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ETHICAL, LEGAL, AND SOCIAL ISSUES IN HOMELAND SECURITY – WHAT THEY ARE AND HOW TO ADDRESS THEM

Alexander Siedschlag

Homeland security is a nation-wide effort, including all of government across federal, state, local, territorial and tribal tiers; the public and the private sector; and the whole community, with each single citizen. The overarching homeland security vision comprises safeguarding the American way of life and is embedded into the goals of the National Security Strategy that include respect for universal values at home and abroad. It thus is evident that *e*thical, *l*egal, and *s*ocial – or ELSI – issues are important to consider. This chapter discusses the origins and essence of ELSI and explores ELSI integration into everyday homeland security. Two defining debates are reviewed: homeland security legislation (specifically the USA PATRIOT Act of 2001 and the USA FREEDOM Act of 2015) and domestic surveillance, with related use of technology such as "drones." Subsequently, the relevance of ELSI is summarized across prevention, protection, mitigation, response, and recovery missions. After adding some examples of how ELSI are addressed in other countries' civil security policy, best practices to effectively address ELSI, as well as limitations of ELSI integration in homeland security, are discussed.

Homeland Security is strategically defined as a "concerted national effort".[1] This means a nationwide effort, including all of government across federal, state, local, territorial and tribal tiers; the public and the private sector; and the whole community, with each single citizen.[2] The overarching "homeland security vision" is "[a] homeland that is safe, secure, and resilient against terrorism and other hazards, where American interests, aspirations, and way of life can thrive."[3] Homeland security is integrated into the goals of the *National Security Strategy* (2015) that include respect for universal values at home and abroad.[4] From all of this, is evident that *e*thical, *l*egal, and *s*ocial *i*ssues – referred to as ELSI – have an important role to play in the homeland security enterprise throughout its mission space.

This chapter starts with a discussion of the origins and essence of ELSI as a generic concept, and then explains how it relates to homeland security. It defines the concept's three components – ethical, legal, and social – and explores main ELSI domains in homeland security in the United States, based on the evolution of the definition of homeland security itself. Security culture is then introduced as a frame of reference to assess and address ELSI. After that, the chapter discusses why ELSI consideration is important in homeland security today, based on current strategic concepts in the context of the all-hazards and whole-community approach. Then, two defining debates are visited as examples: homeland security legislation (specifically the USA PATRIOT Act of 2001 and the USA FREEDOM Act of 2015) and the Constitution; and domestic surveillance, with related use of technology such as "drones." Subsequently, the relevance of ELSI is summarized across the five national preparedness mission areas of homeland security: prevention, protection, mitigation, response, and recovery. After adding some international

examples of how ELSI are addressed in countries' homeland security, home affairs, or civil security policies and strategies, the chapter concludes with a summary of ways to effectively address ELSI in the national effort of all-hazards based homeland security, as well as a discussion of the limitations of ELSI.

THE ORIGINS AND ESSENCE OF ELSI

Due consideration of ethical, legal, and social issues is essential but not specific to homeland security law, policy, and practice. ELSI were known and discussed before 9/11 and the era of homeland security. They are in fact part of a moral discourse that transcends the borders of the nation state.[5] In particular the interaction of technology and society has always been assessed from the point of view of law and ethics, and across national boundaries. Technology assessment that addresses the effects of new products and processes on society and explores the social acceptance and ethical acceptability of new technologies has been applied for quite some time to fields such as nuclear technology, pharmacology, gene technology, or artificial intelligence, just to name a few.[6] Moreover, ethical aspects have long been addressed in strategic planning processes.[7] ELSI as a specific concept was first introduced to denote a component in the Human Genome Project (HGP), active from 1990 to 2003, that assessed ethical, legal, and societal implications of the newfound genetic knowledge.[8]

Today, ELSI has expanded into a universal concept used in science and technology research to address compliance and societal acceptance issues in military and national security research, in particular related to unanticipated military uses of technology and crossovers of military technological solutions to civilian use.[9] This for example includes informed consent, data protection, and risk-benefit assessment for research involving human subjects; ownership and use to purpose of data; potential of data to allow identification of individuals rather than just providing cluster information, such as supporting the right of individual self-determination; and assessing and addressing potential for dual (civil and military) use and misuse (e.g., terrorist abuse) of research results. Common related procedures to address ELSI aspects in science and technology research include self-control by researchers and professional associations; safeguards and codes of conduct, including addressing of wider (societal) impact of research results; institutional review and audit systems; as well as legally rooted mechanisms, such as data protection and harmonization of terminologies and legal standards to support compliance.[10]

Broader conceptions have related ELSI to the entire spectrum of "emergency research ethics," addressing how scientific study of individuals and populations experiencing calamity can and should "protect and promote the well-being and autonomy of research participants, researchers,

science and society as a whole […], while allowing and encouraging research to take place that will benefit members of society through the production of knowledge or new […] interventions."[11] This concept – *mutatis mutandis* – is quite directly applicable to the function of ELSI in the practice of homeland security, simply by shifting the focus from "research" in the preceding paragraph to "policy." Issues such as consent (provide information and protect autonomy and well-being), due consideration of vulnerable populations, public consultation and addressing of public risk perception (not merely objectively assessed risk), and the quality of governance and regulation are examples of pervasive ethical, legal, and social issues in homeland security strategy as well as everyday policy.

The relevance of ELSI to U.S. homeland security has substantially increased following the evolution of homeland security policy definitions. Those definitions now include a focus on securing society and all of its values. At the same time, current definitions underscore that homeland security is not a single-department activity but an interagency as well as a whole-community responsibility, aimed at creating the capabilities required to carry out specific missions to ensure preparedness and foster a resilient nation.

The first *Quadrennial Homeland Security Review* of 2010 introduced the concept of the "homeland security enterprise."[12] The homeland security enterprise refers to the collective efforts and shared responsibilities of federal, state, local, tribal, territorial, nongovernmental, and private-sector partners – as well as individuals, families, and communities – to maintain critical homeland security capabilities. It connotes a broad-based community with a common interest in the safety and well-being of America and American society.

The *2014 Quadrennial Homeland Security Review* then defined the "homeland security vision" as follows: "A homeland that is safe, secure, and resilient against terrorism and other hazards, where American interests, aspirations, and way of life can thrive."[13] The bandwidth of homeland security response to a very broad threat horizon, as well as the quite extensive perimeter of protection encompassing the whole way of life of the American society, indicate the huge variety of ethical, legal, and social issues to consider.

ELSI COMPONENTS DEFINED

In brief, each of the ELSI components may be defined as follows:

Ethical issues – "The field of ethics (or moral philosophy) involves systematizing, defending, and recommending concepts of right and wrong behaviour."[14] Ethical issues describe the space defined by the study of moral obligation that is available to achieve coherence of security with political and societal preferences.[15]

That space can be broken down into three distinct systems, as explained by Naomi Zack in her *Ethics for Disaster*:[16] consequentialism, deontology (or duty ethics), and virtue ethics. Consequentialism entails results that are the most important moral factor. Deontology or duty ethics requires that we always follow certain moral principles, regardless of the result. Virtue ethics is the moral system based on the common values regarded as typical of a good character of individuals. It may appear as if the three components of ELSI may be best addressed with one particular of the three moral systems referred to above. Ethical issues may appear to be best responded to by virtue (values ethics); legal issues by deontology; and social issues by consequentialism, focused on the actual effects on people. However, why it seems logical to split use of moral systems according to the character of the issue, this will in most cases not be adequate to the practical problems at stake. Because ELSI issues rarely exist in separation from each other in homeland security that is all-hazards based and whole-community driven, philosophically sound as well as pragmatically adequate addressing of them will most likely be based on a combination of elements from the three moral systems.

Legal issues – Consideration of legal issues in their embeddedness with ethical and social issues is based on John Stuart Mill's concept of liberty as defined in *On Liberty* (1863):[17] the limit that must be set on society's power over each individual.

As part of ELSI, reflection on legal issues mainly serves to duly consider the criticism of homeland security intrusion: encroaching of constitutionally protected citizen rights and freedoms without a proportional security payoff, thus not serving the security of the people but infringing liberty.[18] Legal issues consideration therefore focuses on balancing of values as well as on distributive justice: Homeland security capabilities should not include as a consequence the uneven distribution of security in society, safeguarding some parts of it more than others, or securing some while making others more vulnerable (to hazards or to an imbalance between security and liberty).

Social issues – Whereas ethical aspects are often seen to cover the moral acceptability of homeland security technologies and practices, social aspects often are regarded to address societal acceptance.[19] This is an important perspective because technology not only can contribute to security but also create new vulnerabilities. It also has the potential to change human behavior and to drive the evolution of security cultures. However, social issues transcend that scope. The social issues component in ELSI really relates to the whole-community approach to homeland security, defending a society's commonly acquired values, following Arnold Wolfers' classical "subjective" definition of national security as a concept that measures "the absence of fear that such values will be attacked."[20]

For example, defending values and the nation's heritage is an important ingredient of homeland security as seen by the U.S. Department of Homeland Security, and reflected in the "homeland security vision" put forward in the *2014 Quadrennial Homeland Security Review*.[21] Addressing social issues therefore requires adequate concepts within the framework of a whole-community approach. It requires focusing attention on the real security needs of society and disaster-struck communities, as opposed to bureaucratic and political construction of disaster.[22] It emphasizes the respect for and response to human and societal needs, and citizen ownership of homeland security, as citizens are its ultimate end-users, or beneficiaries.

