
AN INTRODUCTION TO THE SYMPOSIUM ON FOREIGN LIFE VALUATION

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Welcome to the University of Illinois Law Review Slip Opinions symposium on “Foreign Life Valuation.” This symposium brings together perspectives from philosophy, psychology, and various legal subdisciplines to address this question: How many—if any—scarce domestic resources should be allocated to the prevention of foreign harms?

The symposium developed out of the article *Valuing Foreign Lives*,¹ which identified some policy puzzles posed by foreign life valuation. The article initiated its inquiry by outlining a working definition of what constitutes a “foreign life,” namely: the lives of persons outside the borders of a nation state. It then identified reasons that might lead policymakers to distinguish between foreign and domestic lives, and surveyed how the U.S. government actually does value foreign life in varied contexts, including within armed conflict and for purposes of domestic regulation.

In writing *Valuing Foreign Lives*, we were continuously struck by the challenges posed by foreign life valuation, and were often frustrated to find ourselves limited by our own backgrounds and expertise. So we were delighted and excited to be presented with the opportunity to invite scholars from philosophy, psychology, and other areas of law to bring their own expertise to bear on questions of foreign life valuation. We think the result has developed into an enriching scholarly conversation on this important—and fundamentally interdisciplinary—issue.

The symposium opens with philosopher Colleen Murphy’s piece entitled “Differentiating Moral Duties.” Murphy makes three main contributions. First, she notes the moral difference between doing and allowing, and articulates how that difference might influence valuation across contexts. Second, she identifies the moral significance of special relationships to identify the varied duties and obligations of individuals and states. Third, she suggests while most philosophers accept a recognition

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

of the need to distribute resources to those in need, whether domestic or foreign, she canvasses philosophers working in distributive justice to explore whether the state's duty to provide distributive justice is bound by political borders or extends to foreign lives. She concludes with a question as to whether the proposed willingness to pay principle "track[s] morally salient distinctions among the various duties we have toward individuals."

While Murphy focuses on the state's potential duties and obligations to foreigners, law professor Jonathan Masur emphasizes foreigners' lack of accountability to states other than their own. Because many life-saving actions may require the cooperation of multiple states to achieve the greatest life valuation, Masur notes that "the welfare-maximizing valuation will be whichever valuation is most likely to encourage foreign action, and that figure may differ dramatically from case to case." He similarly argues for case-by-case foreign life valuation in the military context distinguishing between combatants and civilians and even among civilians in order to capture the "moral valence of the activities in which [they] are engaged." Masur also cautions against widespread transparency as it may hamper negotiations, yet also notes that efforts to optimize secrecy may backfire causing some countries to feel particularly undervalued. He concludes that the foreign context may need to remain ad-hoc in a way that the domestic system does not.

In "Valuing Immigrant Lives," law professor Jaya Ramji-Nogales interrogates the implications of foreign life valuation in the specific context of immigration policy. She notes that immigrants challenge the definition of foreign lives, as they present contexts where individuals who are physically present in a jurisdiction are not politically represented in that same jurisdiction. She then thinks through the particular distributive justice concerns raised by the valuation of immigrants both inside and on the way to our physical borders. She argues that treating such individuals as "domestic" would require a massive and likely politically unpalatable reform of current policies ranging from detention to entry to the weight given to family reunification. Yet treating them as foreign raises complicated questions of causality and reciprocity.

Psychologist Paul Slovic explores the implications of a particular psychological bias—the prominence effect—on decisions about foreign life valuation. Focusing on humanitarian interventions as a setting in which foreign life valuation is implicated, he puzzles over why elite decision makers who profess to strong foreign life valuation nonetheless rarely engage in humanitarian interventions. The numbers of foreign lives implicated is often large and well documented but he wonders: "Why can't sheer numbers, once great enough, tip the scales toward at least some forms of meaningful intervention if not outright troops on the ground?" Slovic points to a "prominence effect" under which "lofty humanitarian values are systematically devalued in the decision-making process" because more psychologically prominent concerns, such as na-

tional security, crowd out other conflicting values. He cites laboratory experiments to both test the strength of the prominence effect on foreign life valuation, as well as to identify potential countering techniques such as decision analysis and value-focused thinking.

In “Valuing Foreign Lives in Genocides and Mass Atrocities: law, humanitarian intervention, and the prominence effect,” law professor Lesley Wexler explores how international and domestic legal institutions may interact differently with the same foreign valuation practices and the same psychological biases. Further developing the example of genocide and the prominence effect presented by Slovic, Wexler explores the impact of the prominence effect on valuation by addressing the effect’s possible role—and remedy—within a particular legal institution: the United States’ Atrocity Review Board (“ARB”). Wexler discusses the legal context in which the ARB operates, evaluating both international law related to states’ obligations regarding genocide and mass atrocities, and the domestic legal structures that empower and constrain the ARB’s operations. She then explores possible prescriptions for responding to the prominence effect, emphasizing the importance of contextualizing those prescriptions to the institutional realities in which they operate.

Law professor David Dana concludes our symposium by widening the scope of foreign valuation beyond simple life valuation. In the face of impending climate change, Dana questions whether states should expend additional resources to preserve or recreate foreign communities and cultures as opposed to simply protecting the individuals that hearken from them. He notes domestic practices to expend significant resources on preserving disaster stricken communities after Hurricane Katrina and Hurricane Sandy and observes that like with foreign lives, no systematic approach has been taken with regards to valuing foreign cultures and communities. He queries whether the otherness and out group biases that pervade foreign life valuation will be exacerbated for the valuation of cultures and communities unknown or radically different than our own and opens a conversation about factors, such as distinctiveness and domestic preferences, that might weigh in favor of significant resource expenditures. Rather than endorse domestic preferences as the only relevant or most decisive factor, Dana views willingness to pay studies eliciting domestic preferences as a necessary first step to “highlight and perhaps to correct—via promoting thoughtful debate and engagement— . . . over and under allocations of resources.”

We feel honored to have been part of this conversation, and hope that this symposium is only the start of a continued discussion on foreign valuation. Certainly, the diverse contributors to this symposium all seem to agree with us that foreign life valuation ought to be more rigorous and that it need not be uniform across settings. They also each pose and develop challenges of their own that reveal the continued—and even deepening—complexities of foreign life valuation.

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DIFFERENTIATING MORAL DUTIES: A RESPONSE TO *VALUING FOREIGN LIVES*

Colleen Murphy*

Should democratic governments place a value on life? If so, should the valuation of foreign lives be the same as the valuation of domestic lives? This Article examines the profound moral issues present when assigning quantitative value to human life in response to Rowell and Wexler. Starting with the assumption that all lives, domestic or foreign, have equal, intrinsic moral value, this Article argues that a justification for disparate life valuations between foreign and domestic lives are a result of the long-recognized difference between act and omission, between imposing a harm on another and failing to render aid. Using the current philosophical debate surrounding the scope of global distributive justice principles as a backdrop, this Article highlights the morally salient distinctions among the various duties we have towards individuals.

Democratic governments evaluate risks, and as part of that process make judgments about the value that the prevention of any given harm has. Such valuation judgments are typically reflected in the resources a government is willing to expend to prevent a specific harm. In *Valuing Foreign Lives*, Arden Rowell and Lesley Wexler focus on the question of whether the valuation of foreign lives should be the same as the valuation of domestic lives.¹ In their sophisticated and thought-provoking piece, Rowell and Wexler present one of the first detailed analyses of the often opaque foreign valuation practices of the United States in a range of contexts, including regulatory contexts, international armed conflict, and disaster aid.² These practices, they highlight, are extremely varied. Foreign lives are not assigned any value in the “seven largest regulations pending as of August 2011,”³ whereas domestic lives are valued by regulators at \$6 to \$9 million.⁴ By contrast, international laws of war and

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1. Arden Rowell & Lesley Wexler, *Valuing Foreign Lives*, 48 GA. L. REV. 499 (2014). The term ‘foreign life’ refers to an individual living outside a given country’s borders. *Id.* at 504.

2. *See id.* at 524–53.

3. *Id.* at 526.

4. *Id.* at 524–25.

United States rules of engagement (“ROE”) are such that foreign civilian lives are valued more than domestic combatants.⁵ In the context of disaster aid, the Office of Foreign Disaster Assistance provides \$400 for fatalities which are disaster related, but the domestic agency FEMA values life at \$2 million.⁶ Their research demonstrates that valuation judgments are currently made in an atheoretical manner, and they provide compelling reasons for why and how current foreign life valuation practices by the U.S. government should be improved. One of the main thrusts of Rowell and Wexler’s article is that foreign life valuation should be considered a topic in its own right, and governments must be transparent in the valuation method chosen so that their choices can be justified both domestically and internationally.⁷

Rowell and Wexler correctly recognize that foreign valuation raises profound moral issues, and it is on these issues that I focus in my article. Rowell and Wexler provide a brief overview of some of the key questions and debates salient for foreign life valuation,⁸ and my commentary builds and expands on this discussion. In particular, I argue that moral distinctions, such as between doing and allowing, as well as concepts from the literature on international distributive justice, provide rich theoretical resources for developing a principled moral grounding for the practice of foreign life valuation.

Before canvassing these resources, it is important to emphasize what is not being assessed in valuation exercises. Critically, the specific valuation exercises on which Rowell and Wexler focus do not express or reflect judgments about the intrinsic moral worth of a given life. Valuation, as defined by Rowell and Wexler, tracks duties and obligations, not intrinsic moral value.⁹ A basic starting assumption of all plausible moral theories is that all lives, domestic or foreign, have equal, intrinsic moral value. In examining below the moral issues surrounding foreign life valuation, I begin from this assumption. Differences in resource expenditures devoted to preventing harm do not automatically violate this assumption. Rather, differences may reflect instead variation in the existence and stringency of the moral duty an individual, or institution, has to guard against certain losses. Recognition of what is being judged—and what is not being judged—is important not just for analytic clarity but also for justificatory reasons. Insofar as differential amounts of resources are justified for preventing loss of domestic and foreign lives, respectively, this is not a function or reflection of different intrinsic moral value of those lives. Insofar as it is important, morally and politically, for governments to justify their policies both domestically and internationally, this is an important point to emphasize. In any morally justified scheme of valuation, all are moral equals.

5. *See id.* at 547–48.

6. *Id.* at 552.

7. *See id.* at 554.

8. *See e.g., id.* at 572–78.

9. *See id.* at 502.

If all human beings are moral equals, on what basis could differential allocation of resources to guard against losses be morally justified? Answering this question requires clarifying the sorts of considerations that, from a moral point of view, ground our moral duties towards others. Since the interest of Rowell and Wexler is on valuation in public policy,¹⁰ I focus here specifically on the obligations of governments towards individuals.

There is broad consensus among moral philosophers (most of whom are non-utilitarian) that one morally salient consideration is the relationship between an action or policy and a given loss. There is a widely recognized distinction made between doing and allowing.¹¹ It is morally worse to kill someone than to allow him or her to die. Similarly, the duty to avoid harming another is generally taken as more demanding than the duty to aid.¹² These examples highlight the idea that the *content* of the particular duty we have toward another individual matters. These distinctions hold regardless of who the individual in question is. In the context of government valuation exercises, this suggests that differences in valuation might track differences in the moral seriousness of the specific duties implicated in resource allocations to avoid or compensate for losses of life. Our actions might contribute to the loss of domestic and foreign lives in different ways. Loss of life could be a function of the direct infliction or authorization of a harmful action, or a failure to provide needed aid. Variance in valuations might track such differences.

