



Introduction

Privacy and Power: A Transatlantic Dialogue in the Shadow of the NSA-Affair

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A Introduction

Edward Snowden's disclosures in the early summer of 2013 have had a roiling, still-unfolding effect. The consequences of the former National Security Agency (NSA) contractor's revelations are intensely disputed. One version of the story is that Snowden's courageous and visionary acts helped galvanize a new and more focused global debate about privacy in our digital, big-data epoch.¹ This debate, in turn, has spurred a number of policy and legal reforms that seek, on one hand, to reinforce communications privacy and data protection while, on the other hand, imposing greater constraints and oversight on states' intelligence services.² As Snowden hoped, the West's fundamental commitment to privacy has been revived and reinforced for a new era.³ But there is another version of the story according to which Snowden's traitorous conduct

¹ See, e.g., Interview by Amy Goodman of James Risen, Pulitzer Prize winning investigative journalist with the N.Y. TIMES (Oct. 14, 2014), www.democracynow.org/2014/10/14/james_risen_on_nsa_whistleblower_edward (claiming that Snowden "sparked a new national debate on surveillance").

² See Andrea Peterson, *A Year after Snowden Revelations, Government Surveillance Reform Still a Work in Progress*, WASH. POST (June 5, 2014), www.washingtonpost.com/news/the-switch/wp/2014/06/05/a-year-after-snowden-revelations-government-surveillance-reform-still-a-work-in-progress/ (arguing that the "move toward greater openness is arguably an incredible shift of policy in a very short period of time."). *But see* Sarah Childress, *How the NSA Spying Programs Have Changed since Snowden*, PBS (Feb. 9, 2015), www.pbs.org/wgbh/frontline/article/how-the-nsa-spying-programs-have-changed-since-snowden/ (alleging that the actual changes implemented "just feel like gestures").

³ See, e.g., David Miranda & Joseph Huff-Hannon, *Edward Snowden Inspires Global Treaty for Online Privacy*, ROLLING STONE (Sept. 24, 2015), www.rollingstone.com/politics/news/edward-snowden-inspires-global-treaty-for-online-privacy-20150924.

imperiled essential intelligence initiatives to the advantage of the West's determined and deadly enemies, with frightening consequences.⁴ Compounding this view is the suggestion that Snowden's leaks confirm that intelligence services, for the most part, have kept within the legal boundaries ordained by their democratically legitimate masters.⁵ There is no evidence, it is argued, that the far-reaching power to watch us has been used to undermine liberties such as the right to democratic participation, the right to free speech, the right to freely assemble, the freedom of religion, or the right to property.⁶

One of the most confounding – and significant – features of the NSA-Affair is that these disputed narratives have a strong transatlantic correlation. This claim can be exaggerated on the basis of overly broad generalizations. Still, thanks to Edward Snowden, it is clearer now than ever before that a vast chasm exists between American and European perspectives on privacy and intelligence gathering.⁷ In fact, the different reactions to Edward Snowden's leaks on the opposite sides of the Atlantic reveal that there is hardly another issue about which

⁴ See Scott Shane, *After Paris Attacks, C.I.A. Director Rekindles Debate Over Surveillance*, N.Y. TIMES (Nov. 16, 2015), www.nytimes.com/2015/11/17/us/after-paris-attacks-cia-director-rekindles-debate-over-surveillance.html?_r=0; James Gordon Meek *et al.*, *Intel Heads: Edward Snowden Did "Profound Damage" to U.S. Security*, ABC NEWS (Jan. 29, 2014), <http://abcnews.go.com/Blotter/intel-heads-edward-snowden-profound-damage-us-security/story?id=22285388>; John Bolton, *Edward Snowden's Leaks Are a Grave Threat to U.S. National Security*, THE GUARDIAN (June 18, 2013, 7:30 AM), www.theguardian.com/commentisfree/2013/jun/18/edward-snowden-leaks-grave-threat ("Whatever his grandiose claims, the NSA leaker has betrayed his country by gifting China moral equivalence for its cyber warfare."); Tom Risen, *Pentagon Report Says Snowden's NSA Leaks Risk Lives*, U.S. NEWS & WORLD REP. (Jan. 9, 2014, 3:38 PM), www.usnews.com/news/articles/2014/01/09/pentagon-report-says-snowdens-nsa-leaks-risk-lives.