SECURITY CULTURE AS A FRAMEWORK FOR ASSESSING AND ADDRESSING ELSI

ELSI considerations do not merely replicate philosophical, legal, and social studies of security. Instead, they look at ethical, legal, and social issues of enduring foundations of homeland security as well as the current practice of homeland security in an integrative way, considering the embeddedness of homeland security into a tridimensional ethical, legal, and social context. In doing so, ELSI analysis assumes that the definition of, and response to, "the greatest risks" (as per the *National Preparedness Goal*)[23] is not only evidence based, but also culturally driven.[24] Thus, security is neither implementation of the obvious nor ontological, but an ongoing controversy. A way to combine those aspects within one model for analysis is offered by the concept of security culture. Security cultures can be summarized as comprising the following four categories:[25]

- *Normative values:* security cultures as ideational representation of foundational decisions about basic normative values (e.g. the security vs. liberty and freedom debate), which shape the normative arena in which homeland security takes place.
- *Knowledge and interpretation:* security cultures as a cognitive form by which members of social communities make sense of reality, attribute meaning to facts as well as save and reproduce practical competencies (e.g. the societal resilience debate).
- *Common symbols:* security cultures as shared symbols on which citizens orient their action and which are a kind of software for operating interfaces between actors and overarching structures (i.e., federal, state, local, territorial and tribal agencies), flexible enough to reflect and adapt to new threats and challenges.
- *Action repertories:* security cultures as sets of individual (or proprietary), experience-based strategies associated to individual attributions of meaning and normative convictions.

Security culture as a concept allows considering relevant ELSI aspects in their mutual relationship, such as public perception of risk, of legitimacy of statecraft and homeland security policy and capabilities, as well as societal acceptance of homeland security measures. A risk management doctrine at federal department level, as pursued by the U.S. Department of Homeland Security (DHS),[26] is not enough. In addition, an evidence based approach is necessary, including social and cultural aspects of risk assessment and management. This touches the very core of homeland security, since

[p]ublic perception, more than critical infrastructure, airports, or national historical sites, it *the* real target of terrorist attacks. Manipulating public perception and exaggerating their capability to do harm are terrorists' primary weapons. In order to be effective, terrorists need to arouse fear of their organizations and leaders. They target that fear by attacking the public's confidence in its national leadership's ability to protect society from the unpredictable and indiscriminate nature of their attacks."[27]

An important application area of security culture analysis in order to address, or if possible prevent, ethical, legal, and social concerns is risk management for homeland security. From the ELSI point of view, such risk assessment should be rooted in rational threat assessment and in addition consider socially informed priorities and social processes of risk perception:

"Risk and the perception of risk […] influence public attitudes about homeland security, and these public attitudes consequently influence policy makers. Homeland security agencies must therefore respond to not only the threats of which they are aware, but also to the values and attitudes present among the public that they protect."[28]

Moreover, homeland security has always been a societal enterprise, long before the term was coined and the whole community principle invoked:

"Throughout America's existence […], homeland security has been an integral part of our communities. From our early history onward, Americans responded to threats and disasters by offering assistance to one another, and by uniting as a whole to protect our way of life from enemy forces. Long before professional fire departments and police forces, churches, civic organizations, families and neighbors served as our first responders to natural and man-made dangers."[29]

As well, ELSI had been discussed with relation to securing the nation and its people long before the term of homeland security came into use.[30] A particularly timely example is airport security and balancing state of the art passenger screening with the risk of ending up performing unconstitutional searches. As the President's Commission on Aviation Security and Terrorism,[31] created by President George Bush to address the broader security context of the Pan Am Flight 103 (Lockerbie) bombing of 1988, had already discussed, denser, science and technology supported airport security measures correlate with more restrictions on fundamental freedoms. Further, the Commission report addressed ethical aspects, such as accumulating huge numbers of passengers for extended amounts of time landside, in the departure hall, which is one of the least secure spaces in an airport, following intensified airside target hardening measures such as multiple identity checks and questioning.[32]

Today's approach of fast security lanes for frequent flyers as well as the U.S. Transportation Security Authority's *TSA PreCheck* program, both allowing passengers to clear the less secure departure hall area faster than the common passenger, is another example of how ELSI can help identify paradoxes in homeland security, such as the uneven distribution of security among people based on security-enhancing measures.

MAIN ELSI DOMAINS

This section identifies main ELSI domains: typical areas where those issues come up in strategic perspective, as well as in everyday homeland security efforts. As mentioned, although not always termed as such, ELSI have been analyzed since the creation of the homeland security enterprise, as well as pre-dating it. Homeland security today represents a functional policy area found in different countries, although its institutional setup in the U.S. is still singular.[33] U.S. homeland security has increasingly focused on broader functional aspects of the mission space. Definitions have evolved

- from homeland security being "a concerted national effort to prevent terrorist attacks within the United States, reduce America's vulnerability to terrorism, and minimize the damage and recover from attacks that do occur"[34];
- over additionally addressing the "full range of potential catastrophic events, including man-made and natural disasters"[35];
- to homeland security as the "intersection of evolving threats and hazards with traditional governmental and civic responsibilities for civil defense, emergency response, law enforcement, customs, border patrol, and immigration."[36]

The scope, content, and relevance of ELSI have evolved accordingly, making ELSI assessment is a competency every homeland security professional should possess.[37] Main domains of ELSI include the following:[38]

- Balancing liberty and security in legislation as well as in policy implementation;

- Homeland security as an eternal state of emergency that may infringe constitutional and democratic principles in the long run;
- Balancing of technological and social issues in surveillance based on ethical net assessment: proportionality of technology with respect to the intended, and reached, homeland security outcomes; human review of the results produced by technology, to avoid subjection of humans to decisions made by machines only; use of formal procedure and public input in the decision to adopt homeland security technology; etc.;
- Potential of abuse: Homeland security technological solutions may be adopted and abused by criminals and terrorists;
- Data-mining and "domestic spying" by government to collect and use personal data, and the related aspects of right to privacy, protection from searches including electronic surveillance, and intelligence gathering on U.S. persons;
- Indiscriminate subjection large parts of society to generalized suspicion and investigation, for example based on profiling (such as racial profiling);
- Discriminatory security interventions (where for example a hazard is generalized to be ascribed to all members of certain national origins, faith communities, etc., or where homeland security capabilities only are used to serve risks and interest specific to a certain sector of society, as opposed to the whole community);
- Use of military courts for civilians and suspending *habeas corpus,* thus denying to alleged terrorists any chance to prove their innocence in court.

Those domains are not typically limited to the homeland security enterprise in the United States. They are relevant to and discussed in any country that follows the vision, mission, and goals of security as a public good, created in a nation-wide whole community effort to safeguard a society's commonly acquired values. ESLI are fundamentally connected to the challenge of making legitimate and just decisions about managing risk to protect democratic society from a plethora of threats without sacrificing liberty and freedom. It is important to address ethical and legal issues in an investigative way since the effects and unintended consequences of homeland security policy decisions and capabilities are sometimes hard to anticipate. The next section will elaborate on the relevance of ELSI in today's homeland security enterprise.

THE RELEVANCE OF ELSI

The new mission statement for the Department of Homeland Security, released in May 2016, well exemplifies the practical relevance of ELSI. It reads: "With honor and integrity, we will safeguard the American people, our homeland, and our values."[39] This can be broken down into the following dimensions:

- Ethical
  - Pursue the department's mission with "honor and integrity";
- Legal
  - "balance and preserve," in enacting the department's mission to provide security to the American people, "freedoms and liberties"[40];
- Social
  - Intention of the statement to "reflect the views and values of our employees"[41];
  - DHS mission to "preserve and promote this Nation's immigrant heritage and humanitarian spirit"[42].

As importantly, ELSI are intrinsically related to the whole-community approach, within in which homeland security is created as a public good, based on shared responsibility throughout the homeland security enterprise that is bound together by national and universal values. In 1952, Arnold Wolfers had defined national security as defending a society's commonly acquired values.[43] The *2014 Quadrennial Homeland Security Review* put forth "homeland security vision," of which defending values and the nation's heritage is a cornerstone.[44] This leads to a specific American aspect to the relevance of ELSI as a universal concept, rooted in the living history of the country as a nation of immigrants:

> "Regardless where they were born, it is important to address homeland security for all U.S. residents. This can be difficult because the complex social environment which currently exists must balance how and where we live, the natural environment, technology, and the value-based world in which we make decisions regarding public safety and protection."[45]

In this context, ELSI consideration is essential for implementation of the whole-community approach: It is necessary to ensure social interoperability of homeland security capabilities, enabling them to work across security cultures and within multicultural settings. The relevance of ELSI thus is further underscored by main social factors and trends in American society that contribute to homeland security decision-making:[46]

- Population increase and concentration in big cities, with more than a quarter of all U.S. citizens living in ten metropolitan areas with the highest population.[47] This increases vulnerability to natural and anthropogenic hazards.
- Population increase of high-risk areas, in particular coastal areas, again increasing societal vulnerability.

- Increase in technology-related risks, which covers both new threats in cyberspace as well as in the physical world, and risks related to, of perceived in association with, new security technologies, such as full body scanners.
- An essential homeland security objective, as discussed above, is defending society's commonly acquired values. This normative embeddedness of homeland security can create vulnerability when at public, policy, and/or administrative and organizational level, definitions and objectives for homeland security diverge to an extent that makes it impossible to agree on effective programs actually determining and addressing to most imminent risks. In addition, there is the challenge of balancing security with other fundamental values such as liberty and freedom in decision making at federal, state, and local levels as well as in business decisions in the private sector.

