Government Surveillance Technology and the Value of Trust

The Relation of Trust between Government and Society, and Its Effect on Cooperation and Morality

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ABSTRACT

This thesis is about government surveillance technology in relation to the value of trust in society. The 2006 EU Data Retention Directive is used as an example of surveillance technology that invades privacy for the sake of security. I will show that trust enables cooperation and morality in society, and ask in what way the Directive relates to these values. The focus lies upon the relation of trust between government and citizens. I will argue that the Directive fails to recognize the value of trust in relation to cooperation and morality in society, because it fails to respect its citizens, and therefore has a bad influence on the climate of trust.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Introduction</td>
<td>p. 4-6</td>
</tr>
<tr>
<td>2. The Data Retention Directive</td>
<td>p. 7-11</td>
</tr>
<tr>
<td>3. Trust</td>
<td>p. 12-23</td>
</tr>
<tr>
<td>3.2. Three Views on Trust</td>
<td>p. 14-19</td>
</tr>
<tr>
<td>3.3. The values of Trust</td>
<td>p. 19-23</td>
</tr>
<tr>
<td>4. The Data Retention Directive and Trust</td>
<td>p. 24-28</td>
</tr>
<tr>
<td>5. Conclusion</td>
<td>p. 29-30</td>
</tr>
<tr>
<td>References</td>
<td>p. 31-32</td>
</tr>
</tbody>
</table>
1. INTRODUCTION

In 2006 the European Union adopted the Data Retention Directive (Directive 2006/24/EC) that makes it mandatory for communication providers to save ‘necessary’ data for a period from six months to two years. Necessary data entails data that can be used to trace and identify the source of a communication; to identify the destination of a communication; to identify the date, time and duration of a communication; to identify the type of communication; to identify users’ communication equipment or what purports to be their equipment; to identify the location of mobile communication equipment.1 In short necessary data contains when, where and with whom one calls or emails, and is online. This information is meant to help with the ‘investigation, detection and prosecution of serious crime, as defined by each Member State in its national law.’2 The Data Detention Directive (hereafter ‘the Directive’) is meant as a security measure in the protection of EU-citizens.

Ever since the adoption of the Directive it has been under heavy attack, and not without good reasons. In the end of 2010 Peter Hustinx, the European Data Protection Supervisor3 wrote (for a conference on the Directive4) the following: ‘The Directive is without doubt the most privacy invasive instrument ever adopted by the EU in terms of scale and the number of people it affects.’5 Hustinx argues that without clear evidence that shows the Directive is really necessary, it should either be revoked or replaced by a new measure. The invasion of privacy and other reasons have evoked a heavy opposition. Some countries rejected to implement the Directive. In Germany it was decided that the Directive was in conflict with the constitution, and the government ordered the communication providers to delete the restored data that was collected since 2006.6 ‘The court held that the blanket data retention mandated by the EU directive violated Article 10 of the German Constitution, which

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2 Ibid.
3 Concerning Hustinx task: ‘The responsibility of the EDPS [European Data Protection Supervisor] is to make sure that all EU institutions and bodies respect people’s right to privacy when processing their personal data.’ Available at: http://europa.eu/about-eu/institutions-bodies/edps/index_en.htm. (Accessed June 14, 2011).
guarantees the basic right to private life and correspondence." The data retention must be suspended until a new national law has been formed. In Romania the Constitutional Court ruled that the EU directive fundamentally violated Article 8 of the European Convention on Human Rights, which guarantees the right to respect for private life and correspondence. Data retention itself, the court wrote, is "likely to overturn the presumption of innocence and to transform a priori all users of electronic communication services or public communication networks into people suspected of committing terrorism crimes or other serious crimes." As a result, all citizens would become "permanent subjects to this intrusion into their exercise of their private rights to correspondence and freedom of expression." The Romanian Constitutional Court objected to the idea of treating all citizens as potential criminals.

It is argued that the Directive does not contribute much to the crime solving percentage. That the costs are too high. That the invasion of privacy is in conflict with human rights and privacy laws. And overall it is questioned whether benefits of the data retention for security outweigh the invasion on the privacy of the users. On the other hand it is claimed that it has helped a lot in the investigation of terrorism. For example, the authorities of Spain and the UK claimed that the data retention was of significant help in the investigation of the 2004 Madrid bombings. The current debate is about whether the directive should remain the same, altered or abolished. The evaluation report of the EU that was published in 2011 was in favour of the continuation of the Directive, albeit with some adjustments. The debate around the Directive is part of a much bigger and central debate in the modern information society, the debate about security versus privacy. To what degree can the government use information technology for surveillance in the name of security? I will focus on a subject that relates to this debate, the matter of trust and government in relation to surveillance technology. I am interested in how the effect of the government surveillance measures relates to trust in society, and the value of trust in society. Please note that I will be focussing on a democratic society.

In this thesis I will be discussing the value of trust in society in relation to the Directive. In section 2. The Data Retention Directive I will give a further introduction to what the Directive entails and why it is surrounded by controversy. The following section 3. Trust is (not entirely unexpected) about trust. First, in 3.1. What is Trust? I will give a general introduction to the concept of trust. Then in 3.2. Three Views on Trust I will discuss the social contract view, the

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7 Ibid.
8 Ibid.
encapsulated-self view and the good-will view on trust. Finally, in 3.3. The Values of Trust I will treat two instrumental values of trust, namely cooperation and morality. Continuing in section 4. The Data Retention Directive and Trust I will relate the Directive to notion of trust discussed in section 2. and discuss the importance of trust in government and vice versa. I will argue that the Directive fails to recognize the value of trust in relation to cooperation and morality in society, because it fails to respect its citizens, and therefore has a bad influence on the climate of trust. Note that throughout this paper when I talk about trust in government, I will refer to trust in a democratic government. And I will adopt the view that trusting the government roughly means having a confident expectation in the ability and intentions to act in the interest of its citizens, or more specifically, in the interest of you as a citizen. Finally in section 5. Conclusion I will summarize the most important parts of the previous sections and conclude that the Directive should be rejected, based on the importance of trust in democratic society.
2. THE DATA DETENTION DIRECTIVE