⁵ See Chris Strohm, *NSA Use of Facial Recognition Stays within Legal Boundary*, BLOOMBERG BUSINESS (June 3, 2014, 2:29 PM), www.bloomberg.com/news/articles/2014-06-03/nsa-use-of-facial-recognition-stays-within-legal-boundary; Doug Stanglin, *Federal Judge: NSA Phone Surveillance Legal*, USA TODAY (Dec. 27, 2013, 2:20 PM), www.usatoday.com/story/news/nation/2013/12/27/new-york-nsa-phone-surveillance/4219055/.

⁶ PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD, REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (2014) (the Board found "no evidence" of improper use).

⁷ See Francesca Bignami, *European versus American Liberty: A Comparative Privacy Analysis of Antiterrorism Data Mining*, 48 B.C. L. REV. 609 (2007). One of the reasons this cultural divide exists may stem in part from each continent's experience with World War II. In Germany, internal security services were very visible and feared. They sought to persecute part of the German populace. In America, the main threat was painted as being overseas, and so internal security services like the FBI were seen as heroes attempting to root out enemy spies.

transatlantic attitudes diverge so sharply. Americans and Europeans have very different views about privacy and the power of intelligence services.⁸ Americans do not understand Europeans' outrage over the collection of seemingly meaningless and mostly innocent information that, when deployed creatively, has pragmatic value for promoting security and commercial innovation. Europeans, and especially Germans, do not understand Americans' seeming indifference toward the profound personal privacy implicated by access to highly revealing telecommunications and Internet data. The so-called "NSA-Affair" – as it is referred to in Germany – once again profoundly and painfully demonstrates that there are "significant privacy conflicts between the United States and the European Countries – conflicts that reflect unmistakable differences in sensibilities about what ought to be kept private."⁹

Especially as we are examining these issues in the tumultuous wake left behind by Snowden's revelations, there are at least two reasons why this divergence matters.

First, transatlantic disagreement over the political and legal meaning of privacy calls into question the widespread conviction that privacy is a shared and fundamental Western value.¹⁰ The concept of the "West" retains its power, in the supposed-West and the supposed-East.¹¹ But the tensions surrounding the NSA-Affair have revealed that the concept can become the source of misunderstanding when dramatically different values emerge and come into conflict *between* Western societies. In part, the transatlantic discord over privacy and intelligence gathering is surprising because it exposes fissures in what was thought to be a foundation of shared social and political ideals among Western democracies.¹² At a

⁸ James Q. Whitman, *The Two Western Cultures of Privacy: Dignity versus Liberty*, 113 *YALE L.J.* 1151 (2004).

⁹ *Id.* at 1155.

¹⁰ Gus Hosen & Maria-Martina Yalamova, *International Co-Operation and Intercultural Relations: Reconciling the Security and Privacy Agendas*, in 2 *CROSS-CULTURAL INTER-ACTION: CONCEPTS, METHODOLOGIES, TOOLS, AND APPLICATIONS* 818, at 822 (Info. Resources Mgmt. Ass'n, 2014).

¹¹ See, e.g., Carey Goldberg, *Differences Between East and West Discovered in People's Brain Activity*, *THE TECH* (Mar. 4, 2008), <http://tech.mit.edu/V128/N9/culture.html>; Alix Spiegel, *Struggle For Smarts? How Eastern And Western Cultures Tackle Learning*, *NPR* (Nov. 12, 2012, 3:29 AM), www.npr.org/sections/health-shots/2012/11/12/164793058/struggle-for-smarts-how-eastern-and-western-cultures-tackle-learning.

¹² See, e.g., CHARLES WALDSTEIN, *THE EXPANSION OF WESTERN IDEALS AND THE WORLD'S PEACE* (1899); NIALL FERGUSON, *CIVILIZATION: THE WEST AND THE REST* (2011).

time when the West is confronted with serious external challenges,¹³ it is imperative that we pursue an honest, nuanced, and critical reflection on the values that supposedly bind us together.