While "vigor of government is essential to the security of liberty," as Alexander Hamilton pointed out in *Federalist No. 1*,[48] ELSI considerations help prevent a "securitization"[49] of society, where the value of security becomes unbalanced and entrenches public life, thus replacing the pursuit of happiness by the people with the pursuit of a virtually limitless state of emergency by the government:

> "Protecting people's security sometimes involves limiting the freedoms of a whole population. So long as the operation of these limitations is kept as short as possible and imposed in order to protect important rights, such as the right to life, even human rights law permits them. Human rights law recognizes the existence of emergencies that 'threaten the life of the nation.' [The] *International Covenant on Civil and Political Rights* (1966) recognize[s] this kind of emergency. Anticipating that declarations of emergency might be used opportunistically by governments as justification for the unnecessary limitation of rights, human rights law discourages the declaration of an emergency by governments, and requires the period of emergency to be as short as possible. Even in emergencies, certain human rights may not be limited, according to human rights law. These include the right not to be tortured and the right not to be discriminated against."[50]

Consideration of ELSI is further relevant in responding to criticism of a legalist bias in homeland security: While agreeing on the need for sound legal foundations of homeland security, some critics maintain that constitutional and legal considerations sometimes prevail over a pointed analysis of security gaps and vulnerabilities.[51] ELSI analysis can help put those legal foundations and measures into the broader context of the society whose values and way of life homeland security is meant to protect. The purpose of ELSI is not to construct homeland security but help make it more consistent, stronger, and responsive to the society it seeks to protect. Security needs to be weighed against other values, such as

liberty and freedom, but also accountability and freedom of discussion. In this light, critical thinking and continuous discussion and debate about balancing values in homeland security are not signs of weakness, but a natural part of the effort and ingredients of success.[52] Lack of critical thinking in homeland security not only can lead to self-serving policies, but to loss of public trust and to mass casualties.[53]

Due ELSI consideration is also important to achieve balanced implementation of a whole-community approach. Often seen as a policy to push the first line of defense against all-hazards threat to the local level and an acknowledgment of the fact that all disasters are local, the "S" dimension in ELSI also refers to balancing intelligence needs with public awareness, public vigilance, and public engagement. Thus, the debate about domestic intelligence for homeland security needs to expand its focus beyond discussion of the security–liberty balance,[54] to include needs for some societal ownership and societally actionable intelligence. Campaigns such as "See Something, Say Something" and initiatives such as *Ready.gov* contribute as much to that objective as does the National Terrorism Advisory System (NTAS) that includes published bulletins in order to enhance transparency and efficiency in communicating information about terrorist threats to the American public, recognizing "that Americans all share responsibility for the nation's security, and should always be aware of the heightened risk of terrorist attack in the United States and what they should do."[55] At the same time ELSI safeguards are built in. For example, the Nationwide Suspicious Activity Reporting (SAR) Initiative (NSI)

> "has worked with various advocacy groups, such as the American Civil Liberties Union, to develop protections that make up a comprehensive NSI Privacy Protection Framework. The NSI requires each fusion center to consider privacy throughout the SAR process by fully adopting this framework prior to NSI participation. Working with different advocacy groups and stakeholders in states across the country has served an important role in successfully shaping and implementing NSI policies and processes."[56]

The next two sections will focus on two defining debates about ELSI aspects in U.S. homeland security: homeland security legislation (specifically the USA PATRIOT Act of 2001 and the USA FREEDOM Act of 2015) and the Constitution; and domestic surveillance, with related use of technology such as "drones," or Unmanned Aerial Vehicles (UAV) and related data-processing systems, referred to as Unmanned Aerial Systems (UAS).

HOMELAND SECURITY LEGISLATION AND THE INTENT OF THE CONSTITUTION

Assessment of ethical, legal, and social issues in homeland security in practice should naturally begin with considering homeland security legislation within the framework and

intent of the U.S. Constitution. Consideration of legal aspects in homeland security in an ELSI context puts legislative change and judicial review in the context of societal values, political ethics, and the ethics of democracy. As *The NSA Report: Liberty and Security in a Changing World* pointed out, it is a constitutional principle that the "United States must protect, at once, two different forms of security: national security and personal privacy."[57]

It is important to remember that the Constitution itself and some Amendments verbally introduced the concept of *security* in what we would today call an ELSI context:[58]

- As per the Preamble, to "*secure* the Blessings of liberty to ourselves and to our Posteriority" is one of the reasons that the People of the United States are establishing the Constitution.
- According to the Second Amendment, together with Supreme Court ruling, citizens' right to possess firearms is generally protected, unconnected to any service in a militia. The text of the Amendment reads: "A well regulated Militia, being necessary to the *security* of a free State, the right of the people to keep and bear Arms, shall not be infringed."
- According to the Fourth Amendment,

"[t]he right of the people to be *secure* in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." As noted by the U.S. Senate, this Amendment seeks to safeguard the balance between security and liberty by "placing a neutral magistrate between the police and the citizen."[59]

In addition, Article 4, Section 4 of the Constitution provides that

- "[t]he United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence."[60]

As President of the Constitutional Convention, George Washington had already explained in 1787 the intent of the Constitution as it relates to finding the right balance between security and liberty:

"Individuals entering into society, must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstances, as on the object to be obtained. It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved; and on the

present occasion this difficulty was increased by a difference among the several states as to their situation, extent, habits, and particular interests."[61]

The era of homeland security demonstrates the continued relevance of Washington's caveat: that a Constitution itself cannot set a perennial standard for a republic and democracy to maintain equilibrium between the two guiding values of security and liberty. As Washington maintained, a balance may only be found on a case by case basis, depending on circumstances and societal objectives.

In this context, critics have maintained that American elites, to include Supreme Court justices, have historically tended and continue to tend to invoke or support limitations to personal freedoms as threat perceptions increase and maintain prevalence of fundamental liberties only again once the perceived threat declines.[62] A major criticism of homeland security legislation refers to its negative impact on the first ten Amendments to the U.S. Constitution, also known as the Bill of Rights. This mainly relates to the rights to freedom of speech, religion, assembly, and privacy (First Amendment); to legal counsel and due process, including speedy and public trial (Fifth and Sixth Amendment); and to the right to be secure against unreasonable searches and seizures (Fourth Amendment as cited above).[63] The related criticism centers on USA PATRIOT Act of 2002 and the subsequent USA FREEDOM Act of 2015, which will be subsequently discussed.

USA PATRIOT Act

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, known as the USA Patriot Act, was part of the vastest federal government reorganization effort since the National Security Act of 1947, which had created, among other things the Department of Defense and the Central Intelligence Agency. The USA PATRIOT Act includes a definition of domestic, as opposed to international, terrorism.[64] It allows authorities new measures in combating terrorism, including domestic terrorism, mainly by expanding permissible surveillance while reducing judicial supervision, in addition to creating new statuary crimes and giving U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) the right to detain immigrants suspicious of terrorism. This included tapping of suspect terrorists' phones, observation of internet activity, and secret searches of homes.[65]

While the PATRIOT Act did not create a new crime of domestic terrorism, it expanded the type of conduct that the government can investigate when it is investigating "terrorism." Although the Congressional intent in diversifying the elements of terrorism was to provide a legal framework for arrest, prosecution and jury trial under the Constitution, critics believe the definition of domestic terrorism was too broad, with too much potential for abuse.[66] Further criticism

of the Act focuses on the following main aspects that bear significant ELSI relevance:[67]

- Sneak-and-peak searches, "a special search warrant that allows law enforcement officers to lawfully enter areas in which a reasonable expectation of privacy exists, to search for items of evidence or contraband and leave without making any seizures or giving concurrent notice of the search."[68]
- Warrants from the Foreign Intelligence Surveillance Court (FISC), which are not required to be released, in particular to the person under investigation, since they are not public record.
- National Security Letters (NSLs), which can be issued by FBI field supervisors without involving judicial authority. Those letters

"give anti-terrorism and counter-intelligence investigators access to an array of consumer information […] [,] where consumers seldom learn that their records have been reviewed unless they are prosecuted. Some examples of records accessible to investigators include driver's licenses, hotel bills, storage rental agreements, apartment leases and other commercial records, cash deposits, wire and digital money transfers, and even patient business records and personal health information."[69]

Sneak-and-peak rules were revised in the *USA PATRIOT Act Improvement and Reauthorization Act of 2005*. A delayed notice requirement was introduced, where suspects must normally be informed about a previously conducted sneak-and-peek search within a "reasonable period not to exceed 30 days."[70] Further legislation drove organizational changes to DHS in order to integrate ELSI consideration across the homeland security mission space. A particularly relevant organizational change is the creation of the Office for Civil Rights and Liberties (CRCL) within the U.S. Department of Homeland Security.

Established by DHS based on requirements from the *Homeland Security Act of 2002 and the Implementing Recommendations of the 9/11 Commission Act of 2007*, the Office for Civil Rights and Civil Liberties (CRCL) is responsible for "integrating civil rights and liberties into all of the Department activities."[71] This among other things includes "[c]ommunicating with individuals and communities whose civil rights and civil liberties may be affected by Department activities, informing them about policies and avenues of redress, and promoting appropriate attention within the Department to their experiences and concerns."[72] CRCL responsibility extends beyond homeland security investigation issues. It also includes ensuring consideration of ELSI in homeland security core missions, such as border security, and their challenge-driven priorities, such as related to massively increased amounts of unaccompanied alien children and family units apprehended at the U.S. Southwest border in 2014:

"CRCL continued to play a role in the Department's response to the influx of unaccompanied children through participation in the Unified Coordination Group, working with other offices on immigration policy to recognize and respect children's and families' civil rights, civil liberties, and access to processes to claim international protection from return to their countries of origin. […] The influx of children and families prompted a substantial increase in complaints received regarding Border Patrol apprehension, short-term detention by Border Patrol, and the detention of families with children in the new ICE family residential facilities. In FY 2014, CRCL opened for investigation 87 new complaints involving children, including opening two complaints concerning family facilities, and closed 12 complaints."[73]

As CRCL is responsible for implementing consideration of ELSI aspects across the activity spectrum of DHS, its responsibilities include community engagement. CRCL not only uses community engagement to support local contexts of due consideration of civil rights and civil liberties in the application of homeland security activities. CRCL community engagement also helps consistently address risk-informed homeland security priories at local level. For example, the office's community engagement