The Data Detention Directive (Directive 2006/24/EC) was adopted by the EU in 2006. In 2010 an evaluative report was published, as was ordered by the EU. This report argued in favour of the continuation of the Directive, albeit with some amendments. Strong opposition came from all over Europe, Germany and Romania rejected the Directive and many associations and individuals expressed their concern. In the introduction I explained shortly what the Directive entailed and for what purposes it was intended. For further explanation I will first quote the most important elements of the Directive itself, and then continue with a joint letter against the Directive, the Evaluation report on the Data Retention Directive from the EU in favour of the Directive, and the Shadow evaluation report on the Data Retention Directive (2006/24/EC) published by European Digital Rights, that concluded the opposite of the evaluation report of the EU. First important elements out of the Directive:

...This Directive relates only to data generated or processed as a consequence of a communication or a communication service and does not relate to data that are the content of the information communicated.

...1. This Directive aims to harmonise Member States' provisions concerning the obligations of the providers of publicly available electronic communications services or of public communications networks with respect to the retention of certain data which are generated or processed by them, in order to ensure that the data are available for the purpose of the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law.

...2. For the purpose of this Directive:
(a) "data" means traffic data and location data and the related data necessary to identify the subscriber or user;
(b) "user" means any legal entity or natural person using a publicly available electronic communications service, for private or business purposes, without necessarily having subscribed to that service;

...
1. Member States shall ensure that the following categories of data are retained under this Directive:

(a) data necessary to trace and identify the source of a communication...
(b) data necessary to identify the destination of a communication...
(c) data necessary to identify the date, time and duration of a communication...
(d) data necessary to identify the type of communication...
(e) data necessary to identify users’ communication equipment or what purports to be their equipment...
(f) data necessary to identify the location of mobile communication equipment...

Member States shall ensure that the categories of data specified in Article 5 are retained for periods of not less than six months and not more than two years from the date of the communication...  

In short, the Directive orders all member states to retain ‘necessary data’ for a period from six months to two years, as a way to help the investigation and prevention of serious crime. Note that the Directive does not apply to the content of communication data, only to the data that can be used to identify the time, place, source and direction of the communication. Not all states have implemented the Directive in the same way and some refuse to even do so. Since the adoption of the Directive in 2006 its acceptability has been heavily debated. It has been questioned whether the benefits of the directive outweigh the costs, and the invasion of privacy. But also whether without the directive the same crimes couldn’t be fought also. And whether it is in conflict with human rights and existing laws on privacy. In June 2010 a joint letter arguing against the Directive was send to Cecilia Malmström the European Commissioner for Home Affairs (since 2010). The letter was signed by 106 persons in the name of varying associations from all over Europe, such as ‘Human Rights Watch’ (international), ‘Forum Menschenrechte’ (Germany), ‘Access to Information Programme’ (Bulgary), Association Belge des Syndicats Médicaux (Belgium), ‘Croatian Journalists’ Association CJA’ (Croatia) and ‘Center for Peace and Democracy Development CPDD’ (Serbia). The letter was send in the name of associations related to subjects varying from human rights to journalism, psychology, digital privacy and medicine. Below I will quote part

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of the letter, describing how the directive damages ‘our open and democratic society’ and why it should be rejected.

We believe that such invasive surveillance of the entire population is unacceptable. With a data retention regime in place, sensitive information about social contacts (including business contacts), movements and the private lives (e.g. contacts with physicians, lawyers, workers councils, psychologists, helplines, etc.) of 500 million Europeans is collected in the absence of any suspicion. Telecommunications data retention undermines professional confidentiality, creating the permanent risk of data losses and data abuses and deters citizens from making confidential communications via electronic communication networks. It undermines the protection of journalistic sources and thus compromises the freedom of the press. Overall it damages preconditions of our open and democratic society. In the absence of a financial compensation scheme in most countries, the enormous costs of a telecommunications data retention regime must be borne by the thousands of affected telecommunications providers. This leads to price increases as well as the discontinuation of services, and indirectly burdens consumers.

Studies prove that the communications data available without data retention are generally sufficient for effective criminal investigations. Blanket data retention has proven to be superfluous, harmful or even unconstitutional in many states across Europe, such as Austria, Belgium, Germany, Greece, Romania and Sweden. These states prosecute crime just as effectively using targeted instruments, such as the data preservation regime agreed in the Council of Europe Convention on Cybercrime. There is no proof that telecommunications data retention provides for better protection against crime. On the other hand, we can see that it costs billions of Euro, puts the privacy of innocent people at risk, disrupts confidential communications and paves the way for an ever-increasing mass accumulation of information about the entire population.

Legal experts expect the European Court of Justice to follow the Constitutional Court of Romania as well as the European Court of Human Rights’s Marper judgement and declare the retention of telecommunications data in the absence of any suspicion incompatible with the EU Charter of Fundamental Rights.
In this paper I will not get into the legality of the directive and whether it is in contradiction with human rights. It is not my expertise and it would take a whole different thesis to analyse it. But the letter illustrates the current debate about the directive in which the problem of this thesis is imbedded. Given the harm the directive is causing on ‘professional confidentiality’, the ‘permanent risk of data losses and data abuses’, the deterring of citizens in making ‘confident communications’ and the undermining of ‘the freedom of the press’, while there is no direct suspicion lack of prove that the directive ‘provides for better protection against crime’, the directive should be repealed. The letter continues to say that ‘Overall it damages preconditions of our open and democratic society.’


