VALUING FOREIGN LIVES

Arden Rowell[*] & *Lesley Wexler*[**]

TABLE OF CONTENTS

---

[*] Associate Professor and Richard W. and Marie L. Corman Scholar, University of Illinois College of Law.

[**] Professor and Thomas A. Mengler Faculty Scholar, University of Illinois College of Law. Thanks for generous comments from Matt Adler, Dan Cole, Paul Diehl, Shahar Dilbary, Colin Flint, Marc Galanter, David Hyman, Paul Heald, Charlotte Ku, Adi Libson, Jonathan Masur, Tim Meyer, Lisa Robinson, Jamie Rowan, Cass Sunstein, Dan Shalmon, Jamelle Sharpe, Rob Sloane, Tom Ulen, Jonathan Wiener, participants at the ASIL Research Colloquium, the International Law/ International Relations Colloquium, the Society for Environmental Law & Economics Colloquium, and the University of Illinois College of Law Faculty Retreat.

I. INTRODUCTION

For risks to their own populations, democratic governments routinely attach some "value" to life-saving interventions like environmental, safety, and health regulations. This helps them to compare multiple possible policies and to determine when the cost of a life-saving intervention is too high. But decisions made by governments do not magically cease their effects at political borders; many decisions made domestically have significant foreign impacts as well. The possibility of cross-border effects creates a conundrum for governments that seek to be democratically accountable to their own citizenry: how many—if any—scarce domestic resources should be allocated to the prevention of *foreign* harms?

This is a hard question, not amenable to easy answers. And yet refusing to deliberatively answer it does not make the problem disappear. Governments must make decisions about resource allocation, and in doing so, they necessarily adopt some approach—implicit, if not explicit—to valuing harms that are foreign rather than domestic.

Domestic policies can have many kinds of foreign impacts; climate change, for instance, can be expected to lead to widespread human suffering and loss of life, as well as lasting damage to existing ecosystems. All of these types of harms are potentially important. That said, this Article seeks to jumpstart discussion about foreign valuation by focusing on a particular subset of foreign harms—that is, the loss of foreign lives—that can sometimes be prevented through domestic policies. While we begin by looking at the United States and how it grapples with the loss of foreign life, other governments around the world must also routinely decide whether and how many resources to allocate for the prevention of foreign harms. We believe that addressing one of the most important categories of valuation—foreign life-saving—as it is performed by the world's largest economy is useful for at least three reasons: it begins to populate our knowledge about how foreign valuation is performed around the world; it provides multiple grounded examples of how governments like the United States routinely make decisions that implicitly adopt some approach to foreign valuation; and it contributes to an evaluation

of whether an atheoretical approach to foreign valuation tends to result in defensible or desirable outcomes. We view our focus on the United States as only the first step in developing a global catalogue of foreign life valuation practices.

This Article has two general goals, the first descriptive and the second prescriptive. The primary descriptive goal is to identify the issue of foreign valuation as providing a discrete analytical category. By "foreign valuation," we mean the question of how a government should allocate domestic resources for foreign benefit.[1] We believe that this question implicates distinctive political, philosophical, psychological, social, and economic challenges that academics and policymakers have yet to thoroughly address or synthesize.

The prescriptive thrust of this Article is to press on the process of foreign life valuation, rather than on promoting a particular form or method of foreign life valuation. We believe multiple potentially defensible methods for valuing foreign lives exist, but that different methods face identifiable challenges and have distinct strengths and drawbacks, which can be poorly- or well-matched to specific decision contexts. We identify factors relevant to deciding among valuation approaches and note that the choice of valuation method might reasonably vary based on the purpose of the valuation, the institution(s) involved, and which of multiple plausible normative theories of valuation is adopted. This pluralistic approach to foreign life valuation should not be confused, however, with the state of current practice, which is both atheoretical (in the sense that it is not based on an identifiable theory) and opaque (in that it is challenging to determine which practices are being used). The combination of these traits is particularly dangerous because it creates unreasoned policies that can only be interrogated with great difficulty. These uninterrogated, unreasoned policies are then used to establish allocations of scarce domestic resources. Among other problems, this valuation practice impedes the

---

[1] We use this definition because it focuses on the question of domestic resource allocation, which we believe to be an important issue for domestic governments to address. The many alternative approaches to valuation, including intrinsic valuation, while not the focus of this Article, are addressed briefly in Parts II and IV.

negotiation of informed international agreements that address the problem of cross-border externalities.

To address this stacked problem, we prescribe a three tiered solution—a solution, again, that focuses on the *process* of valuation rather than on promoting any particular valuation approach.

The first part of the prescription is that domestic policymakers should adopt a generally transparent disclosure-based approach to foreign life valuation that clearly and systematically identifies (a) the expected foreign impacts of a policy and (b) the method of foreign life valuation used. A generalized policy of transparency in foreign life valuation will allow for interrogation of existing practices, and can also provide useful information for potential international negotiations. It is therefore a sensible default strategy, although we acknowledge that some contexts may present overwhelming strategic reasons to keep such information private and thus overcome the default.

Second, when policymakers are allocating domestic resources in the absence of background-negotiated agreements, policymakers should only incorporate *domestic* benefits (and costs) into their decisions of how to allocate domestic resources. This limit keeps the scope of the analysis synchronous with the source of the expenditure. In performing synchronized analyses, however, policymakers should be careful to recognize that foreign impacts may have ancillary domestic impacts—that life (or other) loss in a foreign country may create domestic costs and benefits. These impacts should be understood as *domestic* impacts, and should thus be incorporated into domestic analyses of domestic resource allocation. In the context of current U.S. regulatory policy, we suggest the residual domestic implications of foreign impacts should generally be incorporated by calculating domestic willingness-to-pay to prevent (or redress) foreign harms.

Finally, policymakers around the world should recognize that international law offers multiple potential tools for managing the problem of cross-border externalities, and should adopt foreign valuation policies that facilitate this negotiation. These tools offer nations the opportunity to negotiate towards increasingly optimal resource allocation. In developing such negotiated agreements, international lawmakers can be informed by disclosure about the expected foreign impacts of domestic policies, and to the extent

they dislike a default of domestic willingness-to-pay to protect foreign lives, they can focus on negotiating for valuation methods that require policymakers to incorporate *foreign* willingness-to-pay or equivalent valuations to prevent foreign harms into their decisions about resource allocation.

