

## Teaching Notes

# NSA, PRIVACY, SAFE HARBOR

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In June 2014, an Austrian privacy activist issued a complaint to the Irish Data Protection Commission (DPC). He argued that the NSA program PRISM, which collected the online data of foreign targets from various communication platforms, violated his privacy rights as a European citizen. The Irish DPC referred the complaint to the highest court in the European Union, the Court of Justice. The Court invalidated the Safe Harbor arrangement in light of the revelations of the NSA's data collection with PRISM. This case study will examine the origins of the Safe Harbor agreement, the NSA's PRISM program, and subsequent invalidation of the agreement.

This case study was completed under the direction of Dr. Amber Díaz Pearson, The Kenan Institute for Ethics.

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## Ethical Frameworks<sup>1</sup>

When analyzing the ethics of the NSA program and E.U. Court of Justice’s decision, the ethical frameworks of deontology and consequentialism will help guide our discussion. The deontological school of thought comes out of 18th century philosopher Immanuel Kant’s writings in which he argues that moral acts are performed out of a sense of duty that we understand rationally. For Kant, moral acts are good-in-themselves, not because of their results (consequences) or how the actor feels about them (emotions).

Kant thought that everyone could be guided by the Categorical Imperative: “Act only on that maxim [principle] through which you can at the same time will that it should become a universal law.”<sup>2</sup> That is, for any action one is willing to take, one should be willing for anyone else to behave in the same way. Relatedly, he argued that humans are not and should not be treated as means to an end (regardless of whether that end – consequence – would be good or bad), but that people are ends-in-themselves. For Kant, people are moral agents, with the capacity to act and choose, and other people are intrinsically valuable as ends-in-themselves.<sup>3</sup>

In contrast, consequentialism emphasizes the outcomes of one’s agency instead of the path to said outcome. In consequentialism, morality is measured by the end result of a string of decisions, which allows for actions of questionable moral fiber to be justified by a morally positive result. Motive and obligation behind actions take a back seat in this school of thought, which means that individual actions may be judged more or less strictly than according to deontology, depending on the consequences they produce.<sup>4</sup>

In its most classic form, Act Consequentialism justifies actions by the maximizing of good. Under this principle, acts of agency that maximize total utility (taking into consideration both negative and positive contributions by the act) are considered morally right. The common slogan of Act Consequentialism therefore reads “the greatest happiness for the greatest number.”<sup>5</sup>

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<sup>1</sup> Adapted from Alexander Klassen’s War Films Teaching Notes. <http://kenan.ethics.duke.edu/wp-content/uploads/2012/08/War-Films-TN2015.pdf>

<sup>2</sup> Kant, Immanuel, 1724-1804. 1993. *Grounding for the metaphysics of morals ; with, on a supposed right to lie because of philanthropic concerns*. Indianapolis: Hackett Pub. Co.

<sup>3</sup> See also Peter Sjöstedt’s summary of deontology. Sjöstedt-H, P. (n.d.). *Kant’s Ethics – Summary*. Retrieved May 17, 2016, from <http://www.philosopher.eu/texts/kants-ethics-summary/>

<sup>4</sup> Sinnott-Armstrong, Walter, “Consequentialism”, *The Stanford Encyclopedia of Philosophy* (Spring 2014 Edition), Edward N. Zalta (ed.), <<http://plato.stanford.edu/archives/spr2014/entries/consequentialism/>>

<sup>5</sup> Bentham, J. (1776). *A Fragment on Government: Being an Examination of what is Delivered, on the Subject of Government in General, in the Introduction to Sir William Blackstone’s Commentaries: with a Preface, in which is Given a Critique on the Work at Large* (No. 2). T. Payne; P. Elmsly; and E. Brooke

## Discussion Questions

1. *What were the implications of the NSA mass surveillance program? For the United States? For the European Union?*
2. *What were the implications of the Court of Justice decision? For the United States? For the European Union?*
3. *How would a deontologist justify the NSA mass surveillance program? A consequentialist? Do you find either set of arguments compelling?*
4. *How would a deontologist justify the Court of Justice's invalidation of Safe Harbor? A consequentialist? Do you find those arguments compelling?*
  - a. *Is there evidence that the Court of Justice used deontology or consequentialism to justify PRISM? Should the Court of Justice have considered justification under the other ethical framework?*
5. *Does the NSA have an obligation to adhere to a set of ethical standards? The Court of Justice?*
  - a. *Are those standards different? If so, how should the United States and the European Union balance the conflicting standards?*