Rowell and Wexler concentrate in their discussion of philosophical challenges to foreign valuation practices on the moral salience of state borders; they reference the debate between cosmopolitans and liberal nationalists on the permissibility of claiming that conationals (or fellow citizens) have more stringent duties towards each other than towards members of other states.¹³ This particular debate illustrates a broader moral issue, namely, the moral significance of what have come to be called “special relationships.”¹⁴ The central moral question posed by special relationships is: when, and for what reasons, does a relationship or role generate specific duties towards particular individuals not owed to others? For example, all adults have certain duties towards all children, such as the avoidance of the intentional infliction of harm. However, parents are widely taken to have special responsibilities towards their own children that they do not have towards other children, including

10. See *id.* at 501–04.

11. See Frances Howard-Snyder, *Doing vs. Allowing Harm*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2011), available at <http://plato.stanford.edu/entries/doing-allowing/>.

12. See, e.g., THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS* 140–41 (2d ed. 2008).

13. For a cosmopolitan account, see GILLIAN BROCK, *GLOBAL JUSTICE: A COSMOPOLITAN ACCOUNT* 264–70 (2009). For a liberal nationalist view, see DAVID MILLER, *NATIONAL RESPONSIBILITY AND GLOBAL JUSTICE* 40 (2007); YAEL TAMIR, *LIBERAL NATIONALISM* 99 (1993).

14. See SAMUEL SCHEFFLER, *BOUNDARIES AND ALLEGIANCES: PROBLEMS OF JUSTICE AND RESPONSIBILITY IN LIBERAL THOUGHT* 56–58 (2001).

more demanding responsibilities to nurture, to educate, and to ensure that their own children are adequately nourished.¹⁵

In my view, there is no reason to assume that our explanation of the moral significance of a given role or relationship will be univocal across all kinds of relationships and roles a given individual may occupy.¹⁶ In the present context, contemporary philosophical debates about distributive justice at the global level, I believe, provide fruitful theoretical resources for determining the moral salience of state borders (and the relationships enjoyed by individuals in the same state) for questions of resource allocation.

Theories of distributive justice answer the question: what constitutes a just distribution of resources? Until recently, answers to that question implicitly assumed that resources were being distributed within a state and only among members of the state.¹⁷ However, increasing awareness of global inequalities in resources and the extent of global poverty forced philosophers to consider whether it is morally justified to restrict the application of principles of distributive justice to a single state. Within the literature on international distributive justice that has developed, scholars generally accept that governments and individuals have humanitarian obligations to assist individuals or communities in need.¹⁸ So theorists are *moderate cosmopolitans* in the sense that they recognize that governments have obligations to foreign individuals and/or communities. The global distributive justice debate concentrates on whether the more demanding duties of justice in the allocation of resources are owed to foreign individuals as well. In other words, the central issue concerns the *scope* of principles of distributive justice.¹⁹

Explanations of the scope of duties of distributive justice are often conditional: norms of distributive justice do (or do not) apply internationally provided international relations, or international institutions that structure interaction, have a given feature.²⁰ For example, John Rawls limits the scope of application of principles of distributive justice to single domestic communities because only when relationships are regulated by what he calls a “basic structure” do questions of distributive justice arise, and there is no global basic structure.²¹ By contrast, Charles Beitz argues that there already exists a global basic institutional structure, and so principles of distributive justice are global in application.²² Thomas

15. See, e.g., George P. Fletcher, *Loyalty*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 513, 517 (Dennis Patterson ed., 2d ed. 2010).

16. See COLLEEN MURPHY, *A MORAL THEORY OF POLITICAL RECONCILIATION* 44 (2010).

17. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* 4–5 (1971).

18. See, e.g., Thomas Nagel, *The Problem of Global Justice*, 33 *PHIL. & PUB. AFF.* 113, 118 (2005); Pauline Kleingeld & Eric Brown, *Cosmopolitanism*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (2013), available at <http://plato.stanford.edu/entries/cosmopolitanism/>.

19. See Arash Abizadeh, *Cooperation, Pervasive Impact, and Coercion: On the Scope (not Site) of Distributive Justice*, 35 *PHIL. & PUB. AFF.* 318, 322–25 (2007).

20. See A. J. Julius, *Nagel's Atlas*, 34 *PHIL. & PUB. AFF.* 176, 187–89 (2006).

21. RAWLS, *supra* note 17, at 242–46.

22. See CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 144–45 (1979).

Nagel also restricts the scope of justice to domestic communities, but for different reasons than those of Rawls.²³ Following Hobbes, Nagel connects sovereignty and justice, arguing that justice does not apply to relationships that are not mediated by a sovereign who can enforce rules and practices, providing assurance to individuals that others will follow mutually beneficial rules if he or she does.²⁴ A. J. Julius argues that the interaction must be sufficiently dense, which he claims it is in some contexts in the international arena.²⁵ Mathias Risse is a pluralist about grounds of justice, identifying shared humanity, membership in a state, governance by international institutions, and engagement in international trade all as salient for creating obligations of justice.²⁶ What these debates show is that contemporary arguments for restricting the scope of distributive justice principles take shared membership in a state to be morally salient *because of the way the state structures and shapes interaction*. Once international institutions regulate and structure interaction in the same manner, the principled ground for restricting the scope of application distributive justice principles is gone. These debates also show two distinct areas of disagreement, one theoretical and one empirical. The theoretical disagreement concerns what exactly matters morally about the way individuals interact within a state. The empirical debates concentrate on whether the feature that is morally salient also obtains when we look at interaction at the global level. The answer to the empirical question of course can change over time, as facts about the structure of interaction internationally change with, for example, changes to international law.

What does the above discussion mean for the question Rowell and Wexler take up, namely, the permissibility of valuing foreign lives differently than domestic lives? First, it highlights the importance of considering in any valuation exercise the actions that lead to certain losses. When losses are the function of the infliction of harm, that is in general more morally concerning than losses that an individual or government allows to occur. Thus, the high valuation placed on the lives of foreign civilians in the laws of war may reflect the stringency of the moral duty of combatants to avoid the intentional infliction of harm. There may also be a justification for differential valuation of foreign and domestic lives in disaster assistance. The lower valuation of foreign loss of human life may reflect the fact that foreign disaster aid is a fulfillment of a humanitarian duty of assistance to those in need. By contrast, domestic loss of life, with its correspondingly higher valuation, may track the fact that the consequences that befall citizens in, for example, natural disasters are influ-

23. Nagel, *supra* note 18, at 116–17.

24. *See id.* at 139–40.

25. *See* Julius, *supra* note 20, at 178.

26. *See* MATHIAS RISSE, ON GLOBAL JUSTICE 17–20 (2012).

enced by regulatory choices made by governments concerning the built infrastructure (e.g., buildings, roads, bridges).²⁷

Second, and relatedly, valuation judgments of domestic lives do not have to be uniform. Nor does the valuation of foreign lives have to be uniform. Disaster aid is a response to a humanitarian duty, and as such the valuation of foreign lives may be permissibly less in amount than the valuation of foreign (civilian) lives demanded by more stringent duties of justice in times of war.²⁸ Insofar as valuation tracks duties, we should not expect the valuation of either foreign lives considered in isolation or of domestic lives considered in isolation to be identical in these two cases.

Finally, governments must decide whether, and under what conditions, it is *morally* justified to differentially value foreign and domestic lives when we hold constant the actions or policy that risk a loss of life. Such decisions force governments to determine, implicitly or explicitly, the basis for any individual's justice-based claim to the scarce resources under a government's control. Sovereignty, dense (economic) interaction, being subject to institutional structures that profoundly determine how one's life goes, and basic shared humanity are all candidate answers one finds in the literature on global distributive justice. They are answers that also have varied implications. The criterion of dense interaction allows for differential valuation of some foreign lives (those lives with whom we do not interact in a dense way), but not others (those with whom a given country interacts in a sufficiently dense way). By contrast, sovereignty permits differential valuation of all foreign lives when and until a world state emerges. The strong cosmopolitan basis of shared humanity prohibits differential valuation.²⁹

My discussion to this point has concentrated on comparative assessments of valuations of foreign and domestic lives across a range of contexts. However, any valuation exercise also assigns some particular value to a specific loss in a given context, which is supposed to be commensurable with what is being measured. In the current context, moral valuations are tracking the stringency of the duties towards individuals to prevent or avoid death in a given context. Rowell and Wexler end their paper by considering four different ways such valuations of foreign lives might proceed in the United States, where domestic valuations are based on the willingness-to-pay criterion. Specifically, the value of a domestic life tracks how much an individual would be willing to pay to avoid mortality risks. Rowell and Wexler survey different options for analogous foreign valuation, which vary in terms of whose willingness-to-pay to avoid foreign mortality risks is being considered (e.g., domestic persons or foreign persons) and whose mortality risks are being averted (e.g.,

27. See Colleen Murphy & Paolo Gardoni, *Evaluating the Source of the Risk Associated with Natural Events*, 17 RES PUBLICA 125, 128–29 (2011).

28. Though I did not discuss just war theory explicitly, there is a long tradition of just war thinking in philosophy that articulates moral duties of justice in war. See, e.g., MICHAEL WALZER, JUST AND UNJUST WARS 127–28 (3d ed. 2000).

29. See BROCK, *supra* note 13, at 289–91.

domestic persons or foreign persons).³⁰ Setting aside for present purposes general moral concerns philosophers have raised about the possibility and desirability of monetizing all losses,³¹ I want to end by highlighting one basic question about willingness-to-pay methods that warrants further consideration. As noted above, valuation judgments in the context under consideration are not tracking the intrinsic value of individual lives. Nor are they tracking the value that an individual attaches to a given life. Rather, valuations track duties. When morally justified, I have suggested above, valuations specifically track morally salient distinctions among the various duties we have towards individuals. The questions that warrant further consideration are: do assessments of a person's willingness-to-pay to avoid certain risks actually track these morally salient distinctions? And whose assessments capture these distinctions? Understanding what influences willingness-to-pay judgments will put us in a position to determine whether this method of valuation of foreign lives tracks what we are interested in from a moral point of view.

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30. Rowell & Wexler, *supra* note 1, at 562–63.

31. See Allan Gibbard, *Risk and Value*, in *VALUES AT RISK* 94, 110 (Douglas MacLean ed., 1986).

THE INTRACTABLE NORMATIVE COMPLEXITIES OF VALUING FOREIGN LIVES

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How should the United States weigh the impact that its policies have on foreign lives? In this Symposium, Rowell and Wexler have focused a much needed lens on the problem, arguing that the U.S. government should implement a consistent system of valuation. Yet this task will likely be far more complex than it might seem at first blush, as this Article endeavors to demonstrate. Regulation that affects foreign citizens, and military action that threatens foreign civilians, each raise highly contextualized issues that cannot easily be resolved on a systematic basis. Government actors may have no choice but to consider them in ad hoc case-by-case fashion. This is an unavoidable consequence of dealing with a foreign sovereign. Nevertheless, the United States could certainly improve the manner in which it has dealt—or not dealt—with the issue. Rowell and Wexler have provided a valuable roadmap to doing so.