The chapters in this book – either embodying or directly engaging with the different transatlantic reactions to the NSA-Affair – pose a challenge to the fundamental assertion that privacy is a Western (not to mention universal) human right. The critical insight that emerges in this respect is that a concept such as privacy, especially when expressed as a national norm, necessarily reflects a society’s culture and identity.¹⁴ The comparative lawyer Pierre Legrand argued that “the objectives pursued by legal actors in a given society can only be determined and understood if account be taken of the culture of which they are also the reflection.”¹⁵ With that lesson in mind, the following chapters repeatedly demonstrate that our different notions of privacy as a legal concept are rooted in different histories, different social and cultural forces, different political traditions and institutions, different legal cultures, and different economic conditions and orientations.¹⁶ On these terms, there is no privacy. There are only *privacies*.

Second, there are tremendously important practical consequences for the diverging transatlantic views on privacy that have been exposed by the NSA-Affair. The intense misunderstanding on these issues threatens to undermine essential cooperation on security and commerce.

America and Europe cooperate in important ways on security and intelligence.¹⁷ Both sides of this partnership view it as necessary to

¹³ Bridget Kendall, *How Does Russia View the West?*, BBC (Aug 10, 2015), www.bbc.com/news/world-europe-33821589 (“If you ask Western policy makers about the main security threats facing Europe, they come up with two: Jihadists from the so-called Islamic State and President Vladimir Putin’s Russia.”); Gareth Jennings, *West “Must Unite” to Face-Off Simultaneous Threats from Islamic State and Russia*, IHS JANE’S 360 (Nov. 16, 2015), www.janes.com/article/56033/west-must-unite-to-face-off-simultaneous-threats-from-islamic-state-and-russia.

¹⁴ See Irwan Altman, *Privacy Regulation: Culturally Universal or Culturally Specific?*, 33 J. Soc. ISSUES 66 (1977); Stephan Richter & Jan Philipp Albrecht, *NSA Spying on Europe Reflects the Transatlantic Culture Gap*, THE GUARDIAN (Oct. 30, 2013, 7:19 AM), www.theguardian.com/commentisfree/2013/oct/30/nsa-spying-europe-transatlantic-culture-gap.

¹⁵ Pierre Legrand, *Comparative Legal Studies and Commitment to Theory*, 58 MOD. L. REV. 262, 263 (1995).

¹⁶ Altman, *supra* note 14 (“[T]he behavioral mechanisms by which accessibility is controlled are probably unique to the particular physical, psychological, and social circumstances of a culture.”).

¹⁷ Richard J. Aldrich, *Transatlantic Intelligence and Security Cooperation*, 80 INT’L AFFAIRS 733 (2004) (describing the “awkward challenges” that face “western intelligence cooperation”).

their respective interests.¹⁸ If that is true, then restoring the trust that was shattered by the NSA-Affair must be a priority, especially as long as we face common – and deadly – threats.¹⁹ This book, with its plain and accessible presentation of our differences, can help us reframe and refashion a common posture that delivers as much cooperation, and as much security, as possible, despite our significant differences.

America and Europe are also indispensable commercial partners, especially in fields that implicate telecommunications data. Our digital ships – full of commercially relevant and valuable data – used to sail in and out of one another’s “safe harbors.”²⁰ As a result of the NSA-Affair, this is no longer to be taken for granted. The value of the trade interests thought to be harmed by the NSA-Affair has been calculated to be in the billions.²¹ It touches the travel, telecommunications, information technology, and banking industries.²² Seemingly in reaction to the NSA-Affair, the Court of Justice of the European Union (CJEU) has repeatedly pressed for a distinctly European approach to data protection with

¹⁸ John M. Nomikos, *Transatlantic Intelligence Cooperation, the Global War on Terrorism, and International Order*, in *INTERNATIONAL ORDER IN A GLOBALIZING WORLD* 161, at 161 (Yannis A. Stivachtis ed., 2007) (“The process [of intelligence cooperation] must be a joint transatlantic partnership which emphasizes shared beliefs, values, and interests; addresses more constructively the differences and greivances; and builds a future upon the recognition that all face a common enemy, one that can be effectively contained and eliminated only through a recognition of mutual interests and the use of multilateral alliances, strategies, and action.”).