"provides opportunities for diverse communities and law enforcement to build understanding and strong partnerships that can assist in identifying behaviors, tactics, and other indicators of potential violent and terrorist activity. Local communities are the front lines of defense and response, and are essential in addressing this issue. Local law enforcement authorities and community members are often best able to identify individuals or groups exhibiting suspicious or dangerous behaviors – and intervene – before they commit an act of violence. The Department, through CRCL, builds on community-based activities to strengthen resilience in communities targeted by violent extremist recruitment. Over the past few years, CRCL has held more than 100 community engagement events, and has trained over 5,000 state and local law enforcement and fusion center personnel on cultural awareness and how to best engage with communities."[74]

The legal discussion of National Security Letters has concluded that they are not in violation of the Fourth Amendment: While FBI issues those letters to telecommunication providers to obtain information about certain customers, including payment sources, search queries, browsing history, and e-mail recipient and subject lines, this is considered information that the customer already has voluntarily given to a third party, the service provider, by using its services. Under the "third-party doctrine," first described by the Supreme Court in *United States v. Miller* (1976),[75] therefore, the National Security Letters do not constitute searches in the sense of the Fourth

Amendment because there is no reasonable expectation of privacy in information possessed or known by third parties.[76] Commentators have therefore argued that the letters may instead violate the First Amendment due to their possible effect on free speech, where the letters may "chill" people away from actually exercising that right for fear of prosecution:

> "The *chilling effect* occurs when people become reluctant to take part in certain activities because they fear participation will bring them under official suspicion of criminal activity. Chill is problematic when it leads people to opt-out of activities that are legitimate and desirable in a free society, such as free association, free speech, and political organization."[77]

USA FREEDOM Act

Following a lack of Congressional approval, parts of the Patriot Act expired on June 1, 2015. *The Uniting And Strengthening America By Fulfilling Rights And Ensuring Effective Discipline Over Monitoring Act of 2015* (USA FREEDOM Act)[78] renewed some expired provisions from the PATRIOT Act through 2019, as well as set limits on mass data collection by the government. Much about the legislative as well as public debate about the USA FREEDOM Act centered on its expected impact on domestic surveillance, specifically by NSA. The Act largely restricts domestic surveillance and the use of technology for such surveillance to the presence of specific requests. Under the PATRIOT Act, production of domestic surveillance data would often have been allowable for mere threat assessment. In particular, the Act responded to concerns about NSA surveillance of U.S. persons by putting a halt to the agency's mass phone data collection program. NSA now requires a federal court permission to receive information about targeted individuals.

The Act also establishes limitations on use of Section 215 of the USA PATRIOT Act, the particular section emblazing the Snowden debate. According to Section 215, the government may apply for a court order compelling any person or entity to turn over records of data relevant to a foreign intelligence investigation. In 2013, Edward Snowden leaked information about the use of Section 215 to bulk collect telephone metadata that NSA held and that could be queried by foreign intelligence investigators.[79] Under the USA FREEDOM Act, use of Section 215 of the USA PATRIOT Act is limited to government data collection based on a "specific selection term" (SST), defined as "a term that specifically identifies a person, account, address, or personal device, or any other specific identifier."[80] This puts strong constraints on bulk data collection, along with further provisions that include

> "minimization requirements on the use of [technology] for conducting surveillance by prohibiting the retention or dissemination of information collected not pertaining to a target of the search; for example, the NSA must enact procedures to discard any dragnet information collected not correlated to targeted and approved searches."[81]

In addition, the USA FREEDOM Act prohibits searches targeting U.S. persons without emergency authorization.[82] Also, the Act takes steps to increase the transparency of surveillance. For example, it allows telecommunication companies to disclose estimates of orders, compliance, and accounts affected, and it requires annual publication of how many orders were sought and granted, and how many U.S. persons were targeted.[83] Lastly, the USA FREEDOM Act requires the government to periodically report, and authorizes the private sector to periodically disclose, aggregate statistics of the use of the authorities granted by the Act.[84]

While these are examples of responsive legislation to address ELSI concerns, questions and unease remain with the critics of homeland security legislation. An important critical ELSI consideration is if concerns about privacy (data collection) can be sufficiently addressed by transparency (ex post reporting of accumulated information about data collection).[85]

Wrong conceptions of ELSI may tempt leaders and organizations in the public sector to seek a false balance between risk-informed homeland security capabilities and response to public concerns, such facilitating outcomes that do not serve society and increase organizational gaps in homeland security. For example,

> "[i]n response to the public outcry following the leaks, Congress enacted several provisions restricting intelligence programs. The president unilaterally imposed several more restrictions. Many of these may protect privacy. Some of them, if considered in isolation, might not seem a major imposition on intelligence gathering. But in fact none of them operate in isolation. Layering all of these restrictions on top of the myriad existing rules will at some point create an encrusted intelligence bureaucracy that is too slow, too cautious, and less effective."[86]

Consideration of "long-term consequences of legal changes made to address short-term public opinion"[87] should therefore be a common element in any ELSI approach because over-response to public concerns of the day may harm the societal security posture in the longer term.

DOMESTIC SURVEILLANCE AND HOMELAND SECURITY TECHNOLOGY SUCH AS UNMANNED AERIAL SYSTEMS

Domestic surveillance and use of homeland security technology is a defining debate not only because of its relevance in public discourse but also because it cuts across homeland security missions and national preparedness capabilities. ELSI concerns arise with both the inclusion and exclusion of

humans in the process of applying security technologies, with the solution only lying in a dilemma:[88] Leaving the human in the loop creates room for errors, use of bias, and erroneously or intentionally unfair treatment of other humans. Taking the human out of the loop is against fundamental ethical and common legal requirements. It also may make procedures more ELSI compliant but infringe the goal of delivering security to society as a common good.

Human-operated and implemented security technologies give rise to concerns such as the following:

> "Humans are psychologically and cognitively imperfect in a range of ways that affect the effectiveness of technologies and the fairness of their application. For example, studies have shown that humans can pay attention to events on a CCTV monitor for no more than about 20 minutes, after which their ability to spot real-time security threats effectively dives dramatically."[89]

At the same time, significant concerns relate to automated technological solutions for homeland security:

> "Automation brings its own set of ethical and legal risks. Accountability for actions is a particular concern. Accountability requires that decisions that have an impact on individuals' rights and freedoms should be traceable to an individual or a body of people authorized to make that decision and who can be held responsible. It also requires that the effectiveness and proportionality of an action should be verifiable after the fact. A data mining technology that uses extremely complicated algorithms to analyze huge quantities of information from a variety of sources to determine who should be singled out for surveillance may raise issues of accountability if no single individual is able to verify the reliability of that determination. In addition, sometimes technology may be insufficiently sensitive to morally significant distinctions to deploy force proportionately."[90]

National Security Agency

Due consideration of the societal dimension of homeland security is important in addressing a series of criticisms of homeland security that in particular relate to surveillance and information collection on U.S. persons. Balancing security with other values is not only a legal requirement and a policy expectation, it also is a social fact that homeland security policy must consider in addition to mission requirements. Homeland security that is not perceived legitimate and proportional to both risk and freedoms is unable to pursue the whole of community approach in which it is grounded. Public concerns about the REAL ID Act about consistent, difficult to tamper standards for State identity cards and some domestic information collected by the National Security Agency (NSA) are cases in point. Although new social media networks like Facebook and search engines such as Google, and others, collect much more information

with no requirements, standards, or restrictions, the activity of governmental agencies created much more tension and suspicion.

Public debate and emergence of ELSI issues regarding domestic surveillance in the public mind when, following leaks by former NSA contractor Edward Snowden, several tabloids published top secret court orders and surveillance programs, including an order to Verizon to hand over all their customers' calling records to the NSA.[91] National Security Letters as discussed above in the context of the USA PATRIOT Act came to be widely discussed in the press and the public. ELSI aspects involved include the question of whether telecommunication company customers were actually regarded as citizens by the government or merely as data subjects. Businesses got under pressure to publicly disclose the character of secret government requests, their frequency, and the frequency of compliance with those requests. Prohibited by the government to make this disclosure at what they deemed appropriate detail, companies filed lawsuits to be allowed full disclosure.[92]

The so-called *NSA Report,* mandated by President Obama as a response to the Snowden case, provides an insightful analysis of ELSI related to intelligence in the homeland security era, calling for fostering of a democratic security culture, based on the following two principles, among others:

> "***Protecting the Right to Privacy***. The right to privacy is essential to a free and self-governing society. The rise of modern technologies makes it all the more important that democratic nations respect peoples' fundamental right to privacy, which is a defining part of individual security and personal liberty.
>
> ***Protecting Democracy, Civil Liberties, and the Rule of Law***. Free debate within the United States is essential to the long-term vitality of American democracy and helps bolster democracy globally. Excessive surveillance and unjustified secrecy can threaten civil liberties, public trust, and the core processes of democratic self-government. All parts of the government, including those that protect our national security, must be subject to the rule of law."[93]

Unmanned Aerial Systems (UAS)

"Drones" are a pertinent example to explore technology-related ELSI further and relate them to the tangible example of surveillance. The increase in surveillance technologies has evoked several debates between supporters and opponents in a variety of fields,[94] including the use of unmanned aerial vehicles, or UAV, commonly known as "drones." We should specifically speak about unmanned aerial systems, or UAS, since ELSI aspects here relate to big data – sourcing and processing of information from interconnected systems – and about payloads (detection, surveillance, and other possible technology) carried. ELSI considerations thus extend beyond the vehicle, or "drone," as such.[95] Homeland security

uses of drones include critical infrastructure designation, such as in the context of big events, supporting mainstreaming of situational awareness, and common situational picture-generating processes across jurisdictions and agencies. For example, UAS are useful in mapping out the surroundings of a stadium to help law enforcement determine critical infrastructure and protection needs in the area. UAS are dual-use technologies, usable for both civil and military-sector deployment.