> Overall, the evaluation has demonstrated that data retention is a valuable tool for criminal justice systems and for law enforcement in the EU. The contribution of the Directive to the harmonisation of data retention has been limited in terms of, for example, purpose limitation and retention periods, and also in the area of reimbursement of costs incurred by operators, which is outside its scope. Given the implications and risks for the internal market and for the respect for the right to privacy and the protection of personal data, the EU should continue through common rules to ensure that high standards for the storage, retrieval and use of traffic and location data are consistently maintained. In the light of these conclusions, the Commission intends to propose amendments to the Directive, based on an impact assessment.

The report states that the Directive is a valuable tool that should be retained. It continues to say that it does however recommend the European Parliament to look at several points for assessment so some amendments can be made to the Directive.

> In the light of this evaluation, the Commission will propose a revision of the current data retention framework. It will devise a number of options in consultation with law

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enforcement, the judiciary, industry and consumer groups, data protection authorities and civil society organisations. It will research further public perceptions of data retention and its impact on behaviour. These findings will feed into an impact assessment of the identified policy options which will provide the basis for the Commission's proposal.

Thus besides from some adjustments, the Directive should be preserved. This conclusion was contradicted by the European Digital Rights that published a shadow evaluation report to go alongside the above mentioned official report. This report focuses solely on the Directive in relation to the fundamental rights and freedoms of EU citizens. It concludes that the EU should reject the ‘principle of data retention’\textsuperscript{12}. It states that the Direction violates the fundamental human rights and is unnecessary to fight serious crime.

While the EU Evaluation Report was favourable towards the continuation of the Directive, its shadow report and the joint letter argued against it. The shadow report holds that the Directive is in conflict with human rights and freedom, although the question whether this is the case is very important, it will not be the research question of my thesis. I use it merely to demonstrate the controversy surrounding the Directive. A very interesting comment was made in the joint letter that was send to the European Commissioner for Home Affairs: ‘Overall it [the directive] damages preconditions of our open and democratic society.’\textsuperscript{13} This comment made me think about the relation of trust between the government and its citizens, and how this can effect cooperation and morality in society. In the following section on trust I will discuss several views on trust and analyze how trust can be important for cooperation and morality.


3. TRUST

In this section I will answer three questions in relation to trust: what is trust, what are the requirements of trust and in what way is trust instrumental the values of cooperation and morality. In the next section I will argue why it is important for the government to ensure a climate of trust in the society, and debate whether or not the Directive is in line or in conflict with this climate of trust.

3.1. What is trust?
The Oxford Dictionary Online describes trust as a ‘firm belief in the reliability, truth, or ability of someone or something’14. Very similar to this definition, but more to my liking, is the definition of trust as having a confident expectation of someone or something.15 This definition is very general, but it comes close to the meaning of trust, because we can interpret the word ‘expectation’ in various ways. Trust is relational; there are different kinds of trust relationships depending on the context. For instance, we have a different kind of trust in our closest friends than we have in our employer or policemen for that matter. When we go to a doctor we trust him in a very different way than we trust our best friends. We can trust people just because of their title, or because others trust them, and we can trust people because we personally know them. We trust in different characteristics or properties, if we trust someone it does not necessarily mean we trust him completely; we can trust people in various degrees and ways.

Trust can work both in and against our advantage. Trusting opens us up to for example the benefits of cooperation, but at the same time it can make us susceptible to matters such as deception and exploitation. This is why the distinction between justified and unjustified trust is important. We can speak of justified trust when we have good reason to trust in someone or something, which makes the chance of perception slimmer. Trust can have intrinsic and instrumental worth. Trust can be valued for itself, because it is a virtue for instance, it can be argued that a virtuous person is trustworthy. However in this thesis I will refer to the instrumental value of trust, how trust can be valued as the means of achieving something else. The main instrumental values of trust are considered to be its positive influence on (social) cooperation, morality, autonomy, (self-)respect and knowledge. I will only discuss the first

two values, i.e. cooperation and morality. This is because I feel that cooperation and morality are the most important ones, in the sense that they often need or imply the other values. Furthermore cooperation and morality are very much intertwined, for without cooperation there is no basis for morality in society.

Trust is inextricably connected to trustworthiness. Carolyn McLeod describes trust as an ‘attitude that we have towards people whom we hope will be trustworthy’\(^{16}\). The difference between trust and trustworthiness is that trust is an attitude whereas trustworthiness is a property. Ideally it is the case that those who we trust are trustworthy and those who are trustworthy we trust.\(^{17}\) She lists the following basic requirements that permit a trust-relationship:

> Trusting requires that we can, 1) be vulnerable to others (vulnerable to betrayal in particular); 2) think well of others, at least in certain domains; and 3) be optimistic that they are, or at least will be, competent in certain respects... There is a further condition which is controversial, however: the trustor is optimistic that the trustee will have a certain kind of motive for acting. Controversy surrounds this last criterion, because it is unclear what, if any, sort of motive we expect from people we trust.\(^{18}\)

Thus trusting involves requires risk, in particular the risk of betrayal as Baier will argue in 3.2. Also it requires a certain kind of optimism in the trustee. The question what kind of motive a trustworthy person should have is more difficult than the question whether he is trustworthy to begin with. The trustor should be confident in the fact that the trustee is capable of and committed to acting a certain way. In 3.2 I will describe three central views on trust, the social contract view, the encapsulated interest view, and the ‘goodwill’ view. These views will explain what trust entails what kind of relationship it requires and what the motive of a trustworthy person is.

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\(^{17}\) Ibid.

