
VALUING IMMIGRANT LIVES

*Jaya Ramji-Nogales**

In *Valuing Foreign Lives*, Arden Rowell and Lesley Wexler bring theoretical rigor to bear on a vitally important yet atheorized area of legal policy: the valuation of foreign lives in U.S. policymaking.¹ At the heart of the article is a call for transparency, aiming to enable greater understanding of the foreign impacts of American policies.² This is a radical move that holds the potential to transform the process of making policy in the United States and to alter negotiations and relations with other nations.

The article offers substantial food for thought as well as a robust research agenda going forward. In furtherance of that agenda, this brief comment focuses on U.S. immigration law and policy, highlighting the challenging questions that this highly politicized field presents for their theory. In particular, the deep political controversies that surround immigration foreground the difficulty of focusing on process rather than prescribing a normative solution. Though I am in the authors' camp in favoring a process-based approach,³ this avenue presents thorny problems that remain to be worked through as the authors pursue their larger research agenda. I applaud the authors for their innovative and provocative theory, and offer up these challenges from the field of immigration law in the spirit of a fellow traveler aiming to help them ensure that their theory is as effective as possible.

The first issue in applying their theory to immigration law and policy is definitional. For this brief comment, I accept at face value their definition of foreign persons as those physically outside the borders of a nation state.⁴ But an immigration law perspective pushes for more answers. How do foreigners residing within the United States fit into this definition? In particular, while an estimated eleven million undocumented migrants reside within the territorial borders of the United States, they remain outside the country's political boundaries.⁵ Should their lives be

*

1. Arden Rowell & Lesley Wexler, *Valuing Foreign Lives*, 48 GA. L. REV. 499 (2014).
2. *Id.* at 556–57, 564.
3. Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach*, 32 MICH. J. INT'L L. 1 (2010).
4. Rowell & Wexler, *supra* note 1, at 507.
5. *Unauthorized Immigrant Population Profiles*, MIGRATION POL'Y INST., <http://www.migrationpolicy.org/programs/us-immigration-policy-program-data-hub/authorized-immigrant-population-profiles> (last visited Feb. 25, 2015).

treated as akin to American lives or as foreign lives under their theory? While either approach would be an improvement to current immigration policies that do not explicitly engage in valuation of undocumented lives, the location of these migrants in the author's framework has profound political consequences. Valuation as foreign would contribute to the marginalization of these migrants and their position as a permanent underclass, while valuation as American would likely provoke substantial political push-back.

If U.S. immigration policy were to value undocumented lives as American lives, it would have substantial ramifications not only for detention policies but also for deportation policies. Transparency would be a helpful first step when it comes to valuing foreign lives in detention; U.S. Immigration and Customs Enforcement is better known for "cover[ing] up evidence of mistreatment, deflect[ing] scrutiny by the news media or prepar[ing] exculpatory public statements after gathering facts that pointed to substandard care or abuse" in immigration detention.⁶ More than 140 immigrants have died over the last decade in detention facilities that are paid in the range of \$160 per day to hold them, with little oversight from the federal government.⁷ A policy that valued each life as between \$5 and \$9 million would necessitate a revision of immigration detention policies.

The risks of entering the United States without authorization presents an even stronger case for policy revision if immigrant lives are to be valued as American lives. Nearly 4500 migrants have died along the southwest border over the past decade, ranging from 328 deaths in 2004 to 477 deaths in 2012.⁸ These are just the deaths counted at the physical border; countless more migrants lose their lives as they pass through their country or other countries on the way to the United States.⁹ Most undocumented migrants fleeing dangerously violent countries currently have no path to legalization in the United States.¹⁰ An immigration poli-

6. Nina Bernstein, *Officials Hid Truth of Immigrant Deaths in Jail*, N.Y. TIMES, Jan. 9, 2010, http://www.nytimes.com/2010/01/10/us/10detain.html?pagewanted=all&_r=0.

7. IMMIGRATION & CUSTOMS ENFORCEMENT HEALTH SERVS. CORPS, LIST OF DEATHS IN ICE CUSTODY OCTOBER 2003 – DECEMBER 2, 2013, *available at* <http://www.ice.gov/doclib/foia/reports/detaineedeaths2003-present.pdf> (last visited Feb. 25, 2015); NAT'L IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION (Aug. 2013), *available at* <http://immigrationforum.org/wp-content/uploads/2014/10/Math-of-Immigration-Detention-August-2013-FINAL.pdf>; *Immigration Detention*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/immigrants-rights/immigration-detention> (last visited Feb. 25, 2015).

8. U.S. BORDER PATROL, SOUTHWEST BORDER DEATHS BY FISCAL YEAR, *available at* <http://www.cbp.gov/sites/default/files/documents/U.S.%20Border%20Patrol%20Fiscal%20Year%20Statistics%20SWB%20Sector%20Deaths%20FY1998%20-%20FY2013.pdf> (last visited Feb. 25, 2015).