This raises ELSI questions such as use of weaponized drones in border management or domestic counterterrorism. In a 2013 poll, 62% of the respondents supported "the use of drones to control illegal immigration on the nation's border." However, only 44% were in favor of "allowing law enforcement to use drones armed with weapons to patrol the nation's border," which shows that the public differentiates between uses of the same technology in different mission scenarios.[96]

ELSI-related criticism of UAS as a homeland security capability has focused on surveillance and in particular of privacy rights and the Fourth Amendment, regarding big data potentially collected on U.S. persons by proliferating UAS technology.[97] U.S. Customs and Border Protection (CBP) were criticized for flying operations for, or lending drones to, other agencies, thus potentially bypassing legal restrictions on their use, while acknowledging the contribution of this capability to enhance disaster response and effectuate emergency management, as well as to secure U.S. borders.[98] The Intelligence Reform and Terrorism Prevention Act of 2004 allowed the DHS Secretary to start a pilot program to examine the "[u]se of advanced technological systems, including sensors, video, and unmanned aerial vehicles, for border surveillance."[99] This however raised issues of surveillance and mass data collection. A proposed solution to these issues is the integration of the homeland security use of UAS into the broader "System Wide Information Management," or SWIM, concept for next generation air traffic management.[100]

Integration of homeland security use of UAS into SWIM could help address ELSI aspects such as classification of data security levels; validation of data against authoritative sources; crowd monitoring; collection and use of data from a variety of sources;[101] and public risk posed by UAS, that were also addressed in the context of the FAA Modernization and Reform Act of 2012.[102] Also, a security by design approach has been called for to mitigate risk of abuse, so that technology development would integrate anti-tamper measures into dual-use and military systems that reduce risk of adversaries gaining information, or even terrorist hijacking (by hacking) of drones and their use in domestic attacks.[103]

The legal response to use of surveillance technology is evolving along with the technological capabilities and their critics.[104] The Supreme Court decided that law enforcement permits the use of surveillance technology via a private plane in "public navigable airspace," including over enclosed backyards, and that this did not pose a Fourth Amendment violation.[105] When more sophisticated tracking technology is used, the Supreme Court sees this as a "search" under the Fourth Amendment, thus requiring a legal warrant.[106] However, the Supreme Court ruled, routine surveillance and searches conducted at the border do not require a warrant or probable cause.[107]

As of now, 31 States have put UAS-related legislation in place, and a total of 41 states have considered UAS-related legal action in the 2016 legislative session.[108] Whereas the majority of legal provisions at State levels seem to relate to protection of critical infrastructure from aerial exploration by adversaries and to weaponized drones, ELSI-related regulations do exist and typically include public safety and force protection, as well as sometimes general limitations on surveillance-related drone use.[109]

For example, Louisiana State legislation addresses safety hazards posed by privately operated unmanned aerial systems: "If the flight of a UAS into the cordoned area endangers the public or an officer's safety, law enforcement personnel or fire department personnel are authorized to disable the UAS."[110] Except as provided in an enumeration of admissible uses in its privacy protection act, the State of Vermont prevents law enforcement agencies for example from using "a drone or information acquired through the use of a drone for the purpose of investigating, detecting, or prosecuting crime," or from use of drones "to gather or retain data on private citizens peacefully exercising their constitutional rights of free speech and assembly."[111] However, law enforcement may use drones "for observational, public safety purposes that do not involve gathering or retaining data, or in cases where a legal warrant was obtained."[112] Nevertheless, "[f]acial recognition or any other biometric matching technology shall not be used on any data that a drone collects on any person, home, or area other than the target of the surveillance."[113] Similarly, as another example, Maine requires a warrant to use of UAS by law enforcement, except in special circumstances.[114] Those among others include situations that threaten national, state, or local security, or the "life or safety of one or more individuals."[115] Noteworthy, in Maine's legislation, ethical aspects – saving human life – are an exception to the restriction of UAS based on other ELSI consideration, mostly as it relates to legal aspects.

ELSI ACROSS THE HOMELAND SECURITY CYCLE

Pulling examples from the all-hazards spectrum, this section summarizes ELSI across the sectors of the homeland security cycle as defined in the National Preparedness Goal, based on Presidential Policy Directive 8 (PPD-8) "National Preparedness" (2011): "A secure and resilient Nation with the capabilities required across the whole community to

prevent, protect against, mitigate, respond to, and recover from the threats and hazards that pose the greatest risk."[116] ELSI consideration can help reach the goal of a resilient nation, by enhancing individual and community preparedness: Providing different members of society with information and resources not only meet ethical, legal, and social requirements for whole-community homeland security. It also enables different members of society to contribute their share to building a resilient nation:

> "Whole community contributors include children; older adults; individuals with disabilities and others with access and functional needs; those from religious, racial, and ethnically diverse backgrounds; people with limited English proficiency; and owners of animals including household pets and service animals. Their needs and contributions must be integrated into our efforts. Each community contributes to the [National Preparedness] Goal by individually preparing for the risks that are most relevant and urgent for them individually. By empowering individuals and communities with knowledge and skills they can contribute to achieving the National Preparedness Goal."[117]

Prevention

The prevention mission of the National Preparedness Goal is centered on the funding core mission of the homeland security enterprise: "preventing, avoiding, or stopping a threatened or an actual act of terrorism."[118] Airport security is the best example to illustrate prevention-related ELSI. Ethical and legal issues of airport security have been discussed since long before 9/11, and the arguments remain relevant.[119]

Airport security screening might involve unconstitutional searches, out of a reasonable balance between law enforcement and privacy rights and interests. According to the Fourth Amendment, the American people have the right "to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." This results in the requirement for any search that takes place to be made on reasonable grounds, with reasonableness commonly defined by the courts based on "the degree of intrusiveness of the search procedure; the magnitude and frequency of the threat; and the sufficiency of alternatives to conducting a search."[120] In addition, courts "consider the effectiveness of the search in reducing the threat and whether sufficient care has been taken to limit the scope of the search as much as possible, while still maintaining this effectiveness."[121] Today's new technologies, including full body scanners, add a new dimension to such an assessment, since the technological potential for intrusive search is there to reveal items that may be illegal but do not pose a threat to aviation security, thus arguably bouncing the reasonability of the screening, or search.

Related cases were already treated in courts before the body scanner age, where criminal defendants sought to exclude evidence such as drugs found during airport security screening by arguing detection of those items was the result of an illegal search, in violation of the Fourth Amendment.[122] In rejection, it was maintained that airport searches as such qualify as private conduct. Counterarguments often referred to the administrative search exception, according to which administrative searches are permissible on the basis of societal purposes other than criminal law enforcement that they help achieve, to explicitly include safety of traffic in general.[123]

Already in 1976, the Supreme Court explained in *United States v. Martinez-Fuerte* that expectations in privacy and freedom "are significantly different," when one moves in the public space, "from the traditional expectation of privacy and freedom in one's residence."[124] While it would probably be hard to maintain that airport security screenings after 9/11 can be considered private conduct since they are performed by the Transportation Security Administration (TSA), which is a component of the U.S. Department of Homeland Security,[125] courts have used the administrative search argument in their ruling, for example regarding Fourth-Amendment violation arguments related to full-body scanning machines.[126] At the same time, unmet need to inform the public ahead of time about the introduction of the machines as well as missing large public consultation were pointed out.[127]

Airport security as well exemplifies social issues in the protection mission, such as public acceptance irrespective of legal acceptability of a measure. If homeland security is about commonly acquired values and a way of life, as per the homeland security vision of the *2014 Quadrennial Homeland Security Review*, then public acceptance of security measures and supporting technologies is as important as legal and ethical acceptability. In the final analysis, the effectiveness of security procedures depends on the acceptance of all people involved, and thus is a societal as well as a human factors issue. It relates to TSA personnel performing screening and using technology, as well as to travelers, airline crews, and family and friends watching their loved ones going through the procedure. It also is a cultural issue since air travel security virtually covers the citizens of the world, with all their diverse ethnic, faith, and cultural backgrounds.

Public acceptance of security technologies was studied extensively before 9/11, with one focus on air travel. Main variables found in previous analyses to explain public acceptance, or lack thereof, include, among others, the character of the threat, the degree of its understanding, and the perception of the associated risk; the understanding of the screening process and its objectives; personality factors; as well as convenience factors such as the effect of the security technology and procedures on reducing time delays.[128]

Protection

The protection mission of the National Preparedness Goal focuses on "protecting our citizens, residents, visitors, assets, systems, and networks against the greatest threats and

hazards in a manner that allows our interests, aspirations, and way of life to thrive."[129] The main ELSI consideration of the protection mission was already framed by John Jay in the *Federalist No. 2*: "To all general purposes we have uniformly been one people each individual citizen everywhere enjoying the same national rights, privileges, and protection."[130]

However, homeland security measures can inadvertently end up in making secure or wealthy citizens more secure, and vulnerable or less prosperous citizens more vulnerable in their use of critical infrastructure. For example, in their analysis of the Pan Am Flight 103 (Lockerbie) case of 1988, the President's Commission on Aviation Security and Terrorism had already concluded that "[p]ublic notification of threats to civil aviation should be made under certain circumstances. As a rule, however, such notification must be universal, to avoid any appearance of favored treatment of certain individuals or groups."[131] This is still true today: Homeland security policies, strategies, and capabilities must not, by design, create or reinforce uneven distribution of protection from threats and hazards, or, by design, limit civil liberties while seeking to provide for civil security.