\(^{18}\) Ibid.
3.2. Three Views on Trust

1. Social contract view

The social contract view entails that ‘trustworthiness can be “compelled by the force of norms” or, more generally, by the force of social constraints...’19. This notion of trust is based on self-interest. A contract, the government, laws or social norms ensure a relation of trust by securing citizens by constraining all citizens by the same rules or laws. The common criticism is that the social contract view gives a limited account of trust. If the trustee can only be trusted because of a something like a contract, he does not seem genuinely trustworthy. I will shortly discuss three perspectives on trust in the social contract, those of Hobbes, Locke and Hume.

Axel Honneth describes Hobbes view on humans in the state of nature and the role of the government in a clear way:

For Hobbes... what is distinctive about humans is their exceptional ability to concern themselves with their future welfare. As soon as one human being encounters another, however, this anticipatory behaviour generates a form of preventive power-escalation that is born in suspicion. Since both subjects must remain mutually alien and inscrutable in their intentions, each is forced into a prospective expansion of its potential for power, in order to be able to defend itself in the future against possible attacks from the other... Since a stance of preventive powerescalation is supposed to be constitutive for the individual nature of humans, the social relations resulting from such a subtraction would possess the character of a war of all against all... The obviously negative consequences of a perpetual situation of struggle among human beings, of permanent fear, and of mutual distrust are supposed to prove that the contractually regulated submission of all subjects to a sovereign ruling power is the only reasonable outcome of an instrumentally rational weighing of interest. In Hobbes’s theory, the crucial justification for the social contract lies simply in the fact that it alone can put an end to the war of all against all, a war that subjects wage for their own individual self-preservation... The ultimate purpose of political practice to be the attempt, over and over again, to bring a halt to this ever-threatening conflict.20

19 Ibid.
In the state of nature all people act only in their *self-interest*. What is right or wrong does not matter when people are only acting in their own interest and are afraid of betrayal. Because of the constant fear of deception, people will try to betray the other one before they are betrayed themselves. Therefore to rely on ethics in a state of nature is a ‘fools game’ and makes one vulnerable. The establishment of a government that forms laws enables the people to act in a collective interest. The fear of being betrayed causes people to get into a state of the war of all against all and only the social contract can put an end to this war. Ethics can only thrive in a society that has laws, because laws enable trust. A government is needed so people can act in the collective interest. The laws form insurance that other people will have to obey to the same rules and are in this sense the foundation of trust. It is the primary role of the government to ensure that there is a milieu of trust in society, so that people will never get back to the state of nature. In the social contract of Hobbes, the government has absolute power. The laws ensure trust and cooperation, because if somebody were to back out of the contract, he would be considered an outlaw and thereby no longer safe.

In the social contract of Locke, trust plays a different role. He describes the importance of trust in his Second Treatise. An import feature of Locke’s social contract is that there are two forms of consent, the contractual consent and the attitudinal consent. The first one is based on the actual social contract, but the latter is based on trust. Trust is an indispensible element of the social contract. Citizens need to be able to trust not only each other but also the government. It is the task of the government to be trustworthy, otherwise they cannot be assured of the attitudinal consent. While Hobbes assigns absolute power to the government, Locke does not. Locke argues that the government must deserve the trust of the citizens, and if this trust is abused, the citizens have the right to overthrow their government.21 The social contract entails that those who enter it give away their ‘legislative’ power to the sovereign, but there is still a great power within the community. If at any time the ‘body of people’, find that the trust that they have bestowed upon the legislator is abused, they have the right to intervene in the state of affairs. Locke writes: ‘Who shall be judge, whether the prince or legislative act contrary to their trust?... To this I reply, The people shall be judge; for who shall be judge whether his trustee or deputy acts well, and according to the trust reposed in him, but he who deputes him, and must, by having deputed him, have still a power to discard

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him, when he fails in his trust? He continues later: ‘When by the miscarriages of those in
authority, it [the trust] is forfeited; upon the forfeiture, or at the determination of the time set,
it reverts to the society, and the people have a right to act as supreme, and continue the
legislative in themselves; or erect a new form, or under the old form place it in new hands, as
they think good.’

In the contractarian tradition of Hobbes, Locke and Hume, trust is not a natural attitude. Laws
are necessary to give a basis for trust, in the state of nature trust is dangerous. Hume however
has a more optimistic belief in the human nature than Hobbes and Locke. He believes that we
have a natural sympathy towards others and that trust will supplement certain emotions that
exist naturally. We have a different attitude towards people for whom we care, this make us
partial in our behaviour. We are expected to act less kind to strangers than to our friends and
family. Trust is not a natural virtue, but comes from social relations. The social contract
ensures that we keep our promises equally to all. While Hobbes thinks that the social contract
is a way to make purely self motivated individuals cooperate for the collective interest. Hume
believes that the social contract reassures individuals who are already aware of the benefits of
coopration, that they will be protected from those that would take advantage of their trust. Although he is aware of the fact that this risk can never be completely taken away, there will
always be people who take advantage of trust.

2. Encapsulated interest view
In ‘Trust’ Russell Hardin describes his view on trust in as ‘encapsulated interest’. This is trust
in the sense that the trustor relies on the fact that the trustee takes his interests serious because
he values the continuation of the relationship, and even though the interests of the trustor and
trustee may conflict, at least the consideration is there. He describes this in the following way:

\[
\text{I trust you because I think it is your interest to take my interests in the relevant matter}
\text{seriously in the following sense. You value the continuation of our relationship and}
\text{you therefore have your own interest in taking my interests into account. That is, you}
\text{encapsulate my interests in your own interests. My interests might come into conflict}
\text{with other interests you have and that trump mine, and you might therefore not}
\]

22 Ibid. Sect. 240.
23 Ibid. Sect. 243.
24 Matravers, M. *Hume on Trust*. The Philosophy of Trust, Reith Lectures 2002. Available at:
25 Ibid.
Encapsulated trust holds that the trustor and the trustee have compatible interest in at least some areas, but this is not enough. It further requires that 'the trusted values the continuation of the relationship with the trustor and has compatible interests at least in part for this reason.' Trust is relational in the sense that it depends on the relationship between the trustor and the trustee. Further, trust always involves some kind of risk. Hardin chooses the encapsulated notion of trust because it is an important notion of all kind of trust relationships.