The remainder of this Article proceeds in four parts. Part II makes the case that foreign valuation should be addressed as an analytical category that is distinct from domestic valuations. We identify psychosocial, philosophical, economic, and political reasons that valuations of foreign goods, like life-saving, trigger challenges beyond those faced in domestic valuation. Part III canvasses current practice in the United States regarding foreign life valuation. Throughout multiple institutional and topical examples, we find that foreign life valuation in the United States is typically both atheoretical and opaque. Part IV prescribes a tiered approach to managing foreign life valuation. It argues that for regulators, the default foreign valuation policy should be: (a) carved out as a distinct category of analysis; (b) transparent; (c) synchronized with domestic resource allocation; and (d) negotiated in international agreements. Part V concludes by identifying remaining puzzles and challenges for future treatments of foreign valuation and mapping out our related articles to further this project.

II. "VALUING" "FOREIGNERS"

This Part is directed towards carving out foreign valuation—and more specifically, foreign *life* valuation—as a category for analysis. We start by describing what we mean by "valuation" in the context of the topic of this Article. As we explain, we are focused particularly on a discrete form of valuation: on determining the amount of resources that are allocated towards an identifiable end. We believe that we can gain significant and meaningful traction on important questions about resource allocation by focusing on this type of valuation. After discussing our approach to valuation, we then address what we mean by "foreign" persons—i.e., persons outside the borders of a nation state—and identify reasons why policymakers should distinguish between domestic and foreign lives. We identify political

challenges that apply to foreign life valuation; sketch competing philosophical accounts of what domestic institutions owe foreign persons; and summarize key social science findings that suggest people treat "foreign" risks, harms, and lives as systematically different than domestic ones.

A. ATTACHING "VALUE" TO LIVES

To address the process of valuing foreign lives, or indeed of anything else, we need some common understanding of what it means to "value" something. This Article will describe a life as valued if a government makes a systematic commitment to expend some scarce resource in order to protect it through legal mechanisms.[2] Often—but not always—this resource will be money, as where additional expensive technologies are required to reduce harm from pollution.[3] Other times, the resource may be a reciprocal mortality risk, as where decisions to reduce mortality risk to foreign civilians increases the mortality risk of U.S. soldiers.[4]

In this sense of valuation, lives are valued across many areas of law. We can calculate some "value" on the lives of potential murder victims by looking to the amount spent on the criminal justice system; the lives of consumers by the amount of damages awarded in wrongful death suits for defective products; and the lives of workers by looking at the amount businesses must spend

---

[2] This use of the term "value" is consistent with common domestic practice in the United States of referring to the "Value of a Statistical Life" or "VSLs" as the quantity of monetary resources society is presumed to be willing to expend to protect a single (domestic) life. For a discussion of agency practices and outstanding puzzles related to this approach to valuation, see Cass Sunstein, *The Value of a Statistical Life: Some Clarifications and Puzzles*, J. BENEFIT COST ANALYSIS (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2278402. For additional discussion of domestic regulatory methodologies for "valuing" lives, see Lisa A. Robinson, *How US Government Agencies Value Mortality Risk Reductions*, 1 REV. ENVT'L ECON & POL'Y 283, 286 (2007).

[3] *See infra* Part III.A. Generally, harm from pollution can be reduced through three methods: reducing pollution, reducing exposure, or exposure allocation. *See* Arden Rowell, *Allocating Pollution*, 79 U. CHI. L. REV. 985, 1024–38 (2012) (specifying exposure allocation as a distinctive approach to reducing the harm from pollution, and identifying legal mechanisms for strategically shifting the geographic distribution of pollution exposures).

[4] *See infra* Part III.B.

to protect them.[5] Other times we need not even guess as to the resource value a decisionmaker attaches to the preservation of life. Sometimes—as with most major federal regulations—resource expenditure on life-protecting measures is explicitly premised upon people's willingness to pay money for those measures.[6] There is no reason to think that any of these measures express the complete intrinsic value of life.[7] Yet each approach attaches some value to human life by manifesting a systematic commitment to expend resources to protect human life.[8]

Why does the law expend resources to protect life? One way to answer this question is to point to the damage of death and inquire into what we imagine the harm of death to be—a question that has puzzled philosophers for millennia.[9] But even if we assume death to be damaging, that does not answer the questions of how many resources the law should commit to preventing it, or—importantly for this Article—whether the laws of each country should commit to spending the same resources to prevent a death, regardless of whose death it is.

---

[5] For extensions and comparisons of the willingness-to-pay methodology in non-regulatory contexts, see Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537, 560–61 (2005) (comparing theories of valuation in tort damages and regulatory willingness to pay).

[6] *See* Cass R. Sunstein & Arden Rowell, *On Discounting Regulatory Benefits: Risk, Money, and Intergenerational Equity*, 74 U. CHI. L. REV. 171, 173–74 (2007) (explaining that existing valuations of mortality risk are based on willingness to pay). These practices remain controversial, at least in academic circles, for a number of distinct reasons. *See, e.g.*, Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless*: *Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1562–63 (2002) (objecting to the general project of monetizing lives); ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 190–216 (1993) (objecting to using aggregated economic preferences to guide political decisionmaking); Cass R. Sunstein, *Valuing Life: A Plea for Disaggregation*, 54 DUKE L.J. 385, 422–39 (2004) (objecting, on distributional grounds, the unreasoned application of willingness-to-pay methodologies).

[7] *See* Arden Rowell, *Partial Valuation in Cost-Benefit Analysis*, 64 ADMIN. L. REV. 723, 742 (2012) (noting the difficulty of expressing the complete value of a life in monetary terms, but arguing that partial valuations in monetary terms may nonetheless be helpful, particularly to inform questions of resource allocation).

[8] *See id.* at 732 ("It is only necessary that people be willing to pay some amount of money for the good.").

[9] For a thought-provoking tracing of the puzzle, see Martha Nussbaum, *The Damage of Death: Incomplete Arguments and False Consolations*, *in* DEATH: NEW ESSAYS ON METAPHYSICS AND BIOETHICS (James S. Taylor ed., 2010) (arguing that the damage of death is surprisingly difficult to specify, and ultimately claiming that the primary source of the damage comes from leaving projects incomplete).

Two primary branches of modern moral philosophy—contractualism and utilitarianism—offer different paths for addressing questions of resource allocation. For utilitarians, the best policy is the one that produces the most good.[10] There is nothing fundamental to this view that is sensitive to the "location" of harms or benefits.[11] Rather, all of the decisions about who matters and how much are built into the definition of the polis: to the decision of whether to include a source of value in the initial analysis.[12] In contrast, contractualists, most notably John Rawls, accept the general assumption that human lives have equal moral weight, but present a framework for establishing a liberal political society by focusing on the question of what policies people would agree to if they had to choose a world to live in from behind a veil of ignorance, where they do not know key facts about their own identity.[13] Both of these methods for determining resource allocation—defining the polis and maximizing good within that polis, and choosing policies from behind a veil of ignorance—are potentially helpful in determining how legal institutions should allocate resources to protect foreign lives. But neither answers the question of how governments should allocate resources to those affected by the polis, yet exist outside of it. Thus, the rest of this Part addresses some concerns that may be distinctive or particularly pressing about the ways in which one might approach resource allocation for life valuation outside the polis, i.e., for what we call foreign life valuation.