Current U.S. critical infrastructure protection policy is a good example of built-in ELSI safeguards against the risk of such wrong trading of values. It rests on Presidential Policy Directive – PPD-21 "Critical Infrastructure Security and Resilience" and Executive Order 13636, both of 2013, directing federal departments and agencies to collaborate among each other and with the private sector to increase the security and resilience of national critical infrastructure. The Executive Order requires involved departments and agencies to assess the privacy and civil liberties impacts of the activities, and the results are addressed in published assessment reports with concrete recommendations for improvement.[132]

Another pertinent example is crime prevention through environmental design. This is a traditional concept that has also been used in homeland security. Hardening of soft targets by making urban built infrastructure a "defensible space"[133] becomes more and more important as we look at for example resilience enhancing programs in response to lone wolf attacks such as the Boston Marathon bombings in 2013 or the increase in active shooter incidents, culminating in the Orlando Night Club shooting in 2016 that was defined as the worst terrorist attack in the United States since 9/11.[134] The relevant case record transcends the United State to include incidents such as the Paris shootings in 2015, as well as the Brussels bombings and the Istanbul Airport bombing in 2016.

Since those attacks typically occur in metropolitan settings to ensure maximum attention for the terrorists' "message," resilience enhancement here directly relates to combining societal and infrastructure dimensions of preparedness, as also pointed out in the *2016 National Preparedness Report,*[135] to create a system that combines social and built environment and infrastructure in order to increase both societal and infrastructural resilience by reducing potential vulnerabilities and impacts and supporting effective crisis management.

However, the "securitization of urban design"[136] has been criticized from an ELSI perspective. In *The Culture of Control: Crime and Social Order in Contemporary Society,* cultural criminologist David Garland identifies cultural and institutional practices to construct artefacts that allow a continuation of imagined middle-class separation from crime. Garland illustrates his argument with examples from urban planning, especially the concept of offering citizens new middle-class type privacy in private public spaces, such as commercial malls based on architectures "to separate out different 'types' of people," including commercial policing by private companies.[137] This does not only put other parts of the urban population at higher security risk but may further undermine a whole-community approach by encouraging territorial thinking on the side of those parts of the population that are privileged to inhabit the securitized urban infrastructure.

Mitigation

The mitigation mission of the National Preparedness Goal relates to "mitigating the loss of life and property by lessening the impact of future disasters."[138] Cybersecurity is another good example of ELSI related to mitigation, since recent legislation and strategy have focused on sharing of threat indicators and building of whole-community awareness to constrain the impact of malicious cyber incidents and cyber attacks.

The Cybersecurity Information Sharing Act of 2015 (CISA) aims to improve cybersecurity in the United States through enhanced sharing of information about cybersecurity threats.[139] It is controversial as critics see it as an unbalanced move of responsibility to government, thereby increasing security risks to personal private information that following the Act might be scattered across a number of agencies across tiers of government, from NSA to local law enforcement.[140] A main point of criticism is that the sharing procedure is ill-defined and raises a series of ELSI concerns. While the Act is supposed to facilitate companies' sharing of personal information with governmental agencies in particular in cases of cyber threats, federal agencies' receipt of threat information may infringe privacy of not correctly earmarked as irrelevant to cyber security and appropriately removed during the sharing process, with a potential to result in "unfiltered oversharing."[141]

Critics such as the American Civil Liberties Union argued the Act would only increase surveillance while not actual security (adding little to prevent cyber attacks while limiting companies' liability in lawsuits over data that were shared unnecessarily and allow identification of individuals), thus harming the security–liberty balance.[142] Noteworthy, DHS itself had raised concerns about the bill. The Department

criticized the plans for direct sharing of information with government agencies. It argued that it should be given the role of the sole recipient of information from the private sector, conduct privacy impact assessments, and erase irrelevant personal information from the cyber threat indicators that arrive from the private sector.[143]

Given the private ownership of the vast majority of critical infrastructure, the relevance of the debate of security vs. other democratic open-society values does not end at all at the limits of the public sector. Balancing values right in the homeland security enterprise is an issue that no single traditional business code of ethics if going to resolve. Business ethics considerations from the discipline of security management are highly relevant to ELSI in homeland security as they relate to use of classified information, procurement, and accountability.

First, "[t]here is no conflict between pursuit of profit and attention to ethics. Businesses generally will prosper in an environment that is fair, open, and morally secure."[144] Second, the citizens themselves are the first line of defense in cybersecurity, as the *Cybersecurity National Action Plan* (2016) acknowledges.[145] Third, the next line of defense then are employees in the private sector who are united in a robust security culture and harden the private sector's social defense posture against cyber attacks and privacy infringements in general: "Employees are the key to ethical business conduct, and their behavior is strongly influenced by the way they are treated and how they view management. Ethics flourish in an environment that fosters individual self-respect, loyalty, and dedication."[146] As can be seen here again, consequential, duty, and value ethics need to be present together in homeland security.

Response

The response mission of the National Preparedness Goal is

> "focused on ensuring that the Nation is able to effectively respond to any threat or hazard, including those with cascading effects, with an emphasis on saving and sustaining lives and stabilizing the incident, as well as rapidly meeting basic human needs, restoring basic services and community functionality, establishing a safe and secure environment, and supporting the transition to recovery."[147]

Emergency management ethics are a major example of related ELSI, in particular addressing decision dilemmas in allocating scare resources to different groups of members of society in times of crisis. Yet the challenges go even further, as can be seen in the public health response to infectious diseases:

> "[B]ecause disease-control measures sometimes involve infringement of widely accepted individual rights and liberties, infectious diseases raise difficult ethical questions about

how to strike a balance between the goal of protecting the greater good of public health and the goal of protecting human rights. Quarantine, isolation and travel restrictions, for example, violate the right to freedom of movement. Other public health measures—such as contact tracing, the notification of thirds parties, and the reporting of health status of individuals to authorities – can interfere with the right to privacy. Although measures such as these may sometimes be necessary to avert public health disasters, the following question arises: How great must a public health threat be for such measures to be justified? […] While ethicists have to date focused on the possibility of conflict between the promotion of public health and individual rights, diseases which are said to have security implications additionally pose conflict between the protection of security and individual rights. Measures like quarantine, for example, might sometimes be motivated by the goal to promote national security (in addition to public health)."[148]

Large-scale public health disasters caused by a communicable disease

> "confront governments and public health organizations with ethical issues that would have wide-ranging implications and consequences. Public officials and health care professionals would face difficult ethical dilemmas in trying to choose among potentially conflicting priorities, particularly if no ethical guidelines are developed in advance. […] [T]here would not be enough time to engage in a public discussion of the ethical trade-offs in many of the critical decisions that would need to be made."[149] "[T]he entire country would face simultaneous limitations, resulting in severe shortages of critical care resources to the point where patients could no longer receive all of the care that would usually be required and expected. […] [A] severe pandemic will challenge almost every sector of society – the health care sector, the labor force, banking, and law enforcement, to name a few."[150]

Critical ethical issues include "health workers' duty to provide care during a communicable disease outbreak'" thus exposing themselves at high risk; "allocation of scarce resources; and conceivable restrictions on individual autonomy and liberty in the interest of public health through public health management measures such as quarantine and border closures."[151] Important ethical principles to address resulting homeland security decision-making dilemmas in an all-hazards, whole community approach include proportionality, reciprocity, and equity. They should be built into any preparedness and response plans, not restricted to public health emergencies, where they may become particularly obvious.

The principle of proportionality demands that "[r]estrictions to individual liberty, or other measures taken to protect the public from harm, should not exceed what is necessary to address the actual level of risk to or critical needs of the community."[152] The principle of reciprocity "requires that

society supports those who face a disproportionate burden in protecting the public and take steps to minimize this burden as much as possible."[153] "Values of distributive justice and equity state that all people have equal moral worth;" however, in case of pandemic, "[d]ifficult decisions will have to be made about whom to treat and about which health care services to provide and which to defer."[154] Those decisions "should not be based on an individual's race, color, religion, nationality, gender, age, disability, sexual orientation, geography, economic status, or insurance status, unless there are specific clinical reasons why different groups should be treated differently."[155]

Recovery

According to the National Preparedness Goal,

> "[r]ecovery includes those capabilities necessary to assist communities affected by an incident in recovering effectively. It is focused on a timely restoration, strengthening, and revitalization of the infrastructure; housing; a sustainable economy; and the health, social, cultural, historic, and environmental fabric of communities affected by a catastrophic incident."[156]

The National Disaster Recovery Framework points out the objective of revitalizing the social fabric of the community and building a more resilient nation. This requires assuring

> "that recovery activities respect the civil rights and civil liberties of all populations and do not result in discrimination based on race, color, ethnicity, national origin (including limited English proficiency), religion, sex, sexual orientation, gender identity, age, or disability."[157]

Not only are all disasters local but also does recovery already start during the response phase, where decisions are made about enabling society to attaining a new normal. Consequently, while the National Disaster Recovery Framework does not address immediate crisis response, it emphasizes that "these activities influence recovery activities, necessitating the need for a structure to consider and advise on recovery implications during the early phases of incident management."[158] In this context, the framework points out the relevance of due ELSI consideration: "Sensitivity and respect for social and cultural diversity must be maintained at all times. Compliance with equal opportunity and civil rights laws must also be upheld."[159]

The moral aspects of the aftermath of natural disasters are specifically discussed in *Ethics for Disaster,* by Naomi Zack.[160] She explores how those disasters shed light on societal inequality, arguing for the preservation of normal moral principles in times of crisis and national emergency. Using the social contract model that assumes government is only

legitimate as a function of popular sovereignty, Zack strongly opposes lifeboat ethics as well as demonstrates the limits of the liberal democratic paradigm that lays fundamental priority on the protection of individual rights and liberties. While it may be argued that a lot of the ELSI discussion on surveillance centers on a simple version of the liberal democratic paradigm where existing citizen rights are to be preserved, identifying and addressing ELSI in complex crises and disasters arguably requires taking a step beyond. The social contract paradigm extends the scope of emergency management ethics to include not only protection of assets but also allocation of scarce resources under pressure and uncertainty, while preserving existing moral principles. Cultural differences pose an additional challenge to the principle of preserving universal ethics in disaster response and recovery.