¹⁹ See GEORG MASCOLO & BEN SCOTT, OPEN TECHNOLOGY INSTITUTE, *LESSONS FROM THE SUMMER OF SNOWDEN: THE HARD ROAD BACK TO TRUST* (2013), http://wcfia.harvard.edu/files/wcfia/files/mascolo_summerofsnowden_0.pdf?m=1383852775.

²⁰ See Mark Scott, *Data Transfer Pact Between U.S. and Europe Is Ruled Invalid*, N.Y. TIMES (Oct. 6, 2015), www.nytimes.com/2015/10/07/technology/european-union-us-data-collection.html; Julia Fioretti & Foo Yun Chee, *New European, U.S. Data Transfer Pact Agreed*, REUTERS (Feb. 2, 2016, 1:15 PM), www.reuters.com/article/us-eu-dataprotection-usa-accord-idUSKCN0VB1RN.

²¹ DANIELLE KEHL *ET AL.*, OPEN TECHNOLOGY INSTITUTE, *SURVEILLANCE COSTS: THE NSA’S IMPACT ON THE ECONOMY, INTERNET FREEDOM & CYBERSECURITY* (2014), www.scribd.com/doc/235335954/OTI-Surveillance-Costs-Final; Sam Gustin, *NSA Spying Will Cost U.S. Tech Titans Billions, and That’s Just the Start*, MOTHERBOARD (July 28, 2014, 11:00 PM), <http://motherboard.vice.com/read/nsa-spying-will-cost-us-tech-titans-billions-and-thats-just-the-start>.

²² See, e.g., KEHL *ET AL.*, *supra* note 21, at 11 (“The NSA disclosures have similarly been blamed for Brazil’s December 2013 decision to award a \$4.5 billion contract to Saab over Boeing, an American company that had previously been the frontrunner in a deal to replace Brazil’s fleet of fighter jets.”).

serious consequences for transatlantic trade.²³ These questions created a significant sticking point in the negotiations over a Transatlantic Trade and Investment Partnership.²⁴ To preserve, let alone “maximize,” the value of the stable and mutually beneficial transatlantic economy, it is necessary to have the authentic and constructive conversation about privacy and intelligence gathering that this book promotes.

Or maybe we are making too much of the tension surrounding the NSA-Affair? It is possible, instead, to see our deep and persistent transatlantic interdependence on security and commercial matters as evidence that these events have not cut out the root of transatlanticism. According to this interpretation, Americans and Europeans have to be close enough to one another to make such a falling out possible in the first place. Seen in this light, the NSA-Affair might be little more than yet another spat in an otherwise constant and secure relationship. Before I survey the book’s contents and offer some introductory reflections on the lessons they teach, I want to respond to the challenge this suggestion poses to the book’s underlying thesis. The NSA-Affair is more than just a common tiff between old and steady friends. We would be wise to take it more seriously than that. It is clear to me that Americans and Europeans differ fundamentally on the issues most closely linked to the NSA-Affair.

B Different Reactions to the NSA-Affair

The terms Americans and Europeans – especially Germans – use to describe the NSA-Affair suggest profound differences regarding privacy and intelligence gathering. This is confirmed by polling results and anecdotes that reflect different reactions to Snowden and the different values Americans and Europeans assign to privacy. Finally, the differences are also clear in the way scholars in the United States and Germany think and write about privacy.

I *What’s in a Name? – And Other Anecdotes*

Throughout this book the phrase “NSA-Affair” is used to describe the political and legal turmoil – both domestic and international – loosed by

²³ Christopher Kuner, *The European Union and the Search for an International Data Protection Framework*, 2 GRONINGEN J. INT’L L. 55 (2014).

²⁴ Mary Bottari, *NSA Spying Scandal Roils U.S.–E.U. Trade Negotiations*, HUFFINGTON POST (Nov. 10, 2013, 5:25 PM), www.huffingtonpost.com/mary-bottari/us-eu-trade-negotiations_b_4251035.html.