B. THE DISTINCTIVENESS OF FOREIGN VALUATION

Throughout this Article, when we discuss "foreign" lives, we are referring to the lives of persons who live outside of a state's political boundaries. So for the United States, "foreign lives" are the lives of anyone outside of the borders of the United States. In this section, we identify a series of distinctive political, philosophical, and psychosocial challenges that arise in the context

---

[10] Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 104–05 (1979).

[11] *Id.* at 112–13.

[12] *Id.*

[13] *See* JOHN RAWLS, A THEORY OF JUSTICE 136–42 (1971) (outlining the veil of ignorance approach).

of valuing foreign lives. These challenges ground our claim that foreign valuation—and foreign life valuation in particular—deserves to be treated as a distinct analytical category, which deserves its own analysis, separate from those afforded domestic valuations.

1. Political Challenges to Valuing "Foreign" Lives. Foreign life valuation poses three political challenges that are distinct from those a country faces in deciding how many resources to allocate towards protecting its own citizens.

The first political challenge arises from the institutional structure of legal and political jurisdiction. Due to the international system as well as possible domestic constraints, states have different kinds of interventions available to them inside and outside of their political boundaries. States are thus used to analyzing questions along these parameters, and the life-saving interventions that result may be substantively textured by the existence of political borders.

The second reason is that distinguishing lives based on political boundaries taps into an important distinction between what it means for a foreign life and a domestic life to be imperiled. People located outside of political boundaries will tend[14] to be systematically excluded from domestic decisionmaking processes.[15] Insofar as this creates two distinct groups—a group of decisionmakers and a group of people who may be affected by those decisions but who have no voice in the decision itself—this is likely to create a systemic negative externality: a cost borne by a

---

[14] We describe this as a "tendency" because we recognize that this is not a perfect distinction, not least because—even within domestic borders—different groups of people may have very different levels of influence in decisionmaking.

[15] Both domestic and international law limit the right to vote in political elections to citizens. U.S. CONST. art. I, § 2, cl. 1; *id.* amend. XVII, § 1; INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, art. 25, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (1967) (entered into force Mar. 23, 1976). *But see* Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411, 1466–67 (1997) (discussing the dilution of accountability in areas with high resident alien population). Nor may foreign nationals make campaign contributions for any U.S. election to political office. 2 U.S.C. § 441(e) (2012). Foreign governments are bound by a norm of nonintervention, though they may lobby for a more transparent, more inclusive approach to foreign lives. *See, e.g.*, TERRY NARDIN, LAW, MORALITY, AND THE RELATIONS OF STATES 269–70 (1983) (discussing the norm of non-intervention as a basic principle of international law); Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 83 AM. J. INT'L L. 1, 6 (1989) (discussing techniques used by states to affect other states' domestic policies).

party whose interests were not represented in the relevant decisionmaking.[16]

Finally, a practical reason for defining foreign lives along political boundaries is that the nature of prospective decisionmaking makes it challenging to identify individual-level information about who is likely to be affected by a policy. It can be difficult enough to determine the groups who are affected by considering the location of affected people when they are put at risk; and for the substantive reasons discussed below, we think that the groups we have identified are particularly relevant to political decisionmaking. That said, we recognize that this group-based distinction is imperfect,[17] and embrace future work refining this definition or applying our methodology to additional groups of persons who might be treated as "foreign."

With these political challenges in mind, we see two significant potential sources of influence of foreign interests on the U.S. regulatory and other decisionmaking processes regarding the resource valuation of foreign lives. The first is international law, which we discuss more below. In brief, international law provides a mechanism by which states can create and consent to resource redistribution to protect foreign lives. States may negotiate over both the existence of foreign valuation and the methodology by which it is accomplished. Of course, they can also attempt to negotiate away the underlying causes prompting the need for such valuation. For instance, states can both negotiate general agreements to reduce emissions causing climate change as well as more specific agreements that force regulators to account for risks

---

[16] *See* N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 196 (6th ed. 2012) (defining negative externalities as arising where one actor's behavior imposes uncompensated costs on another actor); *see generally* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). Of course, not all externalities are negative; it is also possible for states or other government bodies to impose positive externalities on one another. *See* Gideon Parchomovsky & Peter Siegelman, *Cities, Property, and Positive Externalities*, 54 WM. & MARY L. REV. 211 (2012) (chronicling the possibility and practicalities of both positive and negative externalities across municipal borders).

[17] People are mobile, and even within domestic borders, people and groups can vary widely in the amount of influence they carry over institutional decisionmaking processes. Under our approach, for example, foreign nationals living within the United States (documented or not) would count as "domestic" lives. As regulators currently include them as beneficiaries of regulatory policy, their categorization as "domestic" lives will hold in this specific category regardless of those groups' conceptions of their identity and their relative political influence.

to foreign lives in determining how to reduce emissions or even more fine-grained agreements that dictate to regulators exactly how to account for risks to foreign lives in determining how to reduce emissions. Such negotiations might, but need not, create reciprocal obligations.

The second source of influence is the implementation of domestic preferences through domestic willingness to invest resources to protect foreign lives. But even if domestic populations have such preferences, this distinction between foreign and domestic lives also heightens what we believe to be a difficult but critical question created by nation-based decisionmaking: should states internalize the harm—or benefit—they cause or contribute to foreign persons?

Our multi-part answer to this question is provided in Part IV below. For now, we seek only to lay the groundwork for understanding the political, philosophical, psychological, social, and economic stakes that arise distinctively in response to this question.

2. Competing Philosophical Accounts of Obligations. Debates between philosophers on the nature of obligation have a complex and storied history, and here we mean only to sketch the parameters of the debate insofar as they relate directly to the question of whether states should value foreign and domestic lives differently. In general, our concern is that failing to distinguish foreign life valuation as an analytical category risks eliding over profound debates between philosophers who see a moral or ethical distinction between foreign and domestic obligations, and those who do not.