When the U.S. government is weighing a legal or policy decision—whether legislative, regulatory, or even military—what weight should it place on the fact that the decision might save the lives, or cause the deaths, of non-Americans in foreign countries? Should it treat these lives as if they were equivalent to American lives? Should it ignore them? Or should it assign them some value in between? For that matter, what approach has the government taken to date?

Arden Rowell and Lesley Wexler’s engaging and informative survey of the various U.S. government practices reveals that this issue continues to bedevil American policymakers, with no easy resolution in sight.¹ Rowell and Wexler explain that various organs of the government engage in widely divergent practices, to widely divergent ends, and typically with little or no transparency about the methods they are employing.² Their study is particularly valuable in that it ties together disparate government practices that are not typically viewed as commensurable.

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1. Arden Rowell & Lesley Wexler, *Valuing Foreign Lives*, 48 GA. L. REV. 499 (2014).

2. *Id.* at 523–53.

They examine U.S. military practices—how the government weighs foreign civilian casualties against military need, or the amount of recompense it is willing to pay when it kills innocent foreign civilians—alongside administrative regulations under the Clean Air Act and a variety of other regulatory statutes.³ What emerges is a comprehensive picture of a muddle. Rowell and Wexler conclude by urging the government to employ systematic, transparent methods to arrive at legitimate and workable values for foreign lives.⁴

Theirs is a noble goal, and it is hard to quarrel with their calls for transparency and thoroughness in the process of determining values for foreign lives. In the short space available, however, I would like to suggest that the problem of valuing foreign lives is more complex than Rowell and Wexler indicate and that even their modest normative prescriptions may turn out to be unworkable. The reason is that valuation questions for foreign lives inevitably arise in more complicated and highly contextualized frames than similar valuation questions for Americans. This stems in part because of the more complicated normative relationship between the American government and foreign citizens. Rowell and Wexler are right to emphasize the importance of selecting a normative theory, be it cosmopolitan, nationalist, or one of several other options. But even if the government were able to select a normative theory—which would be no small feat—there are critical, highly contextual problems that would remain unsolved. The principal source of these questions is the fundamental fact that foreign citizens are not answerable to the United States as a sovereign.

First, consider standard agency regulation. When U.S. agencies promulgate regulations with purely domestic effects, there are strong arguments in favor of treating all American citizens uniformly. The government is under an obligation to maximize the welfare of all Americans, and there are no obvious distinctions that would separate one group from another based upon context. Consistent with this idea, most agencies employ a single value of life, though there are unexplained differences between agencies. (For instance, the FAA sets the value of life at \$6.3 million;⁵ EPA uses a value of life of \$7.7 million;⁶ and the National Highway Transportation Safety Administration employs a value of \$7.8

3. *Id.* at 524–53.

4. *Id.* at 554–69.

5. FAA, REVISED DEPARTMENTAL GUIDANCE: TREATMENT OF THE VALUE OF PREVENTING FATALITIES AND INJURIES IN PREPARING ECONOMIC ANALYSES (2008),

http://www.faa.gov/regulations_policies/policy_guidance/benefit_cost/media/Revised%20Value%20Of%20Life%20Guidance%20February%202008.pdf (in 2008 dollars); *Consumer Price Index Inflation Calculator*, BUREAU OF LAB. STAT. (Feb. 27, 2015), <http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=5%2C800%2C000&year1=2008&year2=2015> (adjusting for inflation to 2015 dollar amounts).

6. *Frequently Asked Questions on Mortality Risk Valuation*, EPA, (Feb. 27, 2015), <http://yosemite.epa.gov/EE%5Cepa%5Ceed.nsf/webpages/MortalityRiskValuation.html#whatvalue> (in 2006 dollars); *Consumer Price Index Inflation Calculator*, BUREAU OF LAB. STAT. (Feb. 27, 2015), <http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=9%2C200%2C000&year1=2014&year2=2006> (adjusting for inflation to 2015 dollar amounts).

million.⁷) That is to say, even in the domestic regulatory context it has proven difficult to convince all agencies to employ a uniform value. This does not bode well for the political prospects of Rowell and Wexler's proposal.

Now imagine that an agency promulgates a regulation with substantial international effects. To crystallize the example, suppose that the EPA is regulating greenhouse gases with the object of reducing climate change. (This is perhaps the U.S. regulation with the greatest international effect.) Further, suppose that the U.S. government has decided to adopt a purely cosmopolitan view of welfare, in which foreign lives are valued equivalently to American lives, and imagine that the agency is regulating purely for welfare reasons.⁸ The agency's only goal is to increase worldwide human welfare by the greatest possible amount. This removes the two largest normative hurdles to settling upon a value for foreign lives.

And yet the problem is still conceptually intractable for an agency such as the EPA. The reason is that with a problem such as climate change, a single nation can have only a limited impact upon worldwide outcomes.⁹ Only if all nations—or at least the major polluting nations—act in concert can the problem be addressed to a significant degree.¹⁰ Accordingly, the American regulation that will lead to the greatest gains in worldwide welfare is not whatever regulation will, on its own accord, produce those gains. Rather, the most successful regulation will be whatever is most likely to induce meaningful reciprocal action by foreign nations.¹¹ It may be that the United States has the greatest chance of convincing China and India to enter into a climate change treaty if it behaves as if it values the lives of Chinese and Indian citizens at zero, as China and India may understand that they must agree to joint action if they wish to protect their own citizens. Or it might be that a treaty is most likely if the United States values Chinese and Indian lives equally to American lives, on the theory that this will demonstrate that the United States is acting in good faith. Or it may be that a treaty is most likely if the United States adopts some intermediate path.¹² The point is that the proper value of foreign lives depends not only upon the normative theo-

7. Memorandum from Peter Rogoff, Acting Undersecretary for Policy, and Kathryn Thompson, General Counsel, DoT, to Secretarial Officers and Modal Administrators, DoT (June 13, 2014) http://www.dot.gov/sites/dot.gov/files/docs/VSL_Guidance_2014.pdf (in 2014 dollars); *Consumer Price Index Inflation Calculator*, BUREAU OF LAB. STAT. (Feb. 27, 2015), <http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=9%2C200%2C000.00&year1=2014&year2=2015> (adjusting for inflation to 2015 dollar amounts).

8. See generally Simon Caney, *JUSTICE BEYOND BORDERS: A GLOBAL POLITICAL THEORY* 3–16 (2005) (detailing cosmopolitan welfare theory).

9. See Cass R. Sunstein, *Of Montreal and Kyoto: A Tale of Two Protocols*, 31 HARV. ENVTL. L. REV. 1, 2 (2007).

10. See Jonathan S. Masur & Eric A. Posner, *Climate Regulation and the Limits of Cost-Benefit Analysis*, 99 CAL. L. REV. 1557, 1587 (2011); ERIC A. POSNER & DAVID WEISBACH, *CLIMATE CHANGE JUSTICE* 2 (2010).

11. See Masur & Posner, *supra* note 10, at 1595.

12. See *id.*

ry chosen but also upon American estimates as to how foreign nations will behave under various regulatory conditions. This is a highly contextualized question, the answer to which will vary widely from case to case and nation to nation. It would be an error for an agency to adopt a single answer and stick to it. Much of standard agency action will likely take this form: the welfare-maximizing valuation will be whichever valuation is most likely to encourage foreign action. That figure may differ dramatically from case to case.

Now consider foreign military action: the United States is deploying military force abroad, in a manner that endangers foreign lives. Even if the United States adopts a cosmopolitan normative outlook, military action presents a vast array of contextual normative questions that a baseline normative theory such as cosmopolitanism cannot answer.¹³ For instance, cosmopolitanism does not require that a foreign combatant be treated equally to an American civilian or even an American soldier. Under most normative theories, a foreign civilian should be treated differently than a foreign combatant; foreign combatants should be treated differently depending upon whether they are allies or enemies of the United States; American combatants should be treated differently than foreign civilians, and so forth.¹⁴ The United States might reasonably decide to value foreign lives differently depending upon whether it is fighting a primarily offensive war (such as the second war against Iraq) or a primarily defensive war (such as World War II). It might also value foreign lives differently depending on the nature of the conflict—whether it is a standard battle of great powers (such as World War I) or an asymmetric war against terrorist groups (such as the American action in Afghanistan against the Taliban and Al-Qaeda.) Even within the category of foreign civilians, the United States might draw normative distinctions between civilian populations that support the United States, and civilian populations that oppose the United States and support its enemies.

For that matter, the United States might draw normative distinctions between foreign civilian populations depending upon the nature and strength of their support for the United States or its opponents. It might also differentiate between civilian populations on the basis of other characteristics, such as the moral valence of the activities in which the civilians are engaged. For instance, it might treat German citizens in World War II differently than Hutu citizens during the Rwandan conflict,¹⁵ and differently than Somali citizens during the American intervention there. The point is that foreign conflicts are inherently normatively

13. See generally David Luban, *War as Punishment*, 39 PHIL. & PUB. AFF. 299 (2011).

14. See generally John F. Coverdale, *An Introduction to the Just War Tradition*, 16 PACE INT'L L. REV. 1 (2004); Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT'L L. 47 (2008).

15. Of course, the United States did not intervene in this conflict, rendering the issue moot. See SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 329–91 (2002). I use the example here as an illustration.

fraught in ways that the more general differences between cosmopolitan and nationalistic theories cannot capture. The value of a foreign life will almost necessarily be a case-by-case—or conflict-by-conflict—matter. Any effort to arrive at a uniform valuation of foreign lives that is applicable to more than the instant issue is almost certainly doomed to failure.

In both of these cases—standard agency regulation and military action—it is also far from obvious that transparency is advisable. Rowell and Wexler make the correct and incisive point that there may be costs to government transparency in valuing foreign lives, particularly when the government chooses to value foreign lives less than American ones.¹⁶ They note that this concern might be particularly acute in the context of military valuations, and that is surely right.¹⁷ But as the preceding paragraphs suggest, it may be problematic in the context of typical agency regulation as well. If the United States wishes to compel a foreign government to take action—with respect to climate change, for example—it will sometimes be advantageous to reveal to that foreign government how the United States is treating foreign citizens. But on other occasions it will be to the United States' advantage to hold its cards close to the vest. Uncertainty might be a more effective tool at convincing a foreign country to commit itself than any unambiguous statement of value. This is just a corollary to the fact that parties to a negotiation rarely divulge their negotiating positions until they no longer have a choice.¹⁸

In addition, any attempt by the United States to keep some valuations private while revealing others is likely to unravel. As Rowell and Wexler explain, the United States is particularly likely to encounter problems with foreign governments and citizens when it places a low value on foreign lives.¹⁹ Foreign governments will undoubtedly be much more pleased with the United States when it values their citizens' lives highly. An American failure to disclose a valuation will thus be interpreted—probably correctly—as a sign that the United States does not value foreign lives highly. Any American attempt at secrecy, no matter how limited, is likely to unravel quickly.²⁰

If the foregoing analysis is correct, it should serve to highlight the importance and timeliness of Rowell and Wexler's work. This is a problem worth focusing on, and they bring a refreshing degree of light (and an absence of heat) to the critical subject. Their call for the U.S. government to attend to the value of foreign lives, rather than simply plugging

16. Rowell & Wexler, *supra* note 1, at 557–58.

17. *Id.*

18. Douglas F. Whitman, *Reputation and Bargaining*, 18 *MIDWEST L. REV.* 17, 22 (2002) (“The competitive negotiator, on the other hand, does not want to reveal his interests. . . . Above all things, the competitive person does not want to reveal any information unless he or she absolutely has to because he suspects that the other party will use the information disclosed in an exploitive manner.”).