Edward Snowden's disclosure of some of the NSA's extensive data collection and intelligence gathering activities.²⁵ But that phrase suggests critical unease (if not hostility tinted with intimations of illegality) towards the operations exposed by Snowden.²⁶ The NSA's programs qualify as an "affair" if they are scandalous – that is, unethical or illegal. In this sense, the use of the phrase "NSA-Affair" is a concession to the anger the revelations have stirred in many Europeans.²⁷ That concession, however, seems to conflict with the book's central claim, which is that, as a result of different cultural and legal traditions concerning privacy and intelligence gathering, Americans and Europeans have reacted differently to the news that the NSA is collecting immense amounts of their telecommunications data. The book starts from the premise that Americans and Europeans do not equally share the view that these programs are scandalous. That is the case – despite the book's adoption of the phrase "NSA-Affair." The developments swirling around Snowden's revelations are not seen in singularly appalling terms by Americans. It is largely the German media that has referred to the story as the "NSA-Affäre," with all of the accompanying negative connotations of that label.²⁸ References to the "NSA-Affair" in the American media mostly involve reports describing the German reaction to the

²⁵ See Tom McCarthy, *Edward Snowden Identifies Himself as Source of NSA Leaks – as It Happened*, THE GUARDIAN (June 9, 2013, 5:16 PM), www.theguardian.com/world/2013/jun/09/nsa-secret-surveillance-lawmakers-live. See, generally, *The NSA Files*, THE GUARDIAN, www.theguardian.com/us-news/the-nsa-files (last visited Feb. 13, 2016); *NSA Spying Scandal*, SPIEGEL ONLINE, www.spiegel.de/international/topic/nsa_spying_scandal/ (last visited Feb. 13, 2016).

²⁶ Charly Wilder, "Out of Hand": Europe Furious Over U.S. Spying Allegations, SPIEGEL ONLINE (Oct. 24, 2013, 1:17 PM), www.spiegel.de/international/world/angry-european-and-german-reactions-to-merkel-us-phone-spying-scandal-a-929725.html.

²⁷ *Id.* See also Alison Smale, *Anger Growing Among Allies on U.S. Spying*, N.Y. TIMES (Oct. 23, 2013), www.nytimes.com/2013/10/24/world/europe/united-states-disputes-reports-of-wiretapping-in-Europe.html; Alissa J. Rubin, *French Condemn Surveillance by N.S.A.*, N.Y. TIMES (Oct. 21, 2013), www.nytimes.com/2013/10/22/world/europe/new-report-of-nsa-spying-angers-france.html; Jay Newton-Small, *U.S. Allies Still Angry at Snowden's Revelations of U.S. Spying*, TIME (Oct. 4, 2013), <http://nation.time.com/2013/10/04/u-s-allies-still-angry-at-snowdens-revelations-of-u-s-spying/>.

²⁸ See, e.g., Kai Biermann, *Eine Telefonnummer reicht, um Menschen zu töten*, ZEIT ONLINE (Oct. 15, 2015, 6:09 PM), www.zeit.de/politik/2015-10/nsa-afaere-untersuchung-sausschuss-metadaten-brandon-bryant-aussage; *NSA-Affäre: Weißes Haus soll Bundesregierung Freigabe der Selektorenliste überlassen haben*, SPIEGEL ONLINE (Aug. 12, 2015, 4:20 PM), www.spiegel.de/politik/deutschland/nsa-afaere-weisses-haus-soll-selektoren-freigabe-nicht-untersagt-haben-a-1047820.html; *NSA-AFFÄRE*, SÜDDEUTSCHE ZEITUNG, www.sueddeutsche.de/thema/NSA-Aff%C3%A4re (last visited Feb. 13, 2016).

story.²⁹ Even more telling is the fact that Snowden's revelations have not widely earned the label "NSA-gate" or "Snowden-gate" from the American media. That would be in keeping with the tiresome American practice of borrowing the suffix "-gate" from the Nixon-era "Watergate scandal" to create a catchy name for nearly every contemporary controversy.³⁰ This is true for even the most banal crises in pop culture and politics, but it has not been the way Americans think about Snowden.³¹ Americans may be more conflicted than Europeans, who seem to regard the story exclusively as a scandal. Only parts of the story – for only some Americans – qualify as an "affair" (or a "-gate"). As a convenience, the developments of the last several years are referred to in this book as the NSA-Affair. But that is not meant to obscure the fact – fundamental to this book's project – that the labels Americans and Europeans have used to refer to the story reflect the countries' significant differences on the issue.