As an introduction into these debates, consider Peter Singer's famous hypothetical about a drowning child, which he uses to argue about the relative value of different lives. Singer says:

> [I]f I am walking past a shallow pond and see a child drowning in it, I ought to wade in and pull the child out. This will mean getting my clothes muddy, but this is insignificant, while the death of the child would presumably be a very bad thing . . . . It makes no moral difference whether the person I can help is a

> neighbor's child ten yards from me or a Bengali whose name I shall never know, ten thousand miles away.[18]

Singer's view is cosmopolitan, a philosophical approach to obligation that assumes that people's obligations to one another do not vary along state or national borders.[19]

Some cosmopolitans extend this premise of individual obligations unbounded by geography or political units to governments and other political institutions. Notably for our purposes, they contend that governments either owe legal obligations of social justice to those outside their jurisdiction[20] or that they should voluntarily undertake these obligations[21] because individuals cannot effectively do so.[22] Institutionalizing these obligations overcomes the plausibility constraints on individuals in undertaking strong duties to those far away.[23] Such obligations might arise via consent in domestic politics, via consent at the international level, or most controversially, by virtue of independent legitimacy requirements or natural law recognizing the primacy of the individual.[24]

Much diversity exists among the cosmopolitans' visions of how to distribute resources. While cosmopolitans may agree that all lives matter equally in some intrinsic sense, they must still decide how governments should manage resource distribution. Cosmopolitans might be utilitarians concerned with achieving the most good who

---

[18] Peter Singer, *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFF. 229, 231–32 (1972).

[19] *See* SIMON CANEY, JUSTICE BEYOND BORDERS: A GLOBAL POLITICAL THEORY 3–16 (2005) (outlining competing approaches to international relations, including cosmopolitism). For the essay that presented cosmopolitanism as a modern approach to international obligations, see Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, BOSTON REV., Oct./Nov. 1994.

[20] IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 250 (Will Kymlicka et al. eds., 2000); CHARLES R. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS 153 (1979); Judith Lichtenberg, *National Boundaries and Moral Boundaries: A Cosmopolitan View*, *in* BOUNDARIES: NATIONAL AUTONOMY AND ITS LIMITS 79 (Peter G. Brown & Henry Shue eds., 1981).

[21] Michael J. Green, *Institutional Responsibility for Global Problems*, 30 PHIL. TOPICS 79, 85 (2002).

[22] Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 STAN. L. REV. 1667, 1670–71 (2003) (quoting Martha C. Nussbaum, *Toward a Viable Cosmopolitanism*, Castle Lecture 4 at Yale University 2 (Mar. 1, 2000)).

[23] *See id.* at 1673 (discussing a variety of reasons cosmopolitans believe these duties belong to institutions).

[24] *See* Noah Feldman, *Cosmopolitan Law?*, 116 YALE L.J. 1022, 1037–42 (2007).

simply expand the relevant population of whose good is considered. Or they may be contractarians more concerned with particular types of distributional effects or minimum thresholds.[25] Given plausibility constraints like the difficulties in monitoring the distant impacts of local actions; the additional transaction costs incurred from engaging in distant interventions; and the difficulties in coordinating interventions with other potential actors, even a strong version of cosmopolitan values need not dictate an equal expenditure on all lives in all instances.

A recent resurgence of cosmopolitanism has been accompanied by a sustained scholarly critique of its application at both the individual and institutional level. Some object that cosmopolitanism does not provide a sufficient account of the content of the obligations owed to those outside of the nation-state.[26] Without a clear vision of what resource tradeoffs are demanded, they suggest cosmopolitanism is insufficiently theorized.[27] Others conclude that regardless of the appeal of resource cosmopolitanism, humans simply cannot reason to and accept such strong obligations to those far away.[28] As detailed below, such limitations may arise from psychological biases or the difficulties of human flourishing within a framework making such intense demands. Even many theorists sympathetic to cosmopolitanism ethics emphasize the importance and value of living within distinct, rooted political communities[29] and reject strong movements to redistribute significant resources away from the state and other smaller political units. These theorists worry that cosmopolitanism's abstractions are too far removed from the

---

[25] For instance, Martha Nussbaum is not a Rawlsian but her capabilities approach might be seen as a complement to Rawls's vision of social justice. *See generally* Martha C. Nussbaum, *Duties of Justice, Duties of Material Aid: Cicero's Problematic Legacy*, 8 J. POL. PHIL. 176 (2000).

[26] Stephen Nathanson, *Crude Alternatives*, BOSTON REV., Feb./Mar. 1995, *available at* http://new.bostonreview.net/BR20.1/nathanson.html.

[27] *Id.*

[28] *Id.*; *see also* Bernard Yack, *Cosmopolitan Humility*, BOSTON REV., Feb./Mar. 1995, *available at* http://new.bostonreview.net/BR20.1/yack.html (arguing that ethical cosmopolitanism "promotes and unjustifiable pride incurability to reason our way to universally applicable moral and political standards"); Mildred F. Reel, *A Nature More Than Human*, BOSTON REV., Feb./Mar. 1995, *available at* http://new.bostonreview.net/BR20.1/reel.html (considering the individual hurdles to achieving cosmopolitanism).

[29] Kwame Anthony Appiah, *Loyalty to Humanity*, BOSTON REV., Oct./Nov. 1994, at 10 (discussing cosmopolitanism and patriotism).

shared beliefs and values necessary to rational deliberation and contend the mere acknowledgement of a common humanity "cannot be the basis for resolving differences."[30]

Rather, many philosophers and political theorists take the view that state and national borders *do* affect obligations—particularly the obligations of states and nations.[31] Notable liberal political theorists like Locke and Rawls suggest the obligations and coercive authority of the state arise from the consent of those who have agreed to its existence. Under this view, the proper source of concern for a government and recipients of its resources are its own constituents. That said, assuming the state's obligations flow to those with political membership, even those skeptical of strong versions of cosmopolitanism recognize that relationship may embolden the state to impose duties on its own members not to harm others outside the state.[32] Such obligations may be imposed via international or domestic law so long as those obligations are undertaken within democratically permissible means.[33] In crafting obligations to value foreign lives in such a framework, pragmatists like Jack Goldsmith argue the United States should only do so when such obligations promote the national interest.[34] However such interests are defined, he contends the primary consideration must be the interests of U.S. citizens rather than the interests of all global citizens.[35]

Thus one set of distinctions between valuing domestic and foreign lives can be drawn based on philosophical distinctions about who owes whom obligations, and upon the role of state and national borders in forming and satisfying those obligations. Recognition of foreign valuation as a distinctive analytical

---

[30] *See* Chester A. Janiak, *An Empty Morality*, BOSTON REV., Feb./Mar. 1995, *available at* http://new.bostonreview.net/BR20.1/janiak.html (accepting the pedagogical but not political virtues of cosmopolitanism).

[31] *See, e.g.*, Nussbaum, *supra* note 19 (summarizing nationalist and statist approaches).

[32] *See* Feldman, *supra* note 24, at 1051 (providing examples like congressional prohibitions on sex tourism).

[33] Most international law has a pedigree at least minimally consistent with the consent that justifies state level coercive authority. *See* Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1845–46 (2000) (discussing the role of consent in international law).

[34] However, Goldsmith does support actions which are both in the state's national interest and help those abroad. *See generally* Goldsmith, *supra* note 22.

