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THE INTRACTABLE NORMATIVE COMPLEXITIES OF VALUING FOREIGN LIVES

Jonathan S. Masur*

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.