Hurricane Katrina that struck the greater New Orleans area in 2005 was used to argue that homeland security back then (before the concept of the homeland security enterprise and the whole-community approach were introduced, and the all-hazards approach was still to be further elaborated on) would not have withstood any ELSI test. It was argued that homeland security's over-concern with big terrorism had undermined the government's ability to respond to the rest of the all-hazards spectrum, failing to deliver security as a public good to the citizens and failing to respond to most elemental societal and human needs in disaster.[161] The consequence, it was pointed out, was a highly unbalanced allocation of resources for recovery across different parts of the community struck by the disaster. The whole-community approach was introduced by FEMA largely as a response to such criticism.[162]

The whole-community approach is an important foundation for due consideration of ELSI in disaster response and recovery. It aligns different tracks of homeland security ethics. As Naomi Zack has argued, all three moral systems, introduced above, that homeland security ethics entail (consequentialism, duty ethics, and virtue ethics) are relevant to disaster prevention and response, and they also constitute the ethical space in which recovery takes place:

> "Virtue ethics, duty ethics, and consequentialism are all relevant to disaster prevention and response. There are always individuals who perform virtuous acts in disasters, that is, heroes. People have duties in disasters; for example, parents must save their children. The consequences to human wellbeing are primary factors in deciding what to do in disasters."[163]

In today's complex homeland security environment, responding to disasters and fighting the war on terrorism, many organizations from different disciplines and geographic areas will find themselves working together and transcending traditional boundaries of all types. While some of them may have excellent ethics programs, this does little for those who

do not. An overarching, national homeland security ethic needs to balance liberty and security in the face of an all-hazards threat environment. ELSI in disaster response and recovery include different organizational and professional security cultures involved in the endeavor. This not only relates to interoperability of minds among actors in the homeland security enterprise, where military, law-enforcement, and other models for emergency response and support follow different principles, such as use of hierarchical authority to resolve chaos vs. problem-solving capacity that supports victims' capacity to reach a new normal.[164]

In an ELSI context, for example discussion use of military capabilities in ensuring resilience to disasters would not concentrate on legal foundations such as the Posse Comitatus Act or on the provisions for defense support of civil authorities,[165] but rather on organizational aspects and security cultures. This would include attention to victims' perception of disaster response and recovery intervention by different organizations, including the military. Events during and following Hurricane Katrina exemplify what victims perceived as unethical behavior by homeland security professionals at that time. For instance, "[t]he conditions at the Convention Center, the Superdome, the I-10/Causeway Overleaf resembled concentration camps – days of internment without adequate food, water or sanitation, and a growing sense of hopelessness."[166]

An example of how ELSI highlighted by the Katrina disaster were addressed for the future is the Post-Katrina Emergency Management Reform Act of 2006.[167] Among other things, it amended the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988 (that authorizes Federal assistance when the President declares a State to be a disaster area). The Stafford Act prohibits discrimination during disaster relief operations. This now includes race, color, religion, nationality, sex, age, disability, English proficiency, and economic status in the discrimination protection clause. State emergency plans must address the needs of all populations.

While all actors across the homeland security enterprise need to be able to adopt or switch to action repertoires informed by the values, norms, and rules of civil security, they also need to bring cultural awareness to the scene: Since recovery starts in the response phase, homeland security and emergency response capabilities need to be used in a way that is enabling societies to return to a new normal, and the communities struck by disaster need to perceive the use of those capabilities to be geared to that end. For that to happen, recovery efforts must limit "situational altruism," although much valued in commonsense ethics, to the benefit of limiting the embedding of response and recovery into mainstream cultural assumptions, where "the practices of crisis relevant organizations reflect prevailing social hierarchies and the differential value placed on different groups, subcultures, and lifestyles."[168]

INTERNATIONAL PERSPECTIVES

Due to their universal character, any understanding of ELSI remains incomplete without addressing them in their international perspective, as the homeland security enterprise includes working with international partners. It is important to appreciate how ELSI are understood and addressed elsewhere in the world, considering that "the homeland security mission is […] a global one, and a homeland security approach that ends at a nation's borders is not a homeland security approach at all."[169] The discussion in this section will focus on some select examples that bear relevance to major homeland security debates and activities in the United States.

ELSI are extensively discussed in the European Union (EU), as all Member States citizens also are citizens of the EU, and the European Union's aims enshrined in the Treaty on European Union include to "offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime,"[170] while "maintaining law and order and safeguarding national security" falls within the responsibility of each Member State.[171]

The European Agenda on Security of 2015 seeks to achieve "an EU area of internal security where individuals are protected in full compliance with fundamental rights."[172] The Agenda is a "*shared agenda* between the Union and Member States" but does not pursue a whole-community or all-hazards approach but "prioritises *terrorism, organised crime* and *cybercrime* as interlinked areas with a strong cross-border dimension, where EU action can make a real difference."[173] The Agenda expands on the European Union's security model that focuses on ameliorating societal conditions that are seen as the root causes for extremism and terrorism. Based on this model the EU aims at delivering security along with freedom and justice to its citizens, among other things strongly focusing on privacy and data protection rights.

While the EU civil security model differs in some regard from the U.S. homeland security approach, concrete ELSI concerns are similar. The emphasis lies on privacy and data protection, as well as "designing in" of privacy into technological solutions, meaning taking hardware measures in addition to legal mechanisms to limit potential for excessive use or abuse.[174] This in particular includes the use of "drones" in internal security (or home affairs, the EU corresponding term for homeland security).[175]

ELSI also are prominently addressed in EU counterterrorism. The European Community, the precursor of what today is known as the European Union that was created in 1992 with the Maastricht Treaty, started to cooperate on counterterrorism with the creation of the Terrorism,

Radicalism, Extremism, and International Violence group, known as the TREVI group, in 1975. This cooperation was framed as law enforcement cooperation, with terrorism defined as a crime in the first place. After 9/11 and terrorist attacks in the EU, this tradition was expanded on in the Hague Programme of 2004,[176] which among other things called for ensuring coherence between the EU and the international legal order, in particular protecting human rights and fundamental freedoms in countering terrorism, fighting organized crime, and security managing migration flows. In the EU discussion, potential for cooperation between the European Union and the United States in counterterrorism is sometimes seen as limited for ELSI reasons: It is argued that the U.S. regard terrorism as an existential threat and use a full-spectrum response that raises human rights concerns, whereas the EU prioritizes policing measures.[177]

While typically a reason for ethical and legal concerns, the introduction of biometric identifiers, including biometric passports for all of its citizens, was framed in the EU mainly as a protective measure for individual identities, which facilitated political and public acceptance.[178] Critics though have argued that biometrics are a disproportional measure and basically turn each citizen into a suspect, that biometric data control is flawed, and that data exchange with the U.S. covering all individuals simply crossing borders goes beyond the applicable legal basis.[179] A more intensive debate was though triggered by ethnic profiling:

> "Ethnic profiling involves the use of ethnic traits (typically by police, but also potentially by emergency services) as an indicator of the need for further investigation. Ethnic profiling is controversial because it has been used in ways that associate certain ethnic groups with certain kinds of criminality. For example, following the 9/11 terrorist attacks of 2001, the German government adopted a program of data mining of government and social services records to identify male students of Muslim background. The German Federal Court later outlawed the policy, citing the stigmatization of Muslims as one of the reasons against it. Ethnic profiling can encourage people to perceive certain groups as ill-intentioned and dangerous and can lead to discrimination against them."[180]

Extensive public debate associated with anti-terror legislation and investigative practice is not uncommon around the world. A recent example is a day-long filibuster (non-stop speeches) of the opposition on South Korea's parliament, to block a vote on a proposed law supported by the government that opposition sees as threatening privacy and personal freedoms.[181] The bill gives more power to the National Intelligence Service (NIS) to investigate individual citizens as well as organizations, without increasing control mechanisms, based on the argument that threats to national security posed by both North Korea and international terrorism

require more intelligence. Former NIS directors were under investigation or even sentenced for overseeing cell phone conversation monitoring of around 1,800 members of South Korea's political, business, and media elite, and for illicitly using NIS capabilities to support political campaigning.

The filibuster could not prevent passing of the law that had actually been in the making and in motion multiple time since the 9/11 terror attacks of 2001.[182] The law also adds new regulations for criminal prosecution, letting those who form a "terror organization" face capital punishment. Critics argue that the new NIS powers are disproportional and unbalanced, although the agency has now been put into a reporting line to the Prime Minister and been given a high-level committee that will define the policies that the agency is going to execute. However, critics maintain that the definition of terrorism in the new law is dangerously unspecific and open to abuse. The law defines terrorism as an "act that can put national security and citizens' safety at risk which includes the disturbance of the nation, regional government, and foreign government exercising its authority."[183]

In the case of Israel, the unique situation of the country warrants a critical approach to political discourse about security vs. liberty. Public discourse has portrayed the country as both vulnerable and in an eternal survival struggle against enduring enemies.[184] From this resulted the self-help argument, legitimizing military action for homeland security and defense, as well as emergency measures. Long before the era of homeland security, in 1953, Israel's High Court of Justice established that freedom (specifically, of expression) was not absolute but relative to other interests of a democratic society.[185] The Court assumed a hierarchy of democratic values where security was positioned above freedom of speech and other liberties, at the same time adding that invoking this hierarchy was only appropriate when the risk of damage (of free speech) to "public peace" was high, thus in the end overruling a government decision to suspend two communist newspapers.[186]

Another example is immigration legislation that has been criticized for preventing family unification and therefore being unethical. The Citizenship and Entry into Israel Law, created in 2003 by temporary order in response to the increase in suicide attacks during the second *intifada* was prolonged with its scope expanded several times so that it came to prevent anybody from immigrating who comes from any region where a threat to the security of the state of Israel may originate.[187] An ELSI concern arising is unproportionality, that is, subjecting a lot of different groups of people to general restrictions without using risk assessment to scale homeland security measures to actual threat levels. Proponents argue with reference to the countries' eternal state of emergency, where the right of Israeli citizens to live is more important than the right of families

to be unified.[188] An eternal state of emergency again is a concept that critics of securitization would reject on ELSI grounds. However, as discussed, ELSI categories, while as such universal, cannot be used adequately without an understanding of security cultures.