Karen Jones calls the social contract view and the encapsulated interest view 'risk-assessment views'. A risk-assessment view of trust holds that people asses the risk of relying on someone else based on the self-interest of the trustee, when the risk is low they trust the other person. Hardin holds that a part of the trust relation is to make rational calculations into to what degree our interests are compatible. But individuals require different calculations than institutions. It is impossible for one to have enough information about the interests of government institutions, much less the individuals running them, to make a rational assessment of whether or not to trust the government.' I will get back to this point in section 4.

A lot of literature writes that trust requires something beyond ‘rational expectations grounded in the plausible motivations of the trustee’. Hardin acknowledges this, but this ‘something’ always remains vague and is very underdeveloped. He assumes that trust is at least mostly self-interest based behaviour. McLeod comments that the critique towards the encapsulated trust is that it is missing something, just like the social contract view, without it the two views might come down to reliability rather than trustworthiness: ‘being motivated by a desire to maintain a relationship (the central motivation of a trustworthy person on the encapsulated interests view) may not require one to adopt all of the interests of the trustor that would actually make one trustworthy to that person. In the end, like the social contract view, the

27 Ibid. P. 3
31 Ibid. P. 5
encapsulated interests view might describe only reliability, not trustworthiness. What is missing is care, trust means depending on the good will of someone else.

3. The Goodwill View

Whereas both the social contract view and the encapsulated interest view are based on self-interest, the goodwill view as McLeod calls it, is based on the goodwill of the trustee. This idea is formulated by Annette Baier. This view holds that ‘a trustee who is actually trustworthy will act out of goodwill toward the trustor, to what or to whom the trustee is entrusted with, or both.’ Trusting is ‘depending on another’s good will’, and this means that the trustor is vulnerable to the ‘limits of that good will’. This is why justified, or as Baier calls it, reasonable trust is very important. ‘Reasonable trust will require good grounds for such confidence in another's good will, or at least the absence of good grounds for expecting their ill will or indifference. Trust then, on this first approximation, is accepted vulnerability to another's possible but not expected ill will (or lack of good will) toward one.’ The notion of good will is what separates trust from mere reliance, it supposes a certain kind of care on the part of the trustee to act a certain way. Whereas both trust and reliance can be disappointed, only trust can be betrayed argues Baier. She writes:

Trust which is reliance on another’s good will, perhaps minimal good will, contrasts with the forms of reliance on others' reactions and attitudes which are shown by the comedian, the advertiser, the blackmailer, the kidnapper-extortioner, and the terrorist, who all depend on particular attitudes and reactions of others for the success of their actions. We all depend on one another's psychology in countless ways, but this is not yet to trust them. The trusting can be betrayed, or at least let down, and not just disappointed... I need not either acknowledge this reliance or believe that she has either invited or acknowledged such rust since there is such a thing as unconscious trust, as unwanted trust, as forced receipt of trust, and as trust which the trusted is unaware of.

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33 Ibid.
34 Ibid.
36 Ibid. P. 235
37 Ibid. P. 234-235.
The criticism to the goodwill view is that goodwill is not necessary for a trust relationship, we can trust people without assuming they have good will towards us. But this is exactly why Baier differentiates trust from reliance, trust requires some sort of care. If the trustee can only be trusted because of rules, laws or social norms, then it might be incorrect to speak about trust. It seems reliance seems is a more appropriate term.

Recap, the first to views on trust are based upon self-interest, the trustor calculates the risks factor of the likeliness that the trustee will act against his interest. The encapsulated self view of Hardin adds to this notion that the trustor and trustee must have to at least some degree compatible interests, and the trustee must be interested in the continuation of the relationship between him and the trustor. But these accounts are missing something essential according to Baier, and this is good will. There is no care on the side of the trustee required to establish a relation of trust. For instance, if a parent does not hit his child only because there are laws against it that would imprison him upon doing so, it would seem counter intuitive to say that the child can trust his parent. It does not seem genuine trust but reliance: the child can depend on the fact that his parent is acting according to the law. The argument against the goodwill view is that it is not necessary to believe in the good will of somebody to trust him. But I agree with Baier that good will is an essential requirement for trust, for without it, it would be not trust but only reliance. In the English language trust is usually used in a very general way, and often mistakes trust for reliance or dependence. But this is a question of semantics and must be left aside. I do think that good will is not always enough, I agree with Hardin that trusting always involves a calculation of compatible interest and the wish for the continuation of the relationship. But like I said in the beginning of section 3, trust is relational, it can differ according to the situation. This is exactly why I think the general definition of trust, that I gave in the beginning of section 3., as ‘having a confident expectation in someone or something’ comes close to the meaning of trust. The definition of trust I will adopt throughout the rest of this thesis is that trust requires both rational calculation concerning the compatible interests of trustor and trustee, and the belief in goodwill on the part of the trustee. Now I will go on to explain why trust is very important in society by discussing two instrumental values of trust: cooperation and morality.

3.3. Values of Trust
Cooperation and morality are to be considered two important instrumental values of trust. These values are related in the sense that cooperation allows for a society to behave morally.
By giving the example of the prisoner’s dilemma I will try to show the importance of trust for cooperation, but at the same time demonstrate the risks trust exposes us to. I continue by arguing, in line of Baier and Kant, that trust is a basic feature of morality.