Besides the very different ways in which they refer to the NSA-Affair, other anecdotes point to the radically different responses to Snowden's revelations in America and Europe. Germans, in particular, have sought to recognize Snowden as an advocate for freedom. German universities have attempted to bestow honorary degrees or other awards of distinction on Snowden. The Academic Senate of the Free University of Berlin granted Snowden an "honorary membership" in appreciation for his "exceptional commitment to transparency, justice and freedom."³² The philosophy department at the University of

²⁹ See Mirko Hohmann, *The German NSA Affair and the Need for Reform in Berlin*, LAWFARE (Sept. 17, 2015, 7:12 AM), www.lawfareblog.com/german-nsa-affair-and-need-reform-berlin; Democrats Ramshied, *After the NSA Affair, the German Government is Steering towards a Serious Confrontation with the U.S.*, DAILY KOS (Feb. 20, 2014, 8:03 AM), www.dailykos.com/story/2014/2/20/1278992/-After-the-NSA-affair-the-German-government-is-steering-towards-a-serious-confrontation-with-the-US.

³⁰ Alex Campbell, *Turning a Scandal into a '-gate'*, BBC (May 11, 2013), www.bbc.com/news/magazine-22464422.

³¹ There are a plethora of sources on either side of the debate, some praising Snowden and others attempting to bury him. See *supra* note 1, note 4. However, the only usage of the phrase "Snowdengate" in mainstream print media comes from the Telegraph review of the Laura Poitras film *CITIZENFOUR*. See Tim Robey, *Citizenfour Review: "Everybody Needs to See It"*, TELEGRAPH (Oct. 16, 2014), www.telegraph.co.uk/culture/film/filmreviews/11166711/Citizenfour-review-Edward-Snowden.html.

³² *ASTa FU Informs Edward Snowden about His Honorary Membership and Demands Asylum for Edward Snowden*, ASTA FU (June 23, 2014), www.astafu.de/content/asta-fu-informs-edward-snowden-about-his-honorary-membership-and-demands-asylum-edward-snowden.

Rostock sought,³³ but was ultimately denied,³⁴ the chance to award Snowden an honorary doctorate. Just blocks from the marvelously restored baroque Frauenkirche, a private landowner has named a plaza in Dresden's Neustadt district "Edward Snowden Platz."³⁵ There have been efforts in Berlin and Cologne to name streets after Snowden.³⁶ There have been few such gestures of veneration in the United States,³⁷ where Snowden instead faces a federal criminal indictment that could result in a lengthy prison sentence.³⁸ Perhaps worse than the government's strong condemnation, it seems that the American public does not care about Snowden at all. One commentator wondered if Snowden's revelations have grown stale or have "proven to be inaccessible or not titillating enough for the American public."³⁹ Americans'

³³ *Germany: Snowden Approved for Honorary Doctorate*, N.Y. TIMES (May 14, 2014), www.nytimes.com/2014/05/15/world/europe/germany-snowden-approved-for-honorary-doctorate.html.

³⁴ Rick Noack, *The Global Cult of Edward Snowden Keeps Growing*, WASH. POST (June 23, 2015), www.washingtonpost.com/news/worldviews/wp/2015/06/23/the-global-cult-of-edward-snowden-keeps-growing/ ("When a German university wanted to award Snowden an honorary doctorate, the German federal government stepped in and prohibited the public institution from pursuing its plan.").

³⁵ *Id.*

³⁶ Adam Taylor, *The Not-so-Subtle Diplomatic Tactic of Renaming Streets to Troll other Countries*, WASH. POST (June 25, 2015), www.washingtonpost.com/news/worldviews/wp/2014/06/25/the-not-so-subtle-diplomatic-tactic-of-renaming-streets-to-troll-other-countries/ (discussing the renaming of a street in Berlin); German Artist Pushes for "Snowden Street" near U.S. Embassy, ALJAZEERA AMERICA (Oct. 31, 2013, 3:38 PM), <http://america.aljazeera.com/watch/shows/the-stream/the-stream-officialblog/2013/10/31/german-artist-pushesforsnowdenstreetnearusembassy.html>; *Berlin Activists Want to Rename Major Streets Around the World "Snowden Street"*, MOTHERBOARD (Oct. 30, 2013, 10:30 AM), <http://motherboard.vice.com/blog/berlin-activists-want-to-rename-major-streets-around-the-world-snowden-street>.

