g., Mark Kleiman, A Perspective on the Growth and Evolution of the Field of Mediation, Mediate.com, July 2006, available at <https://www.mediate.com/articles/kleimanM1.cfm>.

<sup>293</sup> Ping-ti Ho, *The Cradle of the East* 12 (1975). As Steward notes, larger rivers must be diverted far upstream of the fields in need of irrigation, requiring heavy labor and a form of political organization capable of exercising control over a large geographic area. Such elaborate forms of organization are typical of both ancient China and the Indus Valley, and tended to emerge much later in regions like Southeast Asia, where the smaller rivers and tributaries were more easily dealt with by local townships and organizations. Julian H. Steward, “Some Implications of the Symposium,” in *Irrigation Civilizations: A Comparative Study* 73 (Steward, ed., 1955).

It is also no surprise that the proponents of global privacy standards feel similarly engulfed by the transborder flows of data, and find themselves clamoring for a massive global governing structure that is capable of protecting humanity from the floods and changes in course that they feel threaten our very existence. But to do so will require flexibility, and more importantly, humility. Before creating a legalistic structure with uniform standards, they would do well to recall what the short-lived Ch'in Dynasty learned from following the draconian advice of Lord Shang and Han Fei Tzu—the harder the Emperor squeezed, the more that political control simply slipped between his fingers. Heraclitus warned us that we can never step into the same river twice, but the efforts thus far to control the use of rapidly changing technologies appear to be nothing so much as a series of massive dams erected at each national border, as if the flows of data have any inclination to stop at a passport control station, as if these flows won't simply be redirected elsewhere. If global privacy advocates wish to chase personal data down each of its tiny tributaries, across countless governments and cultures, they need to be much more clever, and display far more creativity than I can even offer in this Article. For I myself, at the end of this journey into the Dao, am both humbled and dubious that the key to protecting and cultivating the true Subjective Self could ever be articulated and committed to the words on a page.