1. Cooperation

It is believed that trust enhances cooperation, or at least makes the process of cooperation less complicated. In addition, trust makes it easier and more likely to benefit from cooperation. A well know example to illustrate the importance of trust in relation to cooperation is the prisoners dilemma. The prisoners dilemma is a very well know game theory, and the details of the versions can differ, but it always come down to the same kind of story. Two men are taken into custody for a crime they did commit. Beforehand both had promised each other that if they would get caught they would not confess or tell on one another. Since there is not enough evidence, the police can only charge the men with a small sentence. Hoping to get confessions, the police take the men into separate rooms for questioning and propose them the following offer: If both confess to the crime they will each get a three year sentence (they defect); if both keep silent they will get a reduced sentence of two years (they cooperate); if one keeps silent while the other one confesses, the former will get a four year sentence and the latter will only get a one year sentence.

<table>
<thead>
<tr>
<th>Prisoner X cooperates</th>
<th>Prisoner X defects</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Prisoner Y cooperates</strong></td>
<td>Prisoner X &amp; Y get 2 years</td>
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<tr>
<td></td>
<td>(Option A =total of 4 years)</td>
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<tr>
<td><strong>Prisoner Y defects</strong></td>
<td>Prisoner X gets 4 years</td>
</tr>
<tr>
<td></td>
<td>Prisoner Y gets 1 year</td>
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<tr>
<td></td>
<td>(Option C =total of 5 years)</td>
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In order to reach a collective interest prisoners X and Y need to trust each other. Options B and C are the best personal outcomes, for respectively prisoner X and Y: They get only one year in prison. However the collective outcomes are worse, the amount to five years. Option A is the best collective outcome, they both get only two years in prison, which amounts to a total prison sentence of four years. In fear of being betrayed by the other they can choose to confess. Chances are though that both defect, which leads to option D, a total sentence of 6 years. Option D it appears, is the worst option. This attempts to shows that that the state of
nature, which represents option D, is the least beneficial to everybody. In the end it seems in their best personal and collective interest to trust each other and cooperate. But still, there will always be the danger that one of them takes advantage of this trust. This problem is known as the free rider problem, where people take advantage of certain social norms or rules. This problem can never be avoided, and as I have noted earlier, risk is a requirement of trust. It shows the importance of justified trust, the minimize the risk factor. The prisoner’s dilemma shows how trust is needed for cooperation. Without trust, the prisoners will likely choose for betrayal out of fear the other one will betray him too. It shows that trust can work both in and against our advantage, it can help us benefit from cooperation or leave us betrayed and in a less than desirable position.

2. Morality
In her essay “Demoralization, Trust, and the Virtues” Annette Baier writes that ‘Some degree of trust in the social world is the starting point and very basis of morality.’\textsuperscript{38} She writes some degree of trust, because trust in general can be harmful. It is reasonable or justified trust that is the basis of morality. As an example Baier describes the relationship between parent and child. ‘A trusting relationship must initiate the child into normal social interaction.’\textsuperscript{39} The parents must encourage certain ‘wanted attitudes to themselves and others; and if this sort of encouragement from trusted care givers is lacking, then the developing child will literally lack the courage needed to function as a social being, the courage to let others demoralization, trust, and the virtues control some aspects of his well-being, to cooperate, and to trust.’\textsuperscript{40} The parents must encourage their children to ‘be considerate, patient, brave, honest, and generous rather than violent, impatient, cowardly, and greedy’.\textsuperscript{41} She lists that conditions such as war, famine, ‘private shock and misfortune’ can threaten these good qualities. But, ‘As long as we are not in a moral “state of nature,” there will be normal conditions in which good habits of the heart can be cultivated and more or less survive.’\textsuperscript{42} Trust is the basis for becoming ‘morally mature’, in the sense that it allows for the encouragement of qualities and virtues. McLeod explains this view as follows: ‘Morality itself is a cooperative activity, which can only get off the ground if people can trust one another to try, at least, to be moral. Yet to be able to make meaningful attempts in this regard, people have to be somewhat morally mature,

\textsuperscript{39} Ibid. P. 180.
\textsuperscript{40} Ibid. P. 180-181.
\textsuperscript{41} Ibid. P. 176-177.
\textsuperscript{42} Ibid. P. 177.
which can only come from a moral education grounded in trust.  

Thus first we need trust to be able to cooperate, as I have argued in the previous paragraph, then we can behave in a moral way.

Kant considered trust to be an essential and indispensible means for achieving cooperation and above all: ‘in expressing our respect for ourselves and others’. This is because by trusting someone to be honest with us, we treat them with respect. In this sense, trust would be an attitude of optimism about the trustee. In Kant’s moral theory the kingdom of ends represents the ideal moral community and it has two essential features. First, in the ideal community all persons are being considered ends in themselves, and can never be treated as mere ends. Persons have intrinsic worth as rational being, because they can set ends for themselves. Second, nobody can act according to a maxime (basic principle) that others could not agree upon. Or differently put, you can only act according to a maxime that you could rationally want all people to act upon. On of the principles within the Kingdom of Ends is that nobody can lie. Lying is in conflict with both the second feature, because no one could rationally want lying to become a maxime. In a society where everybody lies, no one can be trusted. Lying is also in conflict with the first maxime, because it fails to respect the intrinsic worth of the person that is being lied to. According to the Oxford English Dictionary to lie is ‘to make a false statement with the intention to deceive.’ This means that the liar intends to prohibit the trustee from acting according to the ends he has set for himself, and is using the trustee as a way for achieving his own ends. The liar fails to respect the person as an end in himself, that is rational and has intrinsic worth. When trust is betrayed or abused, we loose respect for one another. Trust is a way of expressing respect in one another, and this would make being trustworthy a moral duty in the kingdom of ends. This line of argument is made by K. Myskja in “The categorical imperative and the ethics of trust” about trust online:

...we can argue that Kant must hold that trustworthy behaviour as well as trust in others is obligatory, as expressions of respect for humanity. The Kantian approach integrates political and ethical aspects of trust, showing that protecting the external activities of citizens is

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45 Ibid.