19. Rowell & Wexler, *supra* note 1, at 557.

20. See generally Sanford J. Grossman, *The Informational Role of Warranties and Private Disclosure About Product Quality*, 24 *J.L. & ECON.* 461, 464–70 (1981); Paul R. Milgrom, *Good News and Bad News: Representation Theorems and Applications*, 12 *BELL J. ECON.* 380, 380–82 (1981); W. Kip Viscusi, *A Note on “Lemons” Markets with Quality Certification*, 9 *BELL J. ECON.* 277, 278 (1978).

in numbers without rationale or reasoning, is on the mark.²¹ Here, I have tried to suggest only that the process will likely remain ad hoc. It will be very difficult or even impossible for the United States to arrive at systematic values for foreign lives, as it has with domestic lives in the regulatory context. This is an unavoidable consequence of dealing with a foreign sovereign. Nevertheless, the United States could certainly improve the manner in which it has dealt—or not dealt—with the issue. Rowell and Wexler have provided a valuable roadmap to doing so.

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21. Rowell & Wexler, *supra* note 1, at 524–53.

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

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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.

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

WHEN (IN)ACTION SPEAKS LOUDER THAN WORDS: CONFRONTING THE COLLAPSE OF HUMANITARIAN VALUES IN FOREIGN POLICY DECISIONS

Paul Slovic

“Why do good people and their governments repeatedly turn away from intervention that could halt genocides and other mass abuses of human beings?”

“What devaluation of human lives could possibly allow this?”

I began to examine such questions when I became aware of the indifference toward the vast scale of atrocities being perpetrated in Darfur, Sudan. I saw a connection between earlier research I had published with David Fetherstonhaugh and colleagues in 1997¹ and subsequent research with Deborah Small and George Loewenstein.² Specifically, this work documented the insensitivity to large numbers of lives at risk that we labeled psychophysical numbing, consistent with the general nonlinear model of valuation proposed by Daniel Kahneman and Amos Tversky (1979) in their landmark paper on prospect theory.³ Subsequent studies uncovered additional evidence of insensitivity described as compassion fade and, in some cases, compassion collapse, where valuation actually decreases and may even collapse to zero as the number of lives at stake increases.⁴ All of this helps explain why many who care greatly about individual lives lose their enthusiasm and compassion when the numbers get large. Slovic, Zionts, Woods, Goodman, and Jinks proposed some

1. See David Fetherstonhaugh, Paul Slovic, Stephen M. Johnson & James Freidrich, *Insensitivity to the Value of Human Life: A Study of Psychophysical Numbing*, 4 *J. RISK & UNCERTAINTY* 283 (1997).

2. See Deborah A. Small, George Loewenstein & Paul Slovic, *Sympathy and Callousness: The Impact of Deliberative Thought on Donations to Identifiable and Statistical Victims*, 102 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 143 (2007).

3. See Daniel Kahneman & Amos Tversky, *An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263 (1979).

4. See, e.g., Ezra M. Markowitz, Paul Slovic, Daniel Västfjäll & Sara D. Hodges, *Compassion Fade and the Challenge of Environmental Conservation*, 8 *JUDGMENT & DECISION MAKING* 397 (2013); Daniel Västfjäll, Paul Slovic, Marcus Mayorga & Ellen Peters, *Compassion Fade: Affect and Charity Are Greatest for a Single Child in Need*, 9 *PLoS ONE* 1 (2014).

procedures that might infuse the dry statistics of atrocities with enough emotion to motivate people to care enough to act.⁵

But yet another problem beyond numbing, at the very foundation of valuation, decision-making, and action has become apparent. It is easy to view inaction on the part of powerful and well-intentioned governments as resulting primarily from a lack of direction or pressure from a numbed public that places little value on saving foreign lives. In her Pulitzer Prize winning book, Samantha Power concluded that: “[G]enocide in distant lands has not captivated senators, congressional caucuses . . . lobbyists . . . or individual citizens. . . . The battle to stop genocide has thus been repeatedly lost in the realm of domestic politics. . . . It takes political pressure to put genocide on the map in Washington.”⁶

True enough, and a testimony to the indifference on the part of a numbed citizenry that doesn't feel an emotional connection to different suffering. But genocides and mass atrocities of recent years in places such as Rwanda, Darfur, and Syria have been thoroughly documented while they were taking place and that documentation has included emotionally jarring testimony and images. Something more than numbness must be impeding action. Is it a matter of values?

It was easy to blame the Bush administration for being uncaring. Even when Colin Powell returned from Darfur in 2004 and used the “G word” to describe the atrocities there, no action was taken.⁷ Then the Obama administration came to power and hopes soared. Surely President Obama cared about humanitarian causes, and he was surrounded aides, including Samantha Power, who certainly placed high value on human lives. In fact, Ambassador Power has recalled that at her first meeting with the President he was greatly interested in her book and its documentation of repeated failures of the American government to live up to its ideals.⁸ Yet six years into an administration most likely to succeed in taking action to mitigate or halt mass atrocities, little seems to have changed—certainly not in Darfur. What's going on?

Perhaps psychology can again provide some explanation. Aided by valuable discussions with colleagues Robin Gregory, David Frank, and Daniel Västfjäll, I sought insight from data I began collecting in 1961. That research examined how people made decisions between two options that were equally valuable to them.⁹ Consider a gift package made up of two components—cash and a coupon worth \$X, redeemable at a

5. Paul Slovic, David Zions, Andrew K. Woods, Ryan Goodman & Derek Jinks, *Psychic Numbing and Mass Atrocity*, in THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY 126 (Eldar Shafir ed., 2012).

6. SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE 509 (2013).

7. David Hancock, *Colin Powell and the G-Word*, CBS (Sept. 9, 2004, 8:20 AM), <http://www.cbsnews.com/news/colin-powell-and-the-g-word/>.

8. Evan Osnos, *In the Land of the Possible*, NEW YORKER (Dec. 22, 2014), <http://www.newyorker.com/magazine/2014/12/22/land-possible?currentPage=all>.

9. Paul Slovic, *Choice Between Equally Valued Alternatives*, 1 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 280 (1975).

store you like. There are two such packages. Package A gives you more cash than Package B, but you are able to increase B's advantage in the value of the coupon book by enough to make the two gifts equally attractive to you. But you have to choose. Which one would you take? Naïve theories would predict you will flip a coin, thus being equally likely to choose A or B. That didn't happen. Eighty-eight percent of respondents, each of whom had individually adjusted the packages to make them equally attractive for them, made the choice in the same direction.¹⁰ What do you think they did? If you predicted that they chose the package with the greater amount of cash, you are correct.¹¹

Similar results occurred with choices among nine other pairs of two-attribute "bundles," such as baseball players (described by batting average and number of home-run hits), secretarial applicants (described by typing speed and typing accuracy), and so on.¹² In every case, choices among individually equated pairs were highly predictable, with about eighty percent of respondents adhering to the following the rule: choose the option that is better on the attribute that is inherently more important (e.g., cash, or batting average, or typing accuracy).¹³

Not trusting the adjustment method used to equate the options in each pair, I finally found a way to overcome my methodological concerns and published these findings after more than a decade.¹⁴ Some thirteen years later, Amos Tversky and Shmuel Sattath incorporated this "more important dimension effect" into a new theory of choice.¹⁵ The core finding was named "the prominence effect."¹⁶ The essence of this effect is that, although we may have a qualitative sense of the importance of valued attributes, we may not have a sense of the appropriate quantitative tradeoffs when these attributes compete with one another.¹⁷ For example, we highly value both affordability and safety in a car, but how much more we should be willing to spend for a specific increment in safety is by no means obvious to us. We struggle with making tradeoffs and seek a simple, defensible way to choose among options whose attributes are important but conflicting. Here is where the prominence effect enters: don't struggle to perform any quantitative calculations to weigh and compare valued objectives. Choose what is best according to the most prominent—that is the most defensible—attributes. You can't go wrong. You can well defend your choice to yourself and others. Moreover, it likely "feels" right.

So what does this have to do with valuing foreign lives and genocide? A lot.

10. *Id.* at 284.

11. *Id.* at 283–84.

12. *Id.* at 283.

13. *Id.* at 284.

14. *See id.* at 280.

15. Amos Tversky, Shmuel Sattath & Paul Slovic, *Contingent Weighting in Judgement and Choice*, 95 PSYCOL. REV. 371 (1988).

16. *Id.* at 375, 382–83.

17. *Id.* at 375–76.

It is well recognized that decisions to save civilian lives by intervening in foreign countries' domestic affairs are among the most difficult and controversial choices facing national decision makers. Although each situation is unique, such decisions typically involve tradeoffs that pit the value of human lives against other important objectives. And on rare occasions we do decide to intervene. In 2011, the United States supported military action to protect the lives of civilians living in Libya,¹⁸ and more recently the American military intervened aggressively to protect a threatened population of Yezidi people in Iraq.¹⁹ On the other hand, the United States has done little to intervene in the genocide in Darfur or to halt the barrel bombings and other government-led atrocities in Syria that have led to hundreds of thousands of deaths and millions of displaced people.²⁰

The inconsistencies are striking. Why intervene in some situations and not in others that, by the numbers, seem far worse? And how do we reconcile the immense value our society places on an individual life with our failure to respond to the plight of millions? What are our true values when it comes to saving human lives? Should we accept these inconsistencies? Are we oblivious to them? Are other objectives really important enough to outweigh millions of lives? Why can't sheer numbers, once great enough, tip the scales toward at least some forms of meaningful intervention if not outright troops on the ground?

The light bulb switched on in 2012 when I was at a conference in Jerusalem, listening to a presentation by social psychologist Nurit Schnabel, and her colleagues Ilanit SimanTov-Nachlieli and Arie Nadler.²¹ The title of their talk says it all: "Sensitivity to Moral Threats Increases When Safety Needs Are Satisfied: Evidence of Hierarchical Organization of Psychological Needs."²² Their conclusion jumped out at me: consistent with Maslow's hierarchy of needs, the basic need for security must be satisfied before people will respond to higher order needs.²³ In other words, when security is tenuous moral action to help others is unlikely.