[35] *Id.* at 1668–69.

category can help delineate the moral and ethical stakes of this issue, and can draw public and philosophical attention to the question of how and when foreign harms create an obligation in governments to commit scarce domestic resources for foreign benefit. For cosmopolitans who believe that ethically and/or morally there should be no distinction drawn between domestic and foreign lives, we believe that carving out the category of foreign life valuation can nevertheless bring attention to political and psychosocial factors that can contribute to foreign and domestic lives actually being treated differently. And for non-cosmopolitans, the distinction has even more theoretical heft, as the distinction between foreign and domestic lives will have profound moral and ethical implications.

3. Psychological Challenges. Another way to evaluate potential distinctions between domestic and foreign lives is to assess people's cognitive processes when they are evaluating risks. A number of identifiable biases and heuristics may lead to differences in how people value domestic and foreign lives. We identify a few such psychological phenomena here, although as with the other distinctive aspects of foreign life valuation we catalog in this Part, we believe that additional research and attention to the psychological distinctiveness of foreign life valuation would be helpful both theoretically, and as a guide to policy development.

One cognitive phenomenon relevant to foreign life valuation is that of "psychic numbing."[36] Related to post-traumatic stress disorder, psychic numbing occurs as a sort of emotional desensitization, which allows people to detach from horrific information.[37] This detachment can even be detected physically,

---

[36] *See* Paul Slovic & David Zionts, *Can International Law Stop Genocide When Our Moral Intuitions Fail Us?*, *in* UNDERSTANDING SOCIAL ACTION, PROMOTING HUMAN RIGHTS 100 (Ryan Goodman, Derek Jinks & Andrew K. Woods eds., 2012) [hereinafter Slovic & Zionts, *Can International Law Stop Genocide?*] (considering psychic numbing as, *inter alia*, the "turning off" of feelings); Paul Slovic, *"If I Look at the Mass I Will Never Act": Psychic Numbing and Genocide*, *in* 2 JUDGMENT & DECISION MAKING 79, 90 (2007) (describing psychic numbing as "the collapse of compassion"); Paul Slovic et al., *Psychic Numbing and Mass Atrocity*, *in* THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY 126 (Eldar Shafir ed., 2013) [hereinafter Slovic et al., *Psychic Numbing*] (same).

[37] *See* Slovic et al., *Psychic Numbing*, *supra* note 36, at 133 (discussing psychic numbing in the context of genocide and nuclear attacks); *see also* Bessel A. van der Kolk, *The Body Keeps the Score: Memory and the Evolving Psychobiology of Post Traumatic Stress*, 1 HARV. REV. PSYCHIATRY 253 (1994).

as the detached decisionmaker emits fewer neurotransmitters related to emotion.[38]

Like many heuristics, psychic numbing can serve a useful purpose in many contexts. In fact, a psychiatrist first coined the term to refer to the "turning off" of emotion that can allow people to respond to horrific events—such as the aftermath of the bombing of Hiroshima—without immediate emotional breakdown.[39] Yet this effect has a dark side as well; as psychologist Paul Slovic explains, it can lead to a "collapse of compassion" when many lives are at risk.[40]

Slovic and co-authors explain this collapse by reference to the "affect heuristic," or the cognitive shortcut that people use to assign meaning to things according to their emotional impact.[41] Affect, or the sense that something is good or bad, plays a critical role in allowing people to understand and use information.[42] It plays a particularly important role in what is sometimes called "System 1" thinking, which tends to be quick, intuitive, and heuristic-dependent.[43] This contrasts with "System 2" thinking, which is slower and more analytical.[44]

When people attach less affect to a particular life at risk, they will care less about saving that life, and are then less interested in investing resources to save it. Slovic and co-authors chronicle a number of factors that can influence how people evaluate various mortality risks.[45] One key element is the extent of the risk; as

---

[38] *See* Jean Decety, Chia-Yan Yang & Yawei Cheng, *Physicians Down-Regulate Their Pain Empathy Response: An Event-Related Brain Potential Study*, 50 NEUROIMAGE 1676, 1677 (2010) (discussing a brain study performed on physicians witnessing painful procedures).

[39] *See* ROBERT JAY LIFTON, DEATH IN LIFE: SURVIVORS OF HIROSHIMA 32 (1967) (discussing coping mechanisms of survivors).

[40] Slovic et al., *Psychic Numbing*, *supra* note 36, at 130–33.

[41] *Id.*

[42] *See* George F. Loewenstein et al., *Risk as Feelings*, 127 PSYCHOL. BULL. 267, 268 (2001).

[43] *See* Slovic et al., *Psychic Numbing*, *supra* note 36, at 127 (describing System 1 as "intuitive, automatic, natural, nonverbal, narrative, and experiential"). *See generally* DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY (Shelly Chaiken & Yaacov Trope eds., 1999); DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011) (popularizing the concept of dual-process thinking).

[44] *See* Slovic et al., *Psychic Numbing*, *supra* note 36, at 127 (describing System 2 as "analytical, deliberative, verbal, and rational").

[45] *Id.* at 127–30 (discussing different factors).

more people's lives are threatened, people become less and less concerned about additional lives. In other words, "the importance of saving one life is great when it is the first, or only, life saved but diminishes marginally as the total number of lives saved increases."[46]

A related and important element of affect is the identifiability of a victim.[47] People are far more concerned about—and far more willing to invest their resources in protecting—identifiable lives than unidentified or statistical ones.[48] Consider the now-famous case of Baby Jessica, whose pitiful experience of being trapped in a well pulled heartstrings and wallets across the country, leaving her with a six-figure trust fund.[49] The impact of identifiability has also been studied empirically. In one study, respondents were given the opportunity to donate to Save the Children.[50] In one version, respondents were asked to donate money to feed an identifiable victim—"Rokia," a seven-year-old African girl—and in another, they were told statistical information about the extent of the hunger problem in Africa, and asked to donate to help.[51] Participants shown the picture of Rokia donated, on average, more than twice the amount as people given only the statistical information.[52] Furthermore, when participants in a third version were given both the picture of Rokia and the statistical

---

[46] *Id.* at 129; *see also* David Fetherstonhaugh, Paul Slovic, Stephen M. Johnson & James Friedrich, *Insensitivity to the Value of Human Life: A Study of Psychophysical Numbing*, 14 J. RISK & UNCERTAINTY 283, 293–94 (1997) (finding that people's willingness to allocate a $10 million grant required 100,000 lives to be saved where 290,000 were at risk, but only 9,000 lives to be saved when 15,000 were at risk).