47 This line of argument is made by Bjørn K. Myskja in The categorical imperative and the ethics of trust, Ethics and information technology, Volume: 10, Issue: 4 (December 1, 2008), pp: 213-220. P.
required in order to act morally. This means that security measures, combined with specific regulations are important preconditions for building online trust, providing an environment enabling people to act morally and for trust-based relationships.\(^{48}\)

It is because of the relation of trust with respect, that trust is a fundamental characteristic of morality in society. And it is not only a characteristic, it also a basic element of morality. For trust expresses respect for the intrinsic worth of people as rational beings that can set ends for themselves, and it is only from their rationality that people can see morality.

4. THE DATA RETENTION DIRECTIVE AND TRUST

So far I have introduced the Directive, discussed three important views on trust and explained why trust is important for cooperation and morality. In this section I will discuss how the Directive relates to trust in society. I will argue that the Directive should be rejected because of the message of distrust it sends, failing to contribute to an environment of cooperation and morality. Based on my arguments that trust is fundamental for cooperation and morality in society, I believe it is clear that the notion of trust in relation to the government deserves great attention. Cooperation and morality are both individual and social goods. Society could benefit a great deal from the right kind of trust environment. McLeod writes: ‘Some argue that trust is a form of “social capital,” meaning roughly that it enables “people to work together for common purposes in groups and organizations”... Hence, “high-trust” societies have stronger economies and stronger social networks in general than “low-trust” societies...’

And Warren writes that ‘A society that fosters robust relations of trust is probably also a society that can afford fewer regulations and greater freedoms, deal with more contingencies, tap the energy and ingenuity of its citizens, limit the inefficiencies of rule-based means of coordination, and provide a greater sense of existential security and satisfaction.’

I see it as the task of the government to create and enforce a climate of trust, so that cooperation and thereby morality can flourish.

In the introduction I mentioned that Romania has rejected the Directive, because it seems to treat all citizens as potential criminals, and thus fails to respect basic human rights of privacy and freedom. This is a common objection against the Directive, it is argued that it is in violation with the principle that people are innocent until proven guilty. The presumption of innocence is a right to all whom are involved in a criminal trial. The right has been adopted in the ‘Convention for the Protection of Human Rights and Fundamental Freedoms’ and applies to the whole EU. However since the citizens are not involved in a criminal trial, I assume it cannot be argued that is in conflict with this law as far as I know, but it shows that there is a social norm within Europe that expects the government to treat people as innocents until proven. Treating all people as potential criminals would seem like a big sign of distrust. And

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yet this is exactly what the government does, the Directive surveys the communication data of all citizens without specific reasons other than the general security.

Following the reasoning of Kant who argued that trust is a way to express respect, we could conclude that the government fails to respect its citizens. Baier argued that justified trust is the basis of morality, because trust allows us to cooperate and behave in a moral way. She gave the example of a parent that gives a moral education based on trust to his child. Trust allows the parents to encourage certain qualities in their child. I would like to extend this example to government and citizens. I think that by showing trust, the government encourages a climate of trust that promotes cooperation and morality in society. In the social contract theory this is the main task of the government, to create a basis of trust in society in order to put an end to the war of all against all. The Directive fails the show optimism in the moral character of the people and fails to promote a climate of trust. This is illustrated by a survey in Germany in 2008 that showed that one in two people kept from contacting their counsellors or therapist over the phone or email because they were concerned about the data retention. This is a concern that is quite understandable, for being in therapy is something private and we would not like it if say a potential employer would get his hands on this information. Whether this concern is justified or not, it is there, so it should be considered as a valid sign of suspicion in reaction to the Directive.

On the other hand, I have discussed that trust is not always a good thing. The Directive is meant to be used in order to assist in the investigation and prevention of serious crime. From this perspective it might be in the interest of the citizens that the government is suspicious towards everyone. In order to protect its citizens, the government might need be alert for criminals that endanger their wellbeing. Trust can lead to betrayal, deception and exploitation. It could be argued that it is in the interest of the citizens that the government is suspicious towards them. Following this argument, we could say that that surveillance measures as the Directive promote the trust of citizens in the government because it promotes a secure living environment.

It is hard to say which perspective is more adequate, for trust is very complex and it is difficult to say what constitutes trust. How can the government create a climate of trust and

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what constitutes trust to begin with? Trust is a very complex notion. As Annette Baier states relationships of trust are situated in a whole network of trust: ‘any person’s attitude to another in a given trust relationship is constrained by all the other trust and distrust relationships in which she is involved.’\textsuperscript{52} When trusting in someone you depend upon his good will in treating you a certain way. There are limits to this good will, so Warren concludes that trusting always involves a process of judging whether your interests conflict in an essential way with the trustee. In personal situations this is ‘relatively easy’, but in a democracy it gets very complicated:

In political situations however, the assumption of solidarity [compatible interests] with others often is suspect, and herein lies the ambiguous, even paradoxical, nature of the topic of democracy and trust. What makes a situation political is that some issue or problem or pressing matter for collective action meets with conflicts of interests or identities, and that parties bring their resources to bear upon these conflicts... And important democratic innovation was the recognition that in many relationships trust is misplaced or inappropriate, suppressing real conflicts of interest while sustaining exploitative and paternalistic relations ...Democratic mechanisms such as voting, freedoms of speech and association, and separations of power enable people to challenge supposed relations of trust, while limiting the discretion of the trusted, and thus the potential harm, in whatever trust relations remain.\textsuperscript{53}

Trusting a person is not the same as trusting an institution and this complicates the relation of trust between government and citizens. The last part of the quote holds that if the democratic government gives to much freedom to ‘challenge supposed relations of trust’, there is a risk that the remaining relations of trust will be harmed. It could be argued that the opposition from the citizens against the Directive is placing doubt on the relation of trust and thereby harming the climate of trust, whilst if there would not have been a opposition the people would not have been aware of the invasive character of the Directive.