9. *See, e.g.*, Rodrigo Dominguez Villegas, *Central American Migrants and "La Bestia": The Route, Dangers, and Government Responses*, MIGRATION POL'Y INST. (Sept. 10, 2014), <http://www.migrationpolicy.org/article/central-american-migrants-and-la-bestia-route-dangers-and-government-responses> (noting that Mexico's "National Human Rights Commission (CNDH), an autonomous institution funded by the government, reported more than 11,000 abductions of migrants between April and September 2010").

10. *Why Don't They Just Get in Line?*, AM. MIGRATION COUNCIL (Mar. 14, 2014), <http://www.immigrationpolicy.org/just-facts/why-don%E2%80%99t-they-just-get-line>.

cy assessment that valued these lives as American lives would necessitate the creation of safer routes to enter and more legal options to remain in the United States, redefining deportation policies.

The authors also suggest that, in future projects, they will explore the valuation of harms beyond death.¹¹ Such valuations would again have a transformative impact on U.S. immigration regulation, and again it matters whether undocumented migrants are valued as American or foreign for this analysis. The example of the cost of family separation resulting from deportation foregrounds this problem. Undocumented migrants have both undocumented and U.S. citizen children. If undocumented parents were valued as Americans, the costs of such family separation would substantially outweigh the benefit of deporting the vast majority of these migrants (with the possible exception of those who pose a serious danger to U.S. society). But if they were valued as foreign, the cost-benefit analysis might require that only those with U.S. citizen children would be allowed to remain.¹² Such an approach matches up with President Obama's recent executive action, and would not therefore profoundly impact U.S. immigration policy but might suggest changes to U.S. immigration law.¹³

Setting definitional complexities to one side, this brief comment explores the valuation of the lives of migrants trying to enter the United States. From that vantage, I focus on two challenges to the authors' theory. They recognize the first at the end of the article: the success of parts of their theory depends on the assumption of equality on the international playing field.¹⁴ International migration demonstrates the power inequalities that limit the power of transparency in reshaping policy outcomes. The second, related, concern is the tension between two goals that I find to be the most valuable contributions of their theory: their effort to bring theoretical rigor to policymaking and their aim to focus on process rather than normative prescriptions.¹⁵ Because their theory necessarily enters a world that is already normatively laden, avoidance of normative prescription risks accepting the status quo ante, which is largely the result of realpolitik and path dependence rather than theoretical rigor. In other words: the authors' process-driven approach risks undermining their effort to theorize the valuation of foreign lives.

The first problem that a global migration perspective unearths is that, in the authors' words, their theory is unable to address international

11. Rowell & Wexler, *supra* note 1, at 574.

12. An estimated fifteen percent of migrants apprehended at the border in 2011 and 2012 were parents of U.S. citizen children. *Border Enforcement Policies Ensnare Parents of US Citizen Children*, HUMAN RIGHTS WATCH (Jan. 8, 2015), <http://www.hrw.org/news/2015/01/08/border-enforcement-policies-ensnare-parents-us-citizen-children>.

13. *Executive Actions on Immigration*, DEPARTMENT OF HOMELAND SECURITY, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <http://www.uscis.gov/immigrationaction> (last updated Feb. 17, 2015).

14. Rowell & Wexler, *supra* note 1, at 577.

15. *Id.* at 502, 514.

distributional inequity.¹⁶ Rowell and Wexler suggest that American policymakers should engage in more transparent valuation of foreign lives in managing cross-border externalities for a variety of reasons.¹⁷ I focus on one here: that such an approach would better inform international lawmakers of the expected foreign impacts of domestic policies. This is indisputable, but it's less clear whether these lawmakers, as the authors suggest, can reasonably negotiate valuation methods that incorporate their views on willingness to pay to prevent foreign harms into decisions about domestic resource allocation. If policymakers were to value the lives of Hondurans fleeing gang violence in their home country and seeking to enter the United States and make this information available to the Honduran government, what could be done with it? With a GDP per capita of less than \$2500, it seems unlikely that the Honduran government could have any impact at all on U.S. policymaking.¹⁸

This problem feeds into a larger dilemma related to process-based solutions. In order to avoid “promoting a particular form or method,” the authors propose a variety of factors that might guide the policy-making process.¹⁹ The potential undocumented migrant exposes the hidden irrationality that pervades even these factors that the authors propose to inject rigor and transparency into the policy-making arena.

The first factor, international law obligations, place little value on the lives of migrants who wish to enter another country without legal authorization.²⁰ Beyond the non-binding Universal Declaration of Human Rights, international law provides little by way of ensuring access to territory even to asylum seekers seeking protection.²¹ The structure of international migration law values most the lives of those foreigners able to cross borders, a situation that is hopelessly irrational both from the perspective of the state and from the perspective of the migrant.²² International law is not always a proxy for theoretical rigor.

