
CONCLUSIONS ON THE SYMPOSIUM ON FOREIGN LIFE VALUATION

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What obligations do states owe to foreign persons as compared to domestic ones? How should government policy account for psychological biases that lead people to value the deaths of many less than the death of one, or for the social factors that lead people to treat out-groups differently than in-groups? If preferences matter to policy, should the political geography of the person with the preference determine whether that preference is counted?

The answers to these questions are difficult, and may even vary across context based upon political, social, or practical factors. Yet, up to now, there has been a marked lack of conversation across academic disciplines on how to integrate these concerns into a general theory of foreign life valuation, and even less on how to tailor a specific foreign valuation practice to specific policy contexts.

Of course, academics are not the only ones who have ideas, and policymakers must routinely make tradeoffs when they are allocating scarce resources. In many contexts—including within domestic regulation, torts, and the laws of war—these tradeoffs implicate balancing between domestic resources and foreign lives. Before Lesley Wexler and I began the research that eventually became *Valuing Foreign Lives*, we thought it was quite possible that policymakers might have developed their own practice-derived principles for making these tradeoffs. If so, other policymakers (and academics) might learn from these principles. And, if practice was working reasonably well with its own derived contextual principles, the theoretical vacuum of foreign life valuation would be merely a theoretical puzzle, rather than a pressing concern for modern legal policy.

So we set off to canvass areas of law to determine how policymakers currently make tradeoffs between foreign impacts and domestic resources, focusing on mortality impacts, since those are important and relatively large.

Unfortunately, we did not find the practice-derived principles for which we were searching—or if we found them, we have (still) been una-

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ble to recognize them. Instead, what we found—as Professor Jonathan Masur acutely summarizes in his commentary—was “a muddle.”

Policymakers in different contexts did indeed apply widely different practices, sometimes valuing foreign lives at zero (as in most, but not all, domestic regulation), sometimes valuing foreign lives equally to domestic ones (as for foreign combatants wounded by U.S. military operations), and other times somewhere in the middle (as with disaster aid and tort damages). Yet there were no apparent principles underlying these differences. In many cases, we found it extraordinarily difficult even to determine what the foreign valuation practice was. Yet even this difficulty did not track any principles that we could see: political or practical reasons might dictate why states might try to keep foreign valuations private, but why should those interests make it more sensible to make domestic regulation valuations more obscure than military valuations?

We found no sign that policymakers were aware of or were considering foreign valuation contexts outside their own, or in some cases, that they had devoted any thought at all to the various implications of their foreign valuation policies. And even more than that, we simply could make no sense of the assembly of resulting practices.

We concluded that, given the frequency and importance in which foreign valuation questions arise, and the general absence of meaningful *ad hoc* practice, foreign life valuation really is a pressing concern for modern legal policy.

So, how *should* policymakers value foreign lives? We tried to make at least incremental progress on this question in the initial article, by identifying the usefulness of asking this kind of analytical question in the first place; by providing empirical groundwork for talking through existing practices that relate to the phenomenon; and by showing the room for improvement in those practices by highlighting opportunities for improved systemization.¹ But while we hoped these were useful points, and that the information we pulled together on actual practice was interesting in its own right, we could still see a great deal of work to be done.

There are a lot of moving parts in questions of foreign valuation: to make progress on the problem, we need additional development of each of those parts, and conversations and communications that can begin to weave those parts into a functioning whole. How might such a project develop? On the basis of at least three things: the attention of considerate and thoughtful people; the application of those people’s diverse disciplinary and factual expertises to the problem of foreign valuation; and communication of insights across disciplinary and contextual barriers.

Lesley and I conceived of this online symposium as a first step in promoting each of these three goals, and are delighted to think that it succeeds in doing so. There is still much work to do, but each of the contributions to the symposium establishes important ground rules on which

1. See Arden Rowell & Lesley Wexler, *Valuing Foreign Lives*, 48 GA. L. REV. 498 (2014).

future development of the theory and practice of foreign valuation might grow. In the spirit of continued forward momentum, I think we can extract the following lessons:

However policymakers *should* value foreign lives, in the vast majority of cases, the way they are doing it now is atheoretic and opaque. At the least, it seems helpful both to point to foreign life valuation as a thing that may be worth thinking about, and to use that attention to encourage further refinement of the determination of what exactly it is that ought to be valued in any policy. Here, David Dana's commentary, which encourages consideration of foreign cultures and civilizations in addition to lives, helps highlight the outlines of the definitional puzzles posed by foreign valuation, even as it deepens the stakes for developing policies that address foreign valuation in a sensible way.

Atheoreticity does not always lead to bad practices, but it does tend to make decisionmaking less systematic and less rigorous. Given our priors about the value of systematic decisionmaking, foreign life valuation practice is a ripe area for increased rigor. Thus, the original piece presents a sound normative prescription: policymakers should be more systematic in foreign life valuation practices. Colleen Murphy's commentary points to ways in which this systemization might be deepened ethically and philosophically, through systematic inquiries into the sources and types of obligations under which states operate.

Another way to improve systemization of foreign life valuation would be to simply work through the various puzzles and stakes that different academic disciplines point us towards. In this sense, policymakers can improve the systemization of their practices by interrogating their own practices using the puzzles various disciplines provide. How can policymakers best interrogate their own practices, in light of interdisciplinary puzzles? This question is foregrounded by Paul Slovic's discussion of the prominence effect in foreign valuation; Lesley Wexler's response provides one example of how this sort of interdisciplinary focus on the problems inherent in foreign valuation might be incorporated into identifiable legal mechanisms.

It is also important to continue to refine understanding of how foreign life valuation practices interact with specific institutions. At first glance, the significant variance in foreign valuation practices can appear problematic, even arbitrary. But when understood in specific institutional context, divergent valuation practices may be perfectly sensible, given the institutional realities in which valuations are used. For instance, as Lesley Wexler emphasizes, and explores within the specific context of the Atrocities Prevention Board ("APB"), there can be critical differences in domestic and international legal institutions that affect how foreign valuation practices can (and should) be structured. Institutional sensitivity may be particularly important where practices can be expected to interact with psychological biases like the prominence effect.

Another way to improve systematization of foreign life valuation would be to place particular valuation decisions in a general context, as against the backdrop of other practices. Without other practices as a backdrop, it may be difficult for policymakers to see the full suite of options—and the full suite of challenges—that face them in their decisionmaking about foreign life valuation. In pondering immigration policy, for instance, Jaya Ramji-Nogales points out that contextualizing current practice against other foreign life valuation practices can help policymakers more thoroughly develop immigration policy.

Opacity of practice in this realm can sometimes be analytically desirable—there are circumstances where being open and honest about foreign valuation practices may create real foreign relations problems, as Jonathan Masur emphasizes in his commentary. But so long as the choice of opacity level is *ad hoc* and unsystematic, there is no particular reason to think that there will be a good match between opacity and the circumstances that make opacity valuable. Here again, systematic interrogation and contextualization may help policymakers develop more considerate policies.

We thank all the contributors, and hope very much to engage in many future conversations on foreign valuation.

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