The trust of citizens in government can be influenced by a lot of matters. Such as economical stability, the appearance of certain politicians, the transparency in government policies, or what is published by the media. In an article about the relation the relationship between partisanship and trust in government, it is argued that trust will be enforced if the citizens

\textsuperscript{52} Baier.
believe that the government is pursuing policies in their interests and ‘reflect their preferences’. And more importantly: ‘Even if policy outcomes are not reflective of citizens’ preferences, citizens may nonetheless be more trusting when the party with which they identify has similar policy preferences...’\textsuperscript{54} This shows that even if it is very important for the citizens to know that the government is acting according to their interests. This is why Locke argues that the legislator must be trustworthy and thereby deserve the trust from society.

Hardin argues the proper attitude of the citizens might not be one of trust or distrust, but rather one of dependence. Citizens lack both trust and distrust in government because they lack knowledge most of the time.

\begin{quote}
The stance of citizens toward government could, in principle, be one of trust, distrust, or lack of either. I wish to pursue the plausibility of supposing that the relevant response for citizens, both rationally and actually, is commonly the lack of either trust or distrust because we typically lack the relevant knowledge for going further than that. Moreover, I think it plausible that we should not generally want trust in government for the simple reason that typical citizens cannot be in the relevant relation to government or to be the overwhelming majority of government officials to be able to trust them except by mistaken inference... Trust is in a cognitive category with knowledge. To say “I trust you” means that I know or think I know relevant things about you, especially about your motivations toward me. It is such knowledge that many of us cannot sensibly claim to have with respect to most government officials or with respect to government generally...The easy answer to the question of my title, therefore, is that, insofar as trust is not possible except by mistake, we do not want it.\textsuperscript{55}
\end{quote}

I would like to reply to this argument that I agree with Hardin that we cannot have enough knowledge about the government to place justified trust in them. It is true that we do not have enough information to make a rational calculation about compatible interests. However, in a democratic society we should be able to place trust on account of certain laws, the existence of objective media and the assumption of goodwill on the part of the government. Depending


on the government to act a certain way is not enough, it is necessary for the notions of cooperation and morality that we actually trust our government.

Concluding, I believe that it is the task of the government to create an environment of trust. This is important for it promotes cooperation and thereby morality in society. One way the government can enforce trust in society is by showing trust in the citizens. This expresses both respect for them as human beings and shows optimism in their moral character. When there is a climate of trust, citizens will be able to work together and behave in a moral way because they are not afraid of betrayal.
5. CONCLUSION

The Data Retention Directive orders all member states to retain necessary data for a period from six months to two years, for the investigation and prevention of serious crime. A lot of controversy surrounded the Directive from the get-go, because of the dilemma between privacy and security. While the EU reported in their evaluation that the Directive should be maintained, but adjusted, many opponents argue for the rejection of the Directive. The invasive character of the Directive on privacy and freedom, does not weigh out to the benefits the restored data can bring about for security. I took the Directive as a way to investigate the relation between government surveillance technology and a climate of trust in society. First I defined trust in very general terms as ‘having a confident expectation in someone or something’, I stated what a relation of trust requires and what it means to be trustworthy.

Hobbes stated the main task of the government to put an end to the state of nature where there is a war of all against all, and prevent future relapses. In the state of nature everybody acts only in self-interest. What defines the war of all against all is suspicion, people cannot trust each other. Laws enable people to trust and cooperate, and where there is trust there can be ethics. Locke argued that the government or legislator must be trustworthy, placing power in the community, whereas Hobbes believed the government should be absolute. The social contract view and the encapsulated self view of trust are both based on self-interest, the trustor and trustee make a rational calculation as to the compatibility of their interests. Baier objected that both accounts missed a degree of care on the part of the trustee. She describes trusting as depending on another’s goodwill. I defined my view of trust as a combination of both, trust requires both rational calculation concerning the compatible interests of trustor and trustee, and the belief in goodwill on the part of the trustee.

I used the prisoner’s dilemma to show in what way trust is essential for cooperation and how trust can make us vulnerable for deception and betrayal. It also showed the importance of justified trust, meaning that the trustor should have good reasons for trusting someone. Continuing I used the reasoning of Kant and Baier to show how trust is fundamental for morality. Their arguments were in line with Hobbes who claimed that in a society without trust morality is a fool’s game. Kant holds that trusting is a way of expressing respect for someone. And since respecting someone holds that someone is not to be treated as a means alone but always as an end in itself, being trustworthy can be considered a moral duty. Baier
argued that trust is the basis of morality, it is necessary to enforce ethical behaviour. Therefore I claimed that it is the task of the government to create a trustworthy environment. It is my opinion that the Directive fails to contribute to a trustworthy environment, and achieves quite the opposite, it creates suspicion and distrust. By treating all people as potential criminals the government fails to show trust in the moral character of its citizens and does not encourage them to be trustworthy.

I end this thesis with some unresolved questions that came up while writing this thesis. So far I have talked about trust in the government, but since it was the EU who implemented it, it leaves us with a complication for the relation of trust between government and citizens. I have stated that it is important for the citizens to think that the government is acting according to their interests. But if the government is not making policy decisions itself, but following orders from the EU, it complicates the trust relationship between government and citizens. How can they believe the government is acting according to their interest, when it is not the government that is making the decisions? Another question was whether it is important that the government at least seems trustworthy or should they actually be trustworthy. One could use the argument of justified trust and argue that they have to be trustworthy. If they only seem to be trustworthy the citizens are bound to find out at some point and might loose their trust in a crucial way. Finally, I focussed on trust in relation to individuals, while the relation of trust between government and citizens is the subject of my thesis. As I said earlier, trusting an individual is not the same as trusting a group, a company or an organization.
REFERENCES