The causal responsibility factor is easily manipulated in the context of global migration. Though most policy-makers would likely portray the decision to migrate as an individual choice, such a framing ignores the role of developed nations in creating the push and pull factors that drive global migration.²³ This factor favors clarity over complexity; while there are understandable benefits to such an approach in the policy-making arena, it does not necessarily lead to rational decision-making. In other

16. *Id.* at 578.

17. *Id.* at 503.

18. *Honduras*, THE WORLD BANK, <http://data.worldbank.org/country/honduras> (last visited Jan. 17, 2015) (listing 2013 GDP as \$18.55 billion and 2014 population as 8.261 million).

19. Rowell & Wexler, *supra* note 1, at 502.

20. Jaya Ramji-Nogales, *Undocumented Migrants and the Failures of Universal Individualism*, 47 VAND. J. TRANSNAT'L L. 699, 703 (2014).

21. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), at Art. 14(1) (“Everyone has the right to seek and to enjoy in other countries asylum from persecution.”). *But see* Hirsi Jamaa v. Italy, Eur. Ct. H.R. (2012).

22. Moria Paz, *Human Rights, Immigration, and Border Walls* (Stanford Pub. Law, Working Paper No. 2526521, 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526521##.

23. Ramji-Nogales, *supra* note 20, at 48–50.

words, without normative direction, the success of the theory depends on the rigor of policy-makers—who, after all, are the ones who designed the current atheoretical system. One approach the authors might take to ameliorate the malleability of this factor is to ensure that causation is measured along a sliding scale rather than as a binary. In other words, a civilian death at the hands of a member of the U.S. armed forces might be the clearest causation and thus the highest level of valuation, while a more complex calculation such as the decision to migrate would be a lower level of valuation, though still higher than zero.

The existence and importance of reciprocity again plays into global distributional inequities. The authors offer international humanitarian law as an example of how valuation of foreign lives might proceed.²⁴ But of course international humanitarian law provides a baseline to resolve an important coordination problem with obvious mutual benefits. In cases where the mutual benefit is less obvious, it's not clear whether reciprocity adds to rationality in decision making or simply reinforces existing power relations. In the realm of global migration law, the flow of undocumented migrants moves in one direction, from the developing to the developed world. Reciprocity could be argued to exist only to the extent that the economies of developed nations depend on the labor provided by undocumented migrants from the developing world.²⁵ But developed nations are not worried that their own nationals will have to risk their lives to find physical safety and economic security. Does this mean that the lives of undocumented migrants should be accorded less value?

The authors recognize the difficulty in enumerating the national interest.²⁶ In the realm of immigration law, domestic preferences are deeply divided.²⁷ This means that both the benefits and the costs of admitting undocumented migrants are highly contested. In such a situation, it is hard to assess the national interest factor without resort to a baseline set of decisional principles. The authors might flesh these principles out in future works. Should those most impacted by the deaths of foreign nationals be accorded priority in the determination of the national interest? Or should the preferences of those most impacted by the admission of foreign nationals be paramount, and if so, how do we determine the membership of this group?

The application of these four factors to the lives of undocumented migrants illustrates the tension between a process-based solution and the authors' effort to inject analytical rigor into policy-making that impacts foreign lives. Their rationale for offering a process rather than mandating a particular approach is compelling: "multiple potentially defensible methods for valuing foreign lives exist, but . . . different methods face

24. Rowell & Wexler, *supra* note 1, at 542.

25. Ramji-Nogales, *supra* note 20, at 53, 57–59.

26. Rowell & Wexler, *supra* note 1, at 560–61.

27. See, e.g., Mark Murray, *NBC/WSJ Poll: Nearly Half Oppose Executive Action on Immigration*, NBC NEWS (Nov. 19, 2014), <http://www.nbcnews.com/storyline/immigration-reform/nbc-wsj-poll-nearly-half-oppose-executive-action-immigration-n251631>.

identifiable challenges and have distinct strengths and drawbacks, which can be poorly- or well-matched to specific decision contexts.”²⁸ Though this pluralist prescription is an appropriate, and in my view, superior, choice given that their theory is to be applied across numerous institutions and cultures, the concern remains that process can be used to evade rigor. Carefully designed safeguards can prevent such evasion to some extent, and should therefore be attached to any such process. The example of U.S. immigration law and policy demonstrates the need to be particularly careful of compounding existing distributional inequities. In the same vein, the goal of transparency in valuing foreign lives is, even standing alone, an immensely useful contribution to American policymaking. Yet therein lurks the dangers of the cost-benefit analysis and its neutrality masquerade. The numbers are dependent on numerous choices dictated by the priors of the person counting; ensuring that those decisions are made rigorously and fairly are the next step for Rowell and Wexler’s theory. This piece is but the first in an exceptionally promising research agenda, and I eagerly await the next installment.

Preferred Citation: Jaya Ramji-Nogales, *Valuing Immigrant Lives*, 2015 U. ILL. L. REV. SLIP OPINIONS 18, <http://www.illinoislawreview.org/wp-content/uploads/2015/04/Ramji-Nogales.pdf>.

28. Rowell & Wexler, *supra* note 1, at 502.