[47] *See* Slovic et al., *Psychic Numbing*, *supra* note 36, at 131–33 (summarizing research comparing investments in protecting identifiable versus unidentifiable lives); Deborah A. Small & George Loewenstein, *Helping* a *Victim or Helping* the *Victim: Altruism and Identifiability*, 26 J. RISK & UNCERTAINTY 5 (2003) (discussing the difference in reaction to an identified victim versus an unidentified statistical victim).

[48] Small & Loewenstein, *supra* note 47, at 5.

[49] *Id.*

[50] George Loewenstein, Deborah A. Small & Jeff Strnad, *Statistical, Identifiable, and Iconic Victims*, *in* BEHAVIORAL PUBLIC FINANCE 32, 37–38 (Edward J. McCaffery & Joel Slemrod eds., 2006).

[51] Deborah A. Small, George Loewenstein & Paul Slovic, *Sympathy and Callousness: The Impact of Deliberative Thought on Donations to Identifiable and Statistical Victims*, 102 ORG. BEHAV. & HUM. DECISION PROCESSES 143, 152 app. a–b (2007).

[52] *Id.* at 146.

information, they still donated significantly less than when they were given only her picture.[53]

Slovic has argued that these cognitive mechanisms, working together, are explanatory of why the international community allows genocides to continue, even after widespread awareness[54] and the existence of cheap and effective interventions. Other theorists have also hypothesized that the deadliness of modern combat methods are possible because of a type of psychic numbing.[55]

Of course statistical information may be available about domestic mortality risks as well as about foreign mortality risks. But the qualities that make a person identifiable and relatable—that cue an affective response to that person's plight—may be strongly related to the political, geographic, or social distance of the potential victim from the potential intervener.[56] We often hear about personal troubles being faced by those in our community; these people's troubles, and stories, are often presented individually, as part of a human-interest story on the news, or as an anecdote related in conversation. If we contrast this to the way we generally learn about foreigners—about people beyond our communities, and beyond our national borders—we might find a systematic difference in how we learn to relate to domestic and foreign plights.

In sum, various cognitive phenomena suggest that people may tend to develop very different preferences about resource allocation, depending upon whether the people affected are identifiable or psychologically distant. This suggests that foreign life valuation should also be considered distinctive from a psychological perspective.

4. Social Challenges: "Otherness" and Foreign-ness. Individual people's willingness to allocate resources to protect "foreigners" may also be systematically impacted by sociological and cultural factors, such as the impact of "othering" and the distinctions that

---

[53] *Id.* at 149.

[54] Slovic & Zionts, *Can International Law Stop Genocide?*, *supra* note 36, at 101; Slovic et al., *Psychic Numbing*, *supra* note 36, at 126.

[55] *See* Loewenstein et al., *supra* note 50, at 36 (summarizing this literature).

[56] *See* Yaacov Trope & Nira Liberman, *Construal-Level Theory of Psychological Distance*, 117 PSYCH. REV. 404 (2012) (presenting the concept of "construal-level theory," which posits that people process problems and information differently depending upon the psychological "distance" through which their perceptions are filtered).

people tend to draw between people in an "in-group" and those in an "out-group."[57]

The concept of "the Other" has an academic pedigree tracing back to early continental philosophy[58] and has been highly influential throughout the social sciences as a way to understand the process by which people distinguish groups to which they do not consider themselves to belong.[59] Psychologists working on "othering" have focused on the mechanisms that lead to intergroup distinctions. "In-group bias" is one such mechanism.[60] This bias leads people to exhibit favoritism for members of their own group, such that the same performance elicits a more favorable evaluation; the same interactions elicit a greater reported feeling of camaraderie; and, most relevantly, the same need elicits greater allocation of resources.[61] When people perceive themselves to be in competition with a rival group, these differences are exacerbated.[62]

Some research also shows that perceived "otherness" can interact with people's risk preferences and with the operationalization of biases. For example, one study found that participants' preferences for risk—specifically, whether they tended to be risk-seeking, risk-averse, loss-seeking, or loss-averse—varied systematically depending upon whether the risks being managed would accrue to an "in-group" or to an "out-group."[63] These effects have been shown to be particularly strong in the context of mortality risks, as opposed to risks to public

---

[57] Marilynn B. Brewer & Roderick M. Kramer, *The Psychology of Intergroup Attitudes and Behavior*, 36 ANN. REV. PSYCHOL. 219, 223–24 (1985) (discussing the reciprocal relationship between the formation of categories and the consequences of categorization).

[58] *See* G.W.F. HEGEL, THE PHENOMENOLOGY OF MIND 228–40 (J.B. Baillie trans., 2d ed. 1931) (discussing "the master-slave dialectic").

[59] *See* EDWARD W. SAID, ORIENTALISM 42–48 (1st ed. 1978) (popularizing the term in a critique of Western representations of non-Western societies and cultures).

[60] *See* Marilynn B. Brewer, *In-Group Bias in the Minimal Intergroup Situation: A Cognitive-Motivational Analysis*, 86 PSYCHOL. BULL. 307, 307–08 (1979) (discussing the psychological foundations of inter-group bias).

[61] *See id.* at 311 (discussing the findings of previous studies).

[62] *See* Mina Cikara et al., *Us Versus Them: Social Identity Shapes Neural Responses to Intergroup Competition and Harm*, 30 PSYCHOL. SCI. 306, 308 (2011) (comparing intergroup responses to harm for fans of the New York Yankees and the Boston Red Sox).

[63] *See* X.T. Wang et al., *Social Cues and Verbal Framing in Risky Choice*, 14 J. BEHAV. DECISION MAKING 1, 12 (2001) (explaining individuals' willingness to be more risk-seeking in the context of kinship).

property or personal money.[64] Other studies have found that members of an out-group are less likely to elicit empathic responses than members of an in-group, that even where empathy is elicited, it is far more fragile and prone to disruption,[65] and, most disturbing, that harm to an out-group can even elicit pleasure.[66]

Together, these studies suggest that, insofar as people tend to think of foreign persons as belonging to the out-group, they will likely think very differently about potential risks to foreign lives than about risks to domestic lives. And as we detail in the next Part, those differences might implicitly inform existing resource valuations in the United States.

5. Challenges in Economic Valuation. Foreign life valuation also poses distinctive challenges from the perspective of economic analysis. By way of background, consider that for domestic U.S. regulatory contexts, which routinely rely on people's willingness to pay to avert mortality risks, current practice does not distinguish between different persons or types of persons in valuing domestic mortality risks. Agencies set a single "value of a statistical life," which is now typically between $6 and $9 million, and use that value to monetize the benefits of a policy that can be expected to save any domestic life.[67]

This type of undifferentiated valuation is not without its drawbacks even domestically. One important limitation is that it is indifferent to the amount of life extension purchased with the $9 million. Thus, current regulatory policy spends the same amount to prevent a ninety-year-old from contracting cancer as it does to

---

[64] *See* X.T. Wang, *Framing Effects: Dynamics and Task Domains*, 68 ORG. BEHAV. & HUM. DECISION PROCESSES 145, 153 (1996) (finding that participants were more risk-seeking in regards to mortality risks than in the other contexts, and that risk-seeking in the family context occurred for mortality risks although it did not occur in other risk contexts).