HOW TO ADDRESS ELSI IN EVERYDAY HOMELAND SECURITY

U.S. homeland security being an enterprise that not only transcends DHS but government and the public sector, society is an active partner in the creation and delivery of security as a common good, as opposed to just a recipient of that good. The homeland security community's efforts to safeguard commonly acquired values should itself be guided by those values, and not acquire a potential to infringe them. Those aspects are part of a challenge that relates to ethical, legal, and social issues, or ELSI. It warrants critical thinking rooted in cross-disciplinary and global perspectives.

The discussion as such is now new, and neither is the search for workable solutions. In his book *National Security and Individual Freedom,* Harold Lasswell concluded in 1950 that American security measures should be the outcome of a comprehensive process of balancing the costs and benefits of all relevant policies, basically suggesting a reasonable trading of liberty for security and security for liberty.[189] From today's ELSI perspective, this solution appears too pragmatic, or utilitarian: According to the 9/11 Commission, there is only a "false choice" of security vs. liberty, since we should not have to trade liberty for security.[190]

Relevant considerations were also present at the International Covenant on Civil and Political Rights (1966), and in further human rights law attempting to balance needs arising from emergencies that "threaten the life of the nation" with the risk of limiting the freedoms of a whole population.[191] Human rights law though requires these limitations imposed in order to protect important rights. Further,

> "[a]nticipating that declarations of emergency might be used opportunistically by governments as justification for the unnecessary limitation of rights, human rights law discourages the declaration of an emergency by governments, and requires the period of emergency to be as short as possible. Even in emergencies, certain human rights may not be limited, according to human rights law. These include the right not to be tortured and the right not to be discriminated against."[192]

It is not trivial of integrate ELSI consideration into everyday homeland security, for a number of additional reasons. As discussed in this chapter, those include concerns of an overemphasis of ELSI that in fact weakens efforts to safeguard the homeland; the fact that ELSI integration into homeland security capabilities and practices may lead to new challenges and dilemmas; as we as the trend of securitization. In particular the latter directly relates to justification of increases in homeland security intelligence, including domestic intelligence: "Throughout US history, in times of national security crisis, civil liberties have been curtailed in exchange for perceived greater security, the balance between liberties and security generally being restored after each crisis."[193]

U.S. government efforts to effectively address ELSI, while not weakening, but strengthening homeland security missions, are present in a number of ways at a number of levels. This includes the organizational level, such as the creation of the Office for Civil Rights and Liberties (CRCL) within the DHS. It also includes the operational level periodical governmental reporting as mandated by the USA FREEDOM Act being an example. Efforts further include an emphasis on the law-enforcement aspect of homeland security and how it functions as an enabler for the whole-community approach. DHS has set a focus on Law Enforcement Partnerships, in the first place emphasizing the role of cooperation in an all-of-government approach to countering domestic terrorism, with an emphasis on social aspects in the context of community policing:

> "Our law enforcement partners at the federal, state, local, tribal and territorial levels are the backbone of our nation's domestic defense against terrorist attacks. They are this country's eyes and ears on the ground, and the first line of detection and prevention. They are a vital partner in ensuring public safety, in every American community."[194]

Apart from those practical measures of inserting due ELSI consideration into the homeland security cycle, what seems to be required are better integrated and more duly considered professional studies of homeland security policies, strategies, and capabilities. The best and arguably most justifiable way of addressing ELSI is by actively researching ethical acceptability, social acceptance, comprehensive legal impact, and unintended consequences before implementing legislation, policies, and technological solutions for homeland security.

Aspects to consider include, for instance: formal procedure and public input in the decision to adopt the technology; assessing of the symbolic meaning the use of technology may imply; reversibility (the use of technology for surveillance should not permanently change state or society); human review (technology should not be automated and make decisions without the human in the loop); appropriateness and clarity of goals; proportionality (technology and information collected should be scaled to the dimension and impact of the security issue addressed); criteria of selection for the subject(s) of surveillance; as well as equal access to and periodic review of surveillance tools.[195] As this list shows, ELSI are best addressed proactively, as opposed to reactively, which however has been typical of a lot of

approaches to those issues in homeland security in the United States. Examples include post-Katrina emergency reform legislation and the ex-post facto reporting mandated in the USA FREEDOM Act.

Regarding two debates discussed in detail in this chapter as examples, mass surveillance by NSA and security technology such as UAS, international discussion has best practices to suggest for consideration in U.S. homeland security:

Based on an analysis of the Snowden case, Amnesty International and Privacy International recommended general criteria for governments to use in mass surveillance programs in order to proactively address ELSI:

"Governments can have legitimate reasons for using communications surveillance, for example to combat crime or protect national security. However because surveillance interferes with the rights to privacy and freedom of expression, it must be done in accordance with strict criteria: surveillance must be targeted, based on reasonable suspicion, undertaken in accordance with the law, necessary to meet a legitimate aim and be conducted in a manner that is proportionate to that aim, and non-discriminatory. This means that mass surveillance that indiscriminately collects the communications of large numbers of people cannot be justified. Mass surveillance violates both the right to privacy and to freedom of expression."[196]

Regarding concerns about security technologies with potential to intrude on privacy, security research recommends proactive addressing of ELSI through a privacy-by-design approach:

"*Privacy by design* is the practice of building privacy protecting features into security practices and technologies to preempt violations of privacy. For example, a privacy-by-design technique was used to produce socially, legally, and ethically acceptable body scanners: instead of producing an image of the naked body, these scanners show operators a simple line-drawing of a generic human body, and represent the location of any suspect object by means of a flashing light. This simple solution preserves the detection function of the technology while minimizing the intrusion into bodily privacy. Privacy-by-design principles that now inform technology development include data minimization, which requires that technology is developed so as to minimize both the amount of data stored, shared, or analyzed and the length of time for which it is kept. This mitigates against mission creep as well as privacy intrusions."[197]

However, the potential for conflict among ELSI principles and procedures becomes evident here, where procedures that implement due consideration of ELSI could end up working against the principles of ELSI. Consider the following example: On the one hand, the human in the loop, so as to avoid unethical or even illegal exposition of humans to non-human decisions, made by machines, is an essential ELSI principle.

On the other hand, automation has the potential to protect privacy by reducing the numbers of humans who actually look at information, thus taking the human out of the loop. Again, it becomes obvious that there are no handbook solutions to ELSI and that theoretical ELSI concepts will not survive real life contact. Rather, it is important to understand the ELSI can only be coherently addressed within an understanding of homeland security as a whole-community effort to safeguard society's commonly acquired values.

This effort needs to include addressing of limitations and unintended consequences of ELSI integration into homeland security capabilities. For example, published vulnerability studies, risk assessment frameworks, as well as National Preparedness Reports may serve to enhance whole-community preparedness but may also reveal security gaps. At the same time, classification of information and lack of transparency of publicly funded programs may infringe the integrity of the homeland security policy area, limit the sense of societal/citizen ownership that homeland security based on a whole-community approach requires, and harm the integrity of the homeland security enterprise by giving the appearance of insufficient commitment to deliver to the people a usable public good of security, or at least a fair return on tax money investment.

In the final analysis, pragmatic implementation of ELSI consideration in everyday homeland security can best be accomplished by following a number of general principles across homeland security domains and missions that can be seen as ingredients of an ELSI-informed security culture – with the dimensions of normative values, knowledge and interpretation, common symbols, and action repertoires, as described above:

- Normative values
  - Nurture a normative security culture, rooted in a view of the citizens being the ultimate owners of homeland security and vested with unalienable democratic rights;
  - Follow the principle of equal access of the whole community to homeland security capabilities and their results, as well as the principle of risk-proportional use of homeland security capabilities.
- Knowledge and interpretation
  - Supported by research, use a comprehensive approach to ELSI safeguards: Asses and address ELSI from the very beginning of the development of a security technology or a policy, in addition to ex-post reporting on possible ELSI negligence;
  - Use formal, reviewable procedures and public input (such as consultation) in the decision to adopt homeland security technology;
  - Assess the harm that a homeland security capability might cause against its benefits;
  - Establish homeland security workforce as well as public awareness of risky potentials for excessive and intruding use of homeland security capabilities.

- Common symbols
  - Consistently understand homeland security as a public good provided for in joint responsibility of all members of the homeland security enterprise;
  - Focus on observable facts regarding security needs of society and disaster-struck communities, as opposed to bureaucratic and political construction of disaster;
  - Maintain a legally sound and culturally fair balance between effectiveness and invasiveness of a homeland security policies and capabilities, based on a focus on human and societal needs as opposed to securitization trends and elite constructions of reality.
- Action repertories
  - As opposed to taking a whole-community approach for granted, continuously assess homeland security activity for inadvertent creation or reproduction of unequal distribution of security in society;
  - Implement homeland security capabilities in a way that they become a whole-community enabler, fostering the societal ownership of homeland security, recognizing that ELSI may be interpreted differently within and across different security cultures;
  - Maintain a consequentialist perspective together with a distributive justice perspective to assess and address unintended consequences of national preparedness planning and practice, such as unfair strategic advantage to some, or exposing some to higher risks without fair reciprocity.

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