Immediately I thought of the prominence effect, where determiners of choice are found to be hierarchical (we called it lexicographical),

18. See Jim Garamone, *Obama Makes Case for U.S. Participation in Libya*, U.S. DEPT. OF DEF. (Mar. 28, 2011), <http://www.defense.gov/news/newsarticle.aspx?id=63342>; *Genocide Prevention Initiative*, UNIV. OF OR., <http://blogs.uoregon.edu/prevent/about-2/> (last visited Mar. 3, 2015).

19. *U.S. Provides Aid to Yezidis, Strikes ISIL Mortar Position*, U.S. DEPT. OF DEF. (Aug. 13, 2014), <http://www.defense.gov/news/newsarticle.aspx?id=122914>.

20. See Fred Hiatt, *Why Does the U.S. 'Stand so Idly by' on Syria?*, Wash. Post, May 4, 2014, http://www.washingtonpost.com/opinions/fred-hiatt-why-does-the-us-stand-so-idly-by-on-syria/2014/05/04/88a9ca4a-d20b-11e3-937f-d3026234b51c_story.html; Eric Reeves, *A Nightmare Impossible to "Slumber" Through*, SUDAN TRIB. (Dec. 31, 2014), <http://www.sudantribune.com/spip.php?article53500>.

21. Nurit Schnabel, Ilanit Simantov-Nachlieli & Arie Nadler, Tel Aviv University, *Sensitivity to Moral Threats Increases when Safety Needs are Satisfied: Evidence of Hierarchical Organization of Psychological Needs* (June 6, 2012).

22. *Id.*

23. A. H. Maslow, *A Theory of Human Motivation*, 50 PSYCOL. REV. 370, 376-380 (1943).

which means satisfying the most important attributes with little or no compensation allowed for lesser attributes. That is, prominent attributes trump less prominent factors. Prominence is driven by the need to justify and defend one's decisions and actions in a way not called for when simply stating one's values. And what is the most prominent set of values in today's foreign policy world? National security interests! Could the unquestioned importance of national security explain, at least in part, the disconnect between the lofty expressed values of our government for protecting distant lives and the minimal valuation of those lives revealed by government inaction when millions are threatened?

The rhetoric of the two most recent American presidents leaves no doubt that, in terms of expressed values, national security and humanitarian lifesaving are both vital objectives. Speaking on CNN in January of 2009, George W. Bush remarked: "The most important job I have had—and the most important job the next president is going to have—is to protect the American public from another [terrorist] attack."²⁴ Barack Obama echoed this sentiment, saying: "I have a solemn duty and responsibility to keep the American people safe. That's my most important obligation as President and Commander-in-Chief."²⁵ Yet both leaders expressed equally high valuation for life saving. Speaking at the Holocaust Museum in Washington, DC, President Obama stated that we need to do everything we can to prevent and end atrocities: "I made it clear that 'preventing mass atrocities and genocide is a core national security interest and a core moral responsibility of the United States of America.'"²⁶

I am drawn to the hypothesis that, because of the prominence effect, lofty humanitarian values are systematically devalued in the decision-making process. When intervention to protect thousands of nameless, faceless lives in a distant land is seen to increase risks to national security, security invariably wins. Decisions in support of security appear vastly more defensible than decisions to protect distant lives. In the few recent situations where the United States has intervened with the stated objective of saving lives, there were presumed security benefits as well, thus no conflict between objectives. We attacked Saddam Hussein, not because he was a mass murderer, but because we believed he possessed and might use weapons of mass destruction.²⁷ When Libyan leader Muammar Gaddafi threatened to go door to door in Benghazi, killing anyone who opposed his regime, the United States joined a NATO coal-

24. *Bush: President's Priority Is Preventing Attack*, CNN (Jan. 14, 2009, 4:24 AM), <http://www.cnn.com/2009/POLITICS/01/14/bush.lkl.interview/>.

25. David Remnick, *Going the Distance: On and Off the Road with Barack Obama*, NEW YORKER, Jan. 27, 2014, <http://www.newyorker.com/magazine/2014/01/27/going-the-distance-2>.

26. President Barack Obama, Remarks at the United States Holocaust Memorial Museum (Apr. 23, 2012) (transcript available in the White House Office of the Press Secretary), *available at* <http://www.whitehouse.gov/the-press-office/2012/04/23/remarks-president-united-states-holocaust-memorial-museum>.

27. *Bush, Blair: Time Running out for Saddam*, CNN (Jan. 31, 2003, 11:37 PM), <http://edition.cnn.com/2003/US/01/31/sprj.irq.bush.blair.topics/>.

tion to topple him from power.²⁸ But he, too, was considered a threat to security, long seen as a loose cannon addicted to violence at home and elsewhere. His menacing visage adorned the cover of Time magazine four times since 1986, when Ronald Reagan referred to him as “this mad dog of the Middle East.”²⁹ When the United States recently decided to come to the rescue of thousands of Yazidis threatened by ISIS in Iraq, we were also protecting American military and diplomatic personnel stationed in nearby Erbil.³⁰ Without that security objective, would we have aided the Yazidis?

In contrast, humanitarian intervention in Darfur appears to have been blocked by security objectives in addition to the military and domestic political costs. We have long sought to obtain intelligence regarding terrorist operations from the Sudanese government.³¹ In addition, Sudanese President Omar al-Bashir, who takes a back seat to no one as a murderer, has been protected by the Chinese government, which for many years was the major buyer of Sudanese oil.³² An action against al-Bashir that strained relations with China would have jeopardized U.S. economic and military interests.

One of the most stunning conclusions by Samantha Power in her book *The Problem from Hell* was that America’s repeated refusals to end genocide were not “accidental products of neglect” but rather “They were concrete choices made by the country’s most influential decisionmakers after unspoken and explicit weighing of costs and benefits.”³³

But if the prominence effect is indeed infiltrating top-level policy decisions and causing decision makers to systematically devalue humanitarian actions, I doubt that the decision makers are consciously aware of this. The prominence mechanism driving the decision-making process is not consciously expressed devaluation of distant lives; this would be abhorrent to leaders who truly do value those lives. Rather, I believe that prominent objectives, in particular those offering enhanced security, draw attention away from less prominent goals. All eyes are on options that protect the homeland, and decision makers fixated on the security

28. President Barack Obama, Address to the Nation on Libya (Mar. 83, 2011) (transcript available in the White House Office of the Press Secretary), available at <http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya>.

29. President Ronald Reagan, the Presidents News Conference (Apr. 9, 1986) available at <http://www.presidency.ucsb.edu/ws/?pid=37105>. See, e.g., *The World After Gaddafi*, TIME, Sep. 5, 2011; *What if He Doesn't Go?: The War Against Gaddafi*, TIME, Apr. 4, 2011; *Target Gaddafi*, TIME, Apr. 21, 1986.

30. Dana Ford & Josh Levs, ‘Heroic’ Mission Rescues Desperate Yazidis from ISIS, CNN (Aug. 16, 2014, 11:41 AM), <http://www.cnn.com/2014/08/11/world/meast/iraq-rescue-mission/>.

31. Madeleine K. Albright, Former Sec. of St., Statement to the National Commission on Terrorist Attacks upon the United States (Mar. 23, 2004).

32. See Christopher Alessi & Stephanie Hanson, *Expanding China-Africa Oil Ties*, COUNCIL ON FOREIGN REL. (Feb. 8, 2012), <http://www.cfr.org/china/expanding-china-africa-oil-ties/p9557>; Nat Hentoff, *Al-Bashir's Genocide Horrors Began and Continue in Darfur*, CATO INST. (Oct. 9, 2013), <http://www.cato.org/publications/commentary/al-bashirs-genocide-horrors-began-continue-darfur>.

33. POWER, *supra* note 6, at 508.

objectives likely fail to consider seriously the millions of people under siege and left to die. Compensatory weighing of costs and benefits associated with seeking security and saving distant lives is not really occurring.

Thus meaningful action to prevent genocide and mass atrocities faces two psychological obstacles. The prominence effect leads to decisions that favor inaction, even when this contravenes deeply held values. And decision makers can get away with this because the public is psychologically numbed. As Samantha Power observed: “No U.S. president has ever made genocide prevention a priority, and no U.S. president has ever suffered politically for his indifference to its occurrence. It is thus no coincidence that genocide rages on.”³⁴

My colleagues and I have been working to design laboratory experiments to test these speculations about the psychological prominence of security in values revealed through decisions. In a recent pilot study, we posed the humanitarian crisis in Syria (prior to the involvement of ISIS) to respondents instructed to play the role of the U.S. President. The objective of protecting 100,000 civilian lives by creating a “safe zone” was pitted against the decision to not intervene in order to minimize the political and military risks of intervention. We assumed the latter objectives would be prominent. Preliminary results support the hypothesis that an individual’s strongly expressed values for intervening to protect lives are often contravened by that same person’s decisions in favor of nonintervention for the sake of security.

But amidst this sobering view contrasting our stated values and our revealed values, the pilot study did offer a ray of hope that needs to be pursued. We found a strong order effect in our data. One group of our respondents was first asked to think about their values for the competing objectives and to quantify them on a 0–100 rating scale of importance. One of the rated objectives was not intervening in order to protect national interests and national security. The objective of the alternative action, intervention, was characterized by three subgoals:

(1) Create a no-fly zone to stop Syrian airplanes from attacking citizens; (2) Place U.S. troops on the border of the safe zone to protect it; (3) Have U.S. troops accompany ground shipments of food and medicine to ensure their delivery to the safe zone.

Those who first decided whether to intervene or not made decisions that conflicted with their subsequent ratings of their goals on the 0–100 scale. As predicted by the prominence hypothesis, choices often favored nonintervention to a degree that was not consistent with respondents’ stated values, which tended to assign greater importance to objectives linked to intervention.

However, those who first searched their souls and expressed their values quantitatively for the various objectives subsequently made choic-

34. *Id.* at XXI.

es that were highly consistent with their expressed values. This suggests that introduction of techniques known as decision analysis and value-focused thinking³⁵ may help policy makers act in ways that don't contradict their expressed values.

Prominence appears likely to be aligned with immediate and certain benefits to individuals whom we care about. Without incorporating decision analysis and value-focused thinking, it will be difficult to defend actions that protect distant, anonymous masses from genocides and mass atrocities.

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35. See ROBIN GREGORY ET AL., *STRUCTURED DECISION MAKING: A PRACTICAL GUIDE TO ENVIRONMENTAL MANAGEMENT CHOICES* (2012); RALPH L. KEENEY, *VALUE-FOCUSED THINKING: A PATH TO CREATIVE DECISIONMAKING* (1996).

VALUING FOREIGN LIVES IN GENOCIDES & MASS ATROCITIES: LAW, HUMANITARIAN INTERVENTION, AND THE PROMINENCE EFFECT

*Lesley Wexler**

I. INTRODUCTION

Genocides and mass atrocities present a stark example of foreign life devaluation. Those engaged in the killings do not just undervalue but actually negatively value the lives lost and at risk. Although the U.S. public and decision makers might highly value such foreign lives in the abstract, the rarity of humanitarian interventions leads Slovic to conclude that government action fails to track abstract valuations.¹ If, as Slovic hypothesizes, the prominence of national security concerns drives down humanitarian interventions below actually held foreign life valuation,² how does law reinforce or counteract this effect on policymakers? Relatedly, how could policymakers reconfigure the law and legal institutions to overcome the prominence effect and allow a fuller cost benefit balancing of actions to prevent genocides and mass atrocities?