[65] *See* Mina Cikara et al., *Us and Them: Intergroup Failures of Empathy*, 20 CURRENT DIRECTIONS IN PSYCHOL. SCI. 149, 150 (2011) (finding that out-group suffering elicited less empathetic responses than in-group suffering, and that empathetic responses that were elicited were more "fragile" and prone to "disruption").

[66] *See* Cikara et al., *supra* note 62, at 308 (finding that, where out-group members are perceived as competitors or rivals—in this experiment, New York Yankees and Boston Red Sox fans—out-group failure or harm can be perceived as pleasurable, when the same activity within the in-group is perceived as painful).

[67] *See* Robinson, *supra* note 2; Sunstein, *supra* note 2.

prevent a nine-year-old from contracting cancer.[68] If the length of one's life is important, this method is problematic.[69] Relatedly, current policy does not distinguish between the amount spent to protect people who are currently alive and those who will exist, if they do exist, only in the future.[70] Again, regulators spend the same underlying amount—about $9 million—to prevent a single death in either of these groups. As Rowell has pointed out, this method imbeds what should be a controversial assumption into valuation practice: namely, whether current people should be required to allocate the same quantity of current resources towards protecting future lives as are allocated to protecting those who are currently alive.[71] An alternative valuation practice would seek to elicit *current* people's willingness to pay to protect future persons from mortality risks.[72] These figures may vary widely, depending upon the extent to which current people internalize risks to future persons.[73]

In the context of foreign life valuation, economic valuation practices pose a similar conundrum of who the source of valuation should be. There are at least four potential economic approaches to the valuation of foreign life, all of which point to different quantities of resource allocation, and all of which have identifiable challenges and drawbacks. These approaches to foreign life valuation could reflect: (1) the amount that *domestic* persons would pay to protect *domestic* lives; (2) the amount that *domestic* persons would pay to protect *foreign* lives; (3) the amount that *foreign* persons would pay to protect *their own* lives; or (4) no value

---

[68] Sunstein, *supra* note 2; *see also* U.S. ENVIRONMENTAL PROTECTION AGENCY, NAT'L CTR. FOR ENVIRONMENTAL ECONOMICS, VALUING MORTALITY RISK REDUCTIONS FOR ENVIRONMENTAL POLICY: A WHITE PAPER 10 (2010) (discussing guidelines prohibiting change in valuation based on differences in population characteristics); Arden Rowell, *The Cost of Time: Haphazard Discounting and the Undervaluation of Regulatory Benefits*, 85 NOTRE DAME L. REV. 1505, 1519 n.44 (2010) (explaining and critiquing current EPA practices).

[69] *See, e.g.*, W. Kip Viscusi, *The Value of Risks to Life and Health*, XXXI J. ECON. LITERATURE 1912, 1920 (1993) (explaining how to account for age in life evaluations).

[70] *See* Richard L. Revesz, *Environmental Regulation, Cost Benefit Analysis, and the Discounting of Human Lives*, 99 COLUM. L. REV. 941, 948, 987 (1999) (questioning the current policy of discounting future generation's lives as unethical).

[71] *See* Rowell, *supra* note 68, at 1535–36 (discussing the current practice of assuming underlying values remain constant through time).

[72] *Id.*

[73] *See id.* (discussing variations in value depending on how current people internalize risks).

at all.[74] The choice between these methods—which we discuss in more depth in Part IV below—again creates distinctive challenges for foreign life valuation that distinguish it from domestic valuation contexts.

Of course, the choice between these methods may be less pressing if the methods would lead to the same resource allocations. For instance, if domestic persons do not actually attach any value to foreign lives, then there will be no outcome difference between choosing between valuation methods (2) and (4) above; spending the amount that domestic persons would pay to protect foreign lives would result in zero expenditure. An empirical economic question, then, is whether Americans actually value foreign lives at all—whether they are willing to dedicate their resources to protect foreign persons. One way to answer this question is to turn to actual practice, in regulatory and non-regulatory realms, to see how the United States as a government values foreign lives—a method we look at in Part III below. But another way to answer this question would be to turn to stated-preference studies, like those that are often used to determine domestic willingness to pay to protect domestic lives.

Some evidence on this front comes from a provocative set of studies by David Dana.[75] Dana ran several stated-preference studies asking people how much they would donate to save foreign civilizations and lives from disasters.[76] He had two particularly interesting findings. First, individual study participants expressed a willingness to allocate significant money towards protecting foreign lives and settlements.[77] This suggests that individual Americans appear willing to pay significant sums of money to gain foreign benefits—a finding supported by the robust nature of U.S. residents' private charitable giving abroad.[78] Second, in line with the findings above, American participants

---

[74] *See infra* Part IV.D.

[75] 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 Econs. Series, Working Paper No. 09-417, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm.7abstract_id=1524337.

[76] *See id.* at 27–28.

[77] *See id.* at 23 (discussing the similar value placed on domestic and foreign lives).

[78] *See id.* at 11 (estimating combined U.S. charitable giving and remittances at $95.2 billion in 2005).

exhibited *significant differences* in their willingness to pay to prevent foreign and domestic disasters.[79] The study does not speak to why participants selected these values or why there was a difference between American and foreign valuations. Moreover, these studies were performed without any budget limitation—a common drawback to stated-preference studies, but perhaps a particularly problematic one where the question is how resources should be allocated under conditions of scarcity. Still, these studies provide a valuable starting point for understanding the way that Americans as individuals appear to value foreign lives.

III. FOREIGN LIFE VALUATION: CURRENT PRACTICES IN THE UNITED STATES

Governments must value lives outside of their political borders. Political borders are porous in many ways; they may be crossed by people, by air and water, by air and water-borne pollutants, or by radio waves and wireless signals.[80] As a result of technological changes and globalization, the effects of domestic decisions now increasingly extend past domestic borders.[81] Thus, the internal decisions of individual countries can have important implications for their neighbors, or even—as with climate change policy—the entire world.[82]

Given that various policies are likely to create a different allocation of harms and benefits, both inter- and intra-nationally, governments have multiple potential strategies to manage cross-border effects. For instance, governments could actively seek to externalize the harms of internal policies and thus place their own citizens at a comparative advantage.[83] In contrast, governments

---

[79] *See id.* at 23 (discussing Americans differing willingness to pay based on geography; American participants were willing to pay more to protect European cities than cities on other continents).