³⁷ *Artists Who Displayed Edward Snowden Statue in New York Park Escape Charges*, THE GUARDIAN (May 6, 2015, 8:01 PM), www.theguardian.com/us-news/2015/may/07/artists-edward-snowden-statue-new-york-park-charges.

³⁸ Peter Finn & Sari Horwitz, *U.S. Charges Snowden with Espionage*, WASH. POST (June 21, 2013), www.washingtonpost.com/world/national-security/us-charges-snowden-with-espionage/2013/06/21/507497d8-dab1-11e2-a016-92547bf094cc_story.html; *U.S. vs. Edward J. Snowden Criminal Complaint*, WASH. POST, <http://apps.washingtonpost.com/g/documents/world/us-vs-edward-j-snowden-criminal-complaint/496/> (last visited Feb. 13, 2016). For the possible federal penalties, see 18 U.S.C.A. § 641 (2016); 18 U.S.C.A. § 793 (2016); 18 U.S.C.A. § 798 (2016).

³⁹ Adam Chandler, *What It Takes to Make People Care about NSA Surveillance*, ATLANTIC (Apr. 6, 2015), www.theatlantic.com/national/archive/2015/04/naked-selfies-and-the-nsa/389778/. The tepid response to Oliver Stone's film *Snowden*, which released in the fall of 2016, might be additional evidence of the American public's unfamiliarity with or

disinterest in Snowden and his revelations led another commentator to wonder if “Americans have largely accepted the reality of the surveillance state in their lives.”⁴⁰

II *Surveying the NSA-Affair*

It is hard to imagine a stronger contrast in responses to the NSA-Affair. But American and European differences with respect to personal information privacy and intelligence gathering – and the resulting different reactions to Snowden’s revelations – are not just reflected in labels and anecdotes. Social science research and survey data confirm these differences. First, these sources suggest that there are fundamental differences between America and Germany on the issue of personal information privacy. Second, they suggest that there are differences between America and Germany more specifically with respect to the NSA-Affair.

1 Data Privacy as an Abstract Question

At the most fundamental level some social science research claims to have confirmed that there are distinct national cultures.⁴¹ That research, which builds upon the characteristics of national culture described by Gerard Hofstede,⁴² assigns the United States and Germany to different (albeit adjacent) clusters of national culture, identified respectively as the “Anglo” and the “Germanic Europe” cultural groups.⁴³ Building from these claims, many authors in the area of information science claim to have “identified a relationship between national culture and attitude to information privacy.”⁴⁴ Concerns about personal information privacy are

disinterest in Snowden and the NSA-Affair. The first of five reasons for the film’s poor showing at the box office offered by an article in *The Wrap* was that “people don’t know/care about Snowden.” See Beatrice Verhoeven, *5 Reasons Why “Snowden” Couldn’t Hack It at the Box Office*, *THE WRAP* (Sept. 18, 2016), www.thewrap.com/snowden-box-office-not-hack-joseph-gordon-levitt/.

⁴⁰ Marc Ambinder, *Does the Public Still Care about the NSA?*, *THE WEEK* (Jan. 29, 2014), <http://theweek.com/articles/452113/does-public-still-care-about-nsa>.

⁴¹ GEERT HOFSTEDÉ, *CULTURAL CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK RELATED VALUES* (1980); GEERT HOFSTEDÉ, *CULTURES AND ORGANIZATIONS: SOFTWARE OF THE MIND* (1991).

⁴² *Id.*

⁴³ CENTER FOR CREATIVE LEADERSHIP, *LEADER EFFECTIVENESS AND CULTURE: THE GLOBE STUDY* (2014), www.ccl.org/leadership/pdf/assessments/GlobeStudy.pdf.

⁴⁴ Sophie Cockcroft, *Culture, Law and Information Privacy*, in *Proceedings of European and Mediterranean Conference on Information Systems 2007 (EMCIS2007)* June 24–26,