While international prohibitions, requirements, and authorizations are likely not singularly dispositive in states' decisions to intervene, they can alter the costs. In this short Essay, I briefly identify international law that directly speaks to states' obligations and authorizations during such events. I conclude Part II by pointing to some reform efforts that could lower the costs for state action responding to genocides and mass atrocities.

Although states always act in the shadow of international law, much decision making on how to address genocides and mass atrocities takes

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1. Paul Slovic, *The Prominence Effect: Confronting the Collapse of Humanitarian Values in Foreign Policy Decisions*, 2015 U. ILL. L. REV. SLIP OPINIONS 26, 32–33.

2. *Id.*

place at the domestic level.³ For powerful states like the United States who can sometimes afford to go it alone or persuade other states to join costly actions, this is particularly true. The domestic law places some limits on the executive's capacity to legally intervene,⁴ but in the second part of this essay, I suggest that politics and preferences constitute the more significant constraints on executive action.

Slovic's essay posits that both the U.S. public and policymakers strongly support saving foreign lives in the abstract.⁵ Yet he concludes the combination of psychic numbing at the public level and the overvaluing of national security at the policy level crowd out a true cost benefit balancing that meaningfully incorporates the humanitarian values that decision makers and the public actually hold.⁶ Thus, humanitarian interventions are rare and, according to Slovic, undersupplied.⁷

How might domestic policymakers engage in a full accounting of foreign lives in the mass atrocities and genocide context given the dominance of national security concerns? The third and final Part of this essay explores one opportunity for combating the prominence effect with legal institutions—the recently created Atrocities Prevention Board (“APB”).⁸ While the APB currently emphasizes information acquisition, analysis, and dissemination with a particular emphasis on early warning and prevention, Slovic suggests more and better information alone will not overcome the prominence effect.⁹ I thus offer three categories of reforms to help the APB realize its goals of more fully integrating humanitarian values into decision making: thoughtful transparency, valuation quantification, and sticky persuasion.

II. INTERNATIONAL LAW AND INSTITUTIONS

International Law determines the legality, and perhaps also legitimacy, of state efforts to address genocides and mass atrocities. In the aftermath of World War II, states crafted a binding agreement to reconsti-

3. Carol Morello, *Kerry Asks Congress Not to Bar Ground Troops in Syria and Iraq*, WASH. POST, Dec. 9, 2014, http://www.washingtonpost.com/world/national-security/kerry-asks-congress-not-to-bar-ground-troops-in-syria-and-iraq/2014/12/09/791fc43c-7fec-11e4-8882-03cf08410beb_story.html.

4. See War Powers Resolution, 50 U.S.C. §§ 1541–48 (2012); International Emergency Economic Powers Act 50 U.S.C. §§ 1701–06 (2012) (limiting the ability of the President to deal with foreign conflicts unless deemed an “unusual and extraordinary threat”); 22 U.S.C. § 2261 (2012) (authorizing the President to spend up to \$25 million on international aid “contingencies”); sources cited *infra* note 19.

5. Slovic, *supra* note 1, at 32.

6. *Id.* at 29–30.

7. *Id.* at 32.

8. WHITE HOUSE, FACT SHEET: THE OBAMA ADMINISTRATION'S COMPREHENSIVE EFFORTS TO PREVENT MASS ATROCITIES OVER THE PAST YEAR 1 (2013), available at http://www.whitehouse.gov/sites/default/files/docs/fact_sheet_-_administration_efforts_to_prevent_mass_atrocities5.pdf.

9. See JOHN NORRIS & ANNIE MALKNECHT, CTR. FOR AM. PROG., ATROCITIES PREVENTION BOARD: BACKGROUND, PERFORMANCE, AND OPTIONS 13–18 (2013) <https://cdn.americanprogress.org/wpcontent/uploads/2013/06/AtrocitiesPrevBoard.pdf>; Slovic, *supra* note 1, at 32–33.

tute the international order.¹⁰ After two bloody world wars, states were understandably and self-servingly concerned with preventing invasions into their own territories as well as more broadly interested in reducing mass casualties from inter-state violence. Thus, the United Nations charter embodies a strong principle of noninterference including prohibitions against physical incursions on state sovereignty and in particular, sets significant limits on the use of force.¹¹ Article 2(4) precludes member states from “the threat or use of force against the territorial integrity or political independence of any state.”¹² Such a rule prohibits unilateral interventions—treating expansionist interventions such as Vietnam’s 1979 incursion into Cambodia and Russia’s invasion of Crimea as on par with humanitarian efforts in the former Yugoslavia or the hypothesized deployment of troops to curb civilian atrocities in Syria.¹³

The U.N. Security Council may, however, authorize the use of unilateral or multilateral force with a recognized threat to international peace or security, and it allows for the invocation of self defense under Article 51. Given the composition and veto power of the Security Council, however, securing a resolution authorizing force for a humanitarian intervention is quite difficult. For example, while the U.N. recently authorized force in Libya, China and Russia have blocked a U.N. approved intervention in Syria, as well as condemnations of political repression in Burma and Zimbabwe. Given the shadow of the veto, many states may not even seek resolutions authorizing humanitarian interventions or lesser condemnations of genocides and mass atrocities.

Of course, states may act collectively or unilaterally without clear U.N. approval as they did in Kosovo. But doing so incurs extensive political costs and states may be wary of weakening the international system. Given that U.S. policymakers hail from a highly legalistic culture, claim to take international law seriously, and possess a general interest in states submitting to the United Nations’ will, they may find these costs coupled with or considered as part of national security concerns particularly weighty.

As Arden Rowell and I discussed in our original paper, *Valuing Foreign Lives*, international law also contains some doctrine that weighs in favor of humanitarian intervention. In short, both the Genocide Convention and the emerging responsibility to protect doctrine encourage states to engage in a fulsome consideration of foreign lives. But it seems the Genocide Convention’s duty to protect rarely, if ever, compels the United States to engage in humanitarian intervention as evidenced by its noninterventions in Rwanda, Darfur, and the Democratic Republic of Congo. And although states have referenced the responsibility to pro-

10. U.N. Charter art. 1.

11. *Id.* art. 2.

12. *Id.* art. 2, para. 4.

13. S.C. Res. 189, U.N. Doc. S/RES/189 (Jun. 4, 1964) (Vietnam-Cambodia conflict); G.A. Res. 68/262, U.N. Doc. A/RES/68/262 (Mar. 27, 2014) (Russia-Ukraine); S.C. Res. 757, U.N. Doc. S/RES/757 (May 30, 1992) (Yugoslavia); *see, e.g.,* Morello, *supra* note 3.

tect doctrine as entailing broader obligations to act than the Genocide Convention, most states and commentators believe that this emerging doctrine still requires U.N. Security Council approval to authorize humanitarian interventions.

Motivated states may still act despite legal prohibitions and may attempt to weaken the limits on humanitarian interventions. One might view U.S. action regarding Kosovo and Syria in this light.¹⁴ Other states have suggested U.N. Security Council states adopt a nonveto policy in cases of proposed actions to respond to genocides and mass atrocities as part of their larger responsibility to protect duties.¹⁵ And the United States is “actively developing a mass atrocity prevention and response doctrine” that includes policy, rules of engagement, military doctrine, and predeployment training in anticipation of potential humanitarian interventions.¹⁶ In support of such actions, the United States has made pronouncements suggesting the legality of unilateral, non-U.N. sanctioned responses.¹⁷ But even if the United States could lower or simply ignore international barriers, Slovic suggests domestic risk assessment regarding national security would still serve as a major impediment to humanitarian interventions.¹⁸ Thus, in the next section, I turn to domestic limitations on the use of force as well as potential mechanisms to enhance its consideration.

III. DOMESTIC LAW AND INSTITUTIONS

As the Commander-in-Chief, the President possesses much greater latitude to legally deploy force under domestic law than under international law. The Constitution does impose some structural limits granting Congress the power to declare war; to organize, arm and discipline the militia; to regulate commerce with foreign nations; to investigate and oversee the President as well as to impeach; along with the powers of the purse.¹⁹ But such powers are rarely exercised in the use of force context and seem unlikely to deter a President determined to engage in a humanitarian intervention.

Rather, the real domestic constraints on the President are decisional and political. In order to overcome general public apathy and engage in a

14. Jutta Brunnee & Stephen J. Toope, *The Rule of Law in an Agnostic World: The Prohibition on the Use of Force and Humanitarian Exceptions*, in KOSKENNIEMI AND HIS CRITICS (Wouter Werner et al., eds., forthcoming 2015) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2547022.

15. See MATTHEW C. WAXMAN, COUNCIL ON FOREIGN REL., INTERVENTION TO STOP GENOCIDE AND MASS ATROCITIES: INTERNATIONAL NORMS AND US POLICY, 23–24 (2009), available at http://i.cfr.org/content/publications/attachments/Mass_Atrocities_CSR49.pdf.

16. Keith A. Petty, *Humanity and National Security: The Law of Mass Atrocity Response Operations*, 34 MICH. J. INT'L L. 745, 768–70 (2013).

17. *Id.* at 768 (referencing the 2006 and 2012 National Security Strategies, the 2010 Department of Defense Quadrennial Defense Review, Senate Resolution 71 (2010) and President Obama's Study Directive of 2011).

18. Slovic, *supra* note 1, at 32.

19. U.S. CONST. art. 1, § 8, art. 2, § 4.

humanitarian intervention, a rational executive would need to conclude that such action is cost-benefit justified given the potential domestic and international political fallout. It is here that the prominence effect that Slovic identifies could pose particular problems: Slovic suggests that national security costs will crowd out a full weighing of the humanitarian interest in saving foreign lives.²⁰

In light of this phenomenon, a policymaker wanting to enhance the prospects for a humanitarian intervention might broaden and deepen the national security conversation or find ways to make humanitarian values more salient and sticky. Those committed to the benefits of humanitarian interventions might reframe or make additional national security arguments to add weight to the pro-intervention calculation. Policymakers often have wide latitude in framing U.S. action; those interested in addressing mass atrocities and genocide nearly always have a plausible argument that U.S. national security interests are implicated if the killings continue or escalate. For instance, the Boko Haram killings in Nigeria²¹ could eventually challenge the authority of an oil exporting state and the fighting and resultant civilian casualties in Syria²² could further destabilize the Middle East.

But relying on such a strategy poses two significant dangers. By ceding the prioritization of national security concerns, intervention will remain off the table when the national security justifications to abstain are more compelling than the national security reasons to act. Even as the world grows smaller and more interdependent, the national security justifications for preventing or responding to genocides and mass atrocities can be quite tenuous.

More importantly, reframing humanitarian interventions as national security missions can undermine the goal of protecting foreign lives even as it makes intervention more likely. Foreign interventions are deeply complex operations where mission goals will affect on the ground implementation.²³ If the government views itself as engaged in regime change, promoting regional stability, or ensuring access to oil and other natural resources, it may be much less protective of civilians and less attuned to the needs of persecuted groups. A state's willingness to sustain collateral damage to the domestic population is likely higher in such instances.

This suggests policymakers ought to make humanitarian values more salient and sticky, either as a stand alone approach or in conjunction with reframing. Triggers, whether used to generate automatic action

20. Slovic, *supra* note 1, at 32.

21. Farouk Chothia, *Who Are Nigeria's Boko Haram Islamists?*, BBC NEWS, Jan. 21, 2015, <http://www.bbc.com/news/world-africa-13809501>.

22. Rick Gladstone & Mohammed Ghannam, *Syria Deaths Hit New High in 2014*, *Observer Group Says*, N.Y. TIMES, Jan. 1, 2015, http://www.nytimes.com/2015/01/02/world/middleeast/syrian-civil-war-2014-deadliest-so-far.html?_r=0.

23. See TAYLOR B. SEYBOLT, HUMANITARIAN MILITARY INTERVENTION: THE CONDITIONS OF SUCCESS AND FAILURE 177-220 (2007).

or as alarm bells calling for scrutiny, might provide one such approach. For instance, the executive branch could use “red lines” or “magic words” as a precommitment strategy.²⁴ For red lines, the president might let it be known that he will respond with force to some preordained event or consequence suggestive of a genocide or mass atrocity. This type of red line might bind the president to expending significant resources to save foreign lives after the crossing of a particular threshold. Similarly, a “magic words” approach might hold that when a sufficiently high level executive branch official labels as a situation a genocide or mass atrocity, it would automatically trigger humanitarian intervention or some other costly action.

Relatedly, the executive branch could also utilize an alarm bell approach by generating genocide and mass atrocity indicators that would automatically trigger early stage assessments of the risks to foreign lives if potential genocides or mass atrocities are left unchecked. Furthermore, by using early stage alarm bells, U.S. decision makers may have the flexibility to choose less costly actions than those available once the genocides or mass atrocities are well underway.

That said, triggers may not themselves overcome the prominence effect during the decision-making process. Early warning is an important piece of the puzzle as it raises the salience of the risk to foreign lives, but it only provides more information sooner—it may not change the priorities assigned in a cost-benefit analysis. Similarly, automatic triggers can serve as a possible deterrent for the malfeasant actors, but recent historical examples involving the invocation of redlines and magic words did not in fact lead to humanitarian interventions in Syria²⁵ or Darfur.²⁶ Rhetorical comments invoking red lines or other supposedly automatic triggers are costly, but they can be walked back as they are not truly automatic. Ultimately, the executive branch may be unwilling to enforce an inflexible, preordained commitment to intervene even when the threshold events occur for many reasons, including Slovic’s observation about ongoing national security concerns.²⁷ To enhance the consideration of humanitarian interventions and thus the meaningfulness of automatic triggers and alarm bells, policymakers also need more processes designed to reinforce an ongoing strong and sticky commitment to the positive valuation of foreign lives.

24. See Margaret Jones, *Tear Down These Red Lines: A Comparison of Israel’s and the United States’ Approach Towards Iran’s Nuclear Program*, 18 PUB. INT. L. REP. 54, 56 (2012); Michael S. Lund, *Bridging the Gap Between Warning and Response: Approaches to Analyzing Effective Preventive Interventions*, in EARLY WARNING AND EARLY RESPONSE (Susanne Schmeidl & Howard Adelman eds., 1997) available at http://www.davidmlast.org/MPA567-2015/4_Prevention_files/Lund%281998%29bridging%20the%20gap.pdf.

25. Glenn Kessler, *President Obama and the ‘Red Line’ on Syria*, WASH. POST (Sept. 6, 2013), <http://www.washingtonpost.com/blogs/fact-checker/wp/2013/09/06/president-obama-and-the-red-line-on-syrias-chemical-weapons/>.

26. See Luke Glanville, *Is “Genocide” Still a Powerful Word?*, 11 J. GENOCIDE RES. 467, 476 (2009).

27. Slovic, *supra* note 1, at 32.

Durable institutional remedies for the prominence effect, as for other forms of bias, must be constructed with a simultaneous understanding of the underlying behavioral phenomena and the constraints and opportunities offered by existing institutions. In light of this, how can an executive branch that wants to fully value foreign lives in the face of genocides and mass atrocities remain committed to them throughout the decision-making process?²⁸

The first step is to create and embed structures and institutions devoted to these values in decision making. The APB, a standing interagency committee, is a promising example.²⁹ After a Presidential Study aimed at the successful prioritization of genocide and mass atrocities, President Obama appointed administration heavyweight Samantha Power to chair this new Board.³⁰ The APB seeks to institutionalize a procedure for atrocities prevention by improving the quality of, access to, and assessment of information, as well as integrating such information into interagency personnel training across executive agencies such as the CIA, Defense, Justice, and State Departments. The APB emphasizes early warning as a formal priority of the administration and was tasked with creating a mass atrocities alert channel across departments and agencies as well as use of early warnings as an automatic trigger of policy review.³¹ The APB is also charged with coordinating international efforts on genocide prevention and response such as: elevating the priority of genocide prevention at the U.N. and building the capacity of other states willing to engage in humanitarian interventions.³²

For a budget neutral, no-dedicated-personnel enterprise, the APB is surprisingly active. The working staff meets weekly to focus on structural issues like atrocity prevention training across agencies with a monthly follow up meeting.³³ The APB also performs “deep-dive analysis” on a quarterly basis to focus on discrete geographic risks in places like Kenya, Burma, and Bangladesh.³⁴

That said, the APB has certainly not fulfilled all—or perhaps even most—of the tasks in its mandate. A recent report concludes that while the President has shown that atrocity prevention is a priority, neither Congress nor the public have been included in the process.³⁵ Nor has the APB made much progress on many of its early prevention initiatives such as alarm bell policy reviews and establishing early warning as a priority. Indeed, the APB has made only limited headway on preventive di-

28. President Obama has declared that the prevention of mass atrocities and genocide is a “core national security interest and core moral responsibility.” Presidential Study Directive 10/ PSD-10, *Directive on Creation of an Interagency Atrocities Prevention Board and Corresponding Interagency Review*, (Aug. 4, 2011), available at <https://www.hsdl.org/?view&did=690868>.

29. See WHITE HOUSE, FACT SHEET, *supra* note 8.

30. NORRIS & MALKNECHT, *supra* note 9, at 1.

31. See Presidential Study Directive 10, *supra* note 29.

32. See WHITE HOUSE, FACT SHEET, *supra* note 8.

33. NORRIS & MALKNECHT, *supra* note 9, at 9.

34. *Id.*

35. *Id.* at 10.

plomacy and efforts to persuade other states of the nonuse of the Security Council veto.³⁶

As the APB is still working through early implementation of its mission, speculations about the overall success or failure of the APB are a bit premature. Since its founding, the Obama Administration has intervened to protect the Yazidis in Iraq but not to protect persons in Syria or the Central African Republic.³⁷ This could be because even a full cost-benefit balancing counseled against such action, because the APB failed to fully weigh foreign lives in the face of national security concerns, because the APB failed to convince higher level decision makers to do so, or because the APB simply came to the table too late—or not at all—for these crises.³⁸ Similarly, distilling the APB's role in less dramatic actions like recent trade sanctions on the DRC, Zimbabwe, Iran, and Burma is challenging as is ascertaining the ultimate significance of those actions.³⁹ Without better information from and about the APB, drawing conclusions about the APB's work is hasty at best.

That said, I offer three modest suggestions all consistent with Arden Rowell's and my larger framework approach to foreign life valuation: promoting systematic interrogation of valuation processes through thoughtful transparency, encouraging the quantification of valuation, and increasing the salience of foreign valuation issues. None of these prescriptions demands a particular substantive outcome. Rather, all serve to enhance decision-making procedures governing humanitarian interventions and genocide prevention and response more generally.

First, given its institutional role, the APB ought to consider enhancing its transparency, where doing so will not interfere with its core functions. Described as utilizing a "level of secrecy similar to that accorded to national intelligence reviews,"⁴⁰ the APB has not declassified its annual report to the President and conducts neither Congressional hearings nor briefings.⁴¹ Given its low visibility, it has built no constituency within Congress or the public at large. Although specific details might need to remain classified, the APB could be more forthright about its general activities, its progress on tasks identified in the Presidential Directive, and its role in decision making. Such information serves multiple functions. It can help scholars and policymakers determine the effectiveness of the

36. JAMES P. FINKEL, CTR. FOR THE PREVENTION OF GENOCIDE, ATROCITY PREVENTION AT THE CROSSROADS: ASSESSING THE PRESIDENT'S ATROCITY PREVENTION BOARD AFTER TWO YEARS, 30–31 (2014), available at <http://www.ushmm.org/m/pdfs/20140904-finkel-atrocity-prevention-report.pdf>.

37. See Helene Cooper et. al, *Obama Allows Limited Airstrikes on ISIS*, N.Y. TIMES, Aug. 7, 2014, <http://www.nytimes.com/2014/08/08/world/middleeast/obama-weighs-military-strikes-to-aid-trapped-iraqis-officials-say.html>.

38. NORRIS & MALKNECHT, *supra* note 9, at 15–18.

39. See *Sanctions Programs and Country Information*, U.S. DEPT. OF THE TREASURY (Mar. 5, 2015), <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx>.

40. Mark Landler, *Task Force Gives Insight on U.N. Nominee*, N.Y. TIMES, Jun. 22, 2013, <http://www.nytimes.com/2013/06/23/us/politics/work-on-task-force-gives-insight-on-un-nominee.html>.

41. NORRIS & MALKNECHT, *supra* note 9, at 10.

APB in specific crises as well as in altering the knowledge and priorities of agencies. At the same time, procedural transparency may help the APB develop and maintain thoughtful decision procedures.

Second, the APB might consider explicit, but potentially confidential, foreign life valuation as we discuss in our original article. President Obama already tasked the APB with developing a National Intelligence Estimate on the global risk of mass atrocities and genocide.⁴² Speaking more broadly, National Intelligence Estimates are efforts to draw information from across agencies to predict the course of future events.⁴³ In the context of mass atrocities and genocides, such an estimate could include a quantification of foreign (and domestic) lives at risk with humanitarian interventions and other policy options. Such numbers facilitate comparisons with other atrocities and genocides as well as with other significant life threatening events like natural disasters in which the United States routinely values foreign lives.⁴⁴ The APB might also consider monetizing such estimates as to allow an “apples to apples” comparison with monetized national security costs and benefits. Such quantification might encourage policymakers to engage in a full blown cost-benefit analysis rather than simply deferring to psychologically prominent concerns like national security.

Third, the APB might draw lessons from psychology to enhance the stickiness and salience of foreign life valuation at the elite decision-making level. In order to counteract the prominence effect, the APB might prime expert audiences to lock in humanitarian valuations. For instance, they might open meetings with a brief personalized example of people at risk of genocide or mass atrocities and call for a moment of silence in which attendees reflect on these harms and their commitment to eradicating them. Relatedly, such moments might accompany the President’s daily security briefing or perhaps the President could receive a separate and earlier genocide and mass atrocity briefing. Such efforts are consistent with the APB’s original mandate which seeks to improve the quality, quantity, and access of information on mass atrocities and genocide not as an end in itself, but as a way to ensure the prioritization of humanitarian values.

IV. CONCLUSION

Domestic policymakers and the public have international commitments to address foreign genocides and mass atrocities. In many cases, these commitments may also represent the ethical and personal preferences of domestic decision makers. The prominence of national security concerns and the limitations posed by the U.N. Security Council may

42. WHITE HOUSE, FACT SHEET, *supra* note 8.

43. Gregg Bruno & Sharon Otterman, *National Intelligence Estimates*, COUNCIL ON FOREIGN REL. (May 14, 2008), <http://www.cfr.org/iraq/national-intelligence-estimates/p7758>.

44. Arden Rowell & Lesley Wexler, *Valuing Foreign Lives*, 48 GA. L. REV. 499, 525–27 (2014).

raise an indefensibly high barrier to expressing these commitments and preferences in the form of humanitarian interventions. This Essay has explored one opportunity for using legal institutions to counter psychological biases effect on foreign life valuation: the Atrocities Prevention Board. It also identified new procedures that could enhance the APB's decision-making capabilities to allow better assessment of the need for intervention in light of the prominence effect. These reforms may help improve the deeply difficult process of cost benefit analysis in the face of a genocide or mass atrocity. More generally, the analysis here speaks to the need for further exploration of opportunities to use law to combat the prominence effect, in genocide policy and elsewhere.

Preferred Citation: Lesley Wexler, *Valuing Foreign Lives in Genocides & Mass Atrocities: Law, Humanitarian Intervention, and the Prominence Effect*, 2015 U. ILL. L. REV. SLIP OPINIONS 32, <http://www.illinoislawreview.org/wp-content/2015/04/Wexler.pdf>.

“WILLINGNESS TO PAY” AND THE PRESERVATION OF COASTAL AND LOW-LYING COMMUNITIES AND CULTURES IN AN ERA OF CLIMATE CHANGE

*David Dana**

The Inuit Village of Kivalina in Alaska is sinking into the ocean.¹ Unless a tremendous amount of resources are invested in keeping the ocean at bay, assuming that were even technically feasible, the village will disappear from its current location. And if the bonds, the community, the culture of Kivalina are to be preserved, a great deal of resources will be required to relocate the village—its buildings, its residents—inland in a new, but in a way similar, Kivalina. Should resources be spent to fight off the effects of extreme weather and sea level rise that could subsume Kivalina or, alternatively, to reconstruct a new Kivalina in a safer, more inland site? The people of Kivalina certainly cannot do much of anything but plea for help, something they have done in part through litigation. Thus, the question really is, should the state and federal government—and really, the latter, as in the United States efforts of these sorts are almost always going to be federally funded or not funded at all—pay to preserve Kivalina or at least recreate Kivalina in a new location?

This is not a question about human lives and the value of human lives per se. The residents of Kivalina can be moved to safe areas in a way that saves their lives from changes in weather and sea level, without the expense of recreating Kivalina in a new location. This is a question of the saving of a community and a culture that might disappear with physical destruction, at least in the absence of a concerted, funded, assisted migration and reconstruction project. And the case of Kivalina is not the only one that raises this question. In an era of climate change, we will have more communities and cultures threatened by extreme weather and sea level changes. The pre-Katrina decision not to invest in better flood protection for the lowest-lying portions of New Orleans, portions that

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1. See, e.g., Stephen Sackur, *The Alaskan Village Set to Disappear Under Water in a Decade*, BBC NEWS MAGAZINE (July 29, 2013, 8:15 PM), <http://www.bbc.com/news/magazine-23346370>.

embodied distinct communities, can be understood, in hindsight, as a decision not to make the investment to preserve those communities and cultures. The post-Sandy decision to subsidize the reconstruction of New Jersey coastal towns that remain highly vulnerable to extreme weather in largely their pre-Sandy form can be understood as a decision to preserve particular communities notwithstanding the high cost of what may well be repeated reconstruction.

Nor is the question of whether it is worth it—whether the benefits exceed costs—to preserve communities and cultures from the effects of climate change limited to the United States. On the contrary, coastal and low-lying communities outside the United States throughout the world are at risk, and one question that should be asked about these vulnerable foreign communities is—even if human lives can be saved without protecting the physical communities from climate change or without efforts to relocate the communities intact, should money (and how much money?) be spent to retain or recreate the communities? From the United States perspective, should U.S. foreign aid be allocated toward this goal of community and culture preservation?

These are not easy questions. Indeed, it is not even easy to say how U.S. law currently values communities and cultures as distinct from lives, let alone how U.S. law should treat communities and cultures. As professors Rowell and Wexler explain in their excellent article on the valuation of foreign lives, United States regulatory policy formally embraces the use of a “willingness to pay” methodology normatively rooted in welfare economics in valuing the saving of a human life for purposes of assessing the costs and benefits of a proposed regulation.² But there is a certain crudeness and degree of inconsistency in how this methodology is deployed in domestic regulation regarding domestic lives, and a near complete lack of transparency in methodology and remarkable inconsistency regarding how foreign lives are valued. Rowell and Wexler explain with care the difficulties involved in using a transparent willingness to pay regulatory methodology to assess how much the United States should be willing to spend to save foreign lives in particular contexts, but come out in favor of endorsing the use of willingness to pay for this purpose.³ My guess is—and it is only a guess, because there is almost no relevant literature on this topic—that a thorough study would show that much of what Rowell and Wexler say about the valuation of foreign lives in U.S. policy and funding decisions could be said about the valuation of both domestic and foreign communities and cultures, as distinct from human lives. That is, with respect to communities and cultures, there is no transparent and certainly no consistent method for valuing them in U.S. policy and funding decisions.

Moreover, the valuation of the preservation of communities and cultures from climate change using a willingness to pay (“WTP”) meth-

2. Arden Rowell & Lesley Wexler, *Valuing Foreign Lives*, 48 GA. L. REV. 499, 527–28 (2014).

3. *Id.* at 568–69.

odology is perhaps an even more daunting task than the valuation of human lives using WTP methodology. First, while we can largely agree as to what is a human life, there is likely to be more disagreement as to what constitutes a distinct “community” or “culture.” It also may be more difficult to agree as to what constitutes the loss of a distinct community or culture. People have been migrating in response to floods, droughts, and war throughout recorded history, and they often do manage to maintain aspects of their original communities and cultures despite the dislocations.⁴

The willingness-to-pay valuation of particular communities and cultures is likely to be highly context-specific and highly dependent on the information people have (or are provided) about the particular communities and cultures, which raises the difficult question—a question also raised by the valuation of foreign lives, as Rowell and Wexler note—of what to do about the fact that WTP valuations may well not conform to egalitarian and cosmopolitan philosophical commitments?⁵ Americans may be willing to pay a reasonable amount to preserve Venice from falling into the sea but unwilling to pay anything to help save a Pacific island nation about which they know almost nothing and cannot imagine visiting. People who live nearby to communities at risk—people who live near New Orleans, for example—may well have a higher WTP to preserve New Orleans than those who live at the farthest points in the country from New Orleans. Because WTP for communities and cultures at risk from climate change are likely to vary from case to case, and because WTP studies are expensive, particularly if they are to include stated preference studies, which may well be necessary, regulatory requirements mandating WTP regarding communities and cultures would not be inexpensive.

Nonetheless, in addition to urging academic research regarding WTP as to communities and culture—however defined—facing the effects of climate change, I argue that, in the most compelling cases, regulators should be required to engage in WTP studies regarding the value of preserving communities and cultures that may/will be lost to climate change—or changes in weather/sea level thought to be influenced by climate change—absent public investment. Such cases would be ones where the communities at issue are relatively large in population (for example, pre-Katrina New Orleans), where the communities represent one of only a small number of communities representing a distinctive culture under stress (for example, the Inuit Village of Kivalina), or where the contemplated public investment in preservation is large in absolute terms or compared to the size of the community at issue, in dollars per residence or household (for example, coastal New Jersey after Hurricane Sandy).

4. See, e.g., Cynthia M. Garza, *Twice Removed: New Orleans Garifuna in the Wake of Hurricane Katrina*, in *DISPLACED: LIFE IN THE KATRINA DIASPORA* 198, 198–211 (Lynn Weber & Lori Peek eds., 2012) (detailing the cultural preservation of the Garifuna people after relocation to New Orleans).

5. Rowell & Wexler, *supra* note 2, at 510–14.

My basic argument for using WTP in these cases is not that WTP is an infallible or often even a highly persuasive form of valuation. Rather, it is that, in the absence of WTP studies as part of reasoned, transparent CBA, we lack any sort of check on or counterpoint to a political/regulatory process that otherwise might allocate too much money or too little money to preserving communities and cultures. Requiring WTP in a limited number of cases, and requiring the public release of the WTP studies, might help correct skews in the political process by engendering a better, fuller public debate.⁶

Both the legislative and regulatory processes are essentially political processes, and they result in political allocations of resources to different perceived needs. If the political process were a completely accurate reflection of the considered, actual preferences of the constituents of the polity as to how resources under scarcity should be allocated, then the argument for using WTP would be very thin, indeed, at least from a certain philosophical viewpoint. But we all know that, by and large, the public is ignorant as to allocations of resources via the legislative and regulatory process. In politics, certain constituencies, certain interest groups, due to wealth, intensity of preferences, geography, or other factors, can secure a share of resources that far exceeds what an ideal politics would allocate to them, whereas other constituencies receive far less than what an ideal politics would allocate to them. Moreover, because the public as a whole is often inattentive and because it takes a great deal to overcome inertia in legislative and regulatory processes, we tend to see an under allocation of resources for extreme weather and sea level risks that are not highly visible and easily displayed in the media (e.g., pre-Katrina New Orleans) and an over allocation of resources when the effects of extreme weather and sea level change become highly, if only temporarily, visible and hence salient in the general culture (e.g., post-Sandy New Jersey). WTP can highlight and perhaps help to correct—via promoting thoughtful debate and engagement—these over and under allocations of resources.

Rowell and Wexler argue for a greater consideration of the intersection of international law and WTP valuations.⁷ They suggest that if the United States and other countries could agree to conduct WTP valuations of foreign lives in a coordinated or harmonized manner and integrate those valuations into policy, there may be greater support for explicitly, consistently valuing foreign lives in U.S. policy. Given the relative paucity of binding, enforceable commitments in international law and nations’ (including the United States’) adamancy about preserving sovereignty and policymaking discretion, I think an international agreement of the sort Rowell and Wexler discuss would be difficult to

6. For this argument in the context of the valuation of foreign lives, see David Dana, *Valuing Foreign Lives and Civilizations in Cost-Benefit Analysis: The Case of the United States and Climate Change Policy* (Northwestern Univ. Sch. of Law and Econ. Series, Working Paper No. 09-47, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1524337.

7. Rowell & Wexler, *supra* note 2, at 573.

reach.⁸ But, in theory at least, agreements of this sort also could encompass the valuation of foreign communities and cultures, as distinct from human lives.

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8. *Id.* at 503; see generally CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE US LEGAL SYSTEM (2013).

CONCLUSIONS ON THE SYMPOSIUM ON FOREIGN LIFE VALUATION

*Arden Rowell**

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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