[80] *See* Anthony J. McMichael, *Globalization, Climate Change, and Human Health*, 368 N. ENG. J. MED. 1335, 1335 (2013) (discussing the increasing connectivity of modern society).

[81] *See* James M. Lindsay et al., *The Globalization of Politics: American Foreign Policy for a New Century*, COUNCIL ON FOREIGN RELATIONS, Winter 2003, at 3–4, *available at* http://www.cfr.org/world/globalization-politics-american-foreign-policy-new-century/p6330 (highlighting the effects of globalization on domestic politics).

[82] For a more detailed discussion on globalization and environmental policy, see generally McMichael, *supra* note 80.

[83] *See supra* Part IV.B.*2*.

could make their decisions as cosmopolitans, investing the same resources to protect foreign and domestic persons.[84] Still another option would be for governments to adopt a studiedly neutral approach to foreign harms and benefits, implementing domestic policies where they seem best for domestic populations, and letting foreign harms and benefits fall as they will.[85] Politics and law may place constraints on any of these strategies; for instance, as we discuss below, international legal obligations may constrain governments from pursuing the externalization of harm strategy.[86] Yet even with existing legal constraints, significant variance in potential strategies for foreign life valuation exists.

Which strategies do governments actually employ for foreign valuation? In this Part, we work to show how one country—the United States—values one foreign resource—lives—across multiple contexts. We believe this is the first discussion pulling together multiple forms of foreign life valuation into a single body of analysis. We think that cross-context comparisons of foreign life valuation policy are fruitful in their own right, as they allow for reflection upon whether differences in policy match up to important distinctions in different governing contexts. We pick up on these comparisons in Part IV, when we present prescriptions for managing differences in valuation contexts.

To this end, we begin this Part by summarizing the United States' approach to valuing foreign lives. We analyze two samples of recent U.S. regulation: the seven largest regulations pending at a single point in time, and a list of pending regulations that have invoked the "social cost of carbon."

We then discuss U.S. practice in non-regulatory contexts including in international armed conflict, torts committed by U.S. armed forces, and disaster aid. We conclude from these samples that the United States has no single formal policy or theoretical approach for valuing foreign lives. Rather, its practices vary strikingly both across and within legal contexts, such that the United States sometimes expends little or nothing to protect foreign lives, sometimes equivalent amounts on foreign and

---

[84] *See supra* Part II.B.*2*.
[85] *See supra* Part II.B.*2*.
[86] *See supra* Part II.B.*1*.

domestic lives, and most surprisingly, sometimes expends more on foreign lives. No explicit theory unifies these varying practices.

A. REGULATORY CONTEXTS

In the United States, regulatory decisions are primarily made by regulatory agencies.[87] Agency decisions are guided by a series of Executive Orders, which are directives issued by the President.[88] The Office of Information and Regulatory Affairs (OIRA) coordinates and reviews these regulatory analyses to ensure that they comply with the President's orders.[89]

Two particularly important Executive Orders direct U.S. regulators to perform cost-benefit analyses prior to promulgating major federal regulations.[90] To comply with these orders, regulators "monetize" the various expected costs and benefits of proposed regulations.[91] To value non-monetary regulatory effects like mortality risks, OIRA directs U.S. regulators to rely upon empirical studies that seek to measure the amount of money people are willing to pay for those effects.[92] Regulators then use these figures to represent the value of the underlying goods. Current practice is to expend between $6 million and $9 million

---

[87] For an accessible primer on how U.S. regulations are made, see SUSAN E. DUDLEY & JERRY BRITO, REGULATION: A PRIMER (2d ed. 2012).

[88] The constitutional basis for these orders is debated, but it is generally traced to two portions of the U.S. Constitution: Article II, Section 1, Clause 1 (the grant of "executive power"), and Article II, Section 3, Clause 4 (directing the Executive to "take Care that the Laws be faithfully executed"); *see also* DUDLEY & BRITO, *supra* note 87, at 23–33 (discussing the constitutional basis of regulatory power).

[89] *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, MEMORANDUM FOR THE HEADS AND ACTING HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES (Mar. 4, 2009).

[90] *See* Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3821 (2011). When considering significant rules, agencies are required to perform a cost-benefit analysis whenever it is permitted by law for them to do so. *See id.* (requiring cost-benefit analyses "to the extent permitted by law"); Exec. Order 12,866, 3 C.F.R. 638, 639 (1993) (requiring various principles of regulation, including implementation of cost-benefit analysis, "to the extent permitted by law and where applicable").

[91] For the Office of Management and Budget's guidance to regulators on how to perform cost-benefit analyses, see OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-4, REGULATORY ANALYSIS (2003). For a discussion of agency monetization policy, see Rowell, *supra* note 68, at 1517–20.

[92] *See* Rowell, *supra* note 68, at 1525.

per domestic life saved.[93] This monetization is commonly called the "value of a statistical life," or "VSL."[94]

1. Survey of Practice: How Agencies Value Foreign Lives. In an important document called "Circular A-4" that guides agencies in developing their valuation practices, the Office of Management and Budget directs agencies to set the scope of their regulatory cost-benefit analyses in the following way: "Your analysis should focus on benefits and costs that accrue to citizens and residents of the United States. Where you choose to evaluate a regulation that is likely to have effects beyond the borders of the United States, these effects should be reported separately."[95]

What does it mean to "focus" on "benefits and costs that accrue to citizens and residents of the United States"? Does it mean that agencies should ignore foreign benefits (and costs), or calculate the domestic impact of foreign benefits (and costs), or count foreign benefits (and costs) whenever they happen to arise in an analysis, but not to spend additional resources seeking them out? Or some fourth alternative? If agencies should take some account of foreign benefits and costs—even while "focusing" on domestic costs—what approach to valuation should they use? We address some of the prescriptive answers to these questions in Part IV below, where we recommend that agencies adopt as a default strategy a foreign valuation approach that calculates the domestic impact of foreign benefits and costs. In the meantime, however, we believe it is useful to examine how U.S. regulatory agencies manage foreign life valuation in practice.

We turned to two data sets of regulations to determine agencies' actual practice. Our data sets were: (1) the seven largest pending regulations at a single point in time (August 2011),[96] and (2) a list of rules incorporating a measure of the "social cost of carbon,"

---

[93] *See* Sunstein, *supra* note 2; Robinson, *supra* note 2.

[94] *See* OFFICE OF MGMT. & BUDGET, REGULATORY IMPACT ANALYSIS: A PRIMER 10 (2011), *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/reg pol/circular-a-4_regulatory_impact-analysis_a-prime.pdf. These figures are based on two kinds of studies: contingent valuation studies, which rely on surveys that ask people to value small mortality risks, and wage-risk tradeoff studies, which look at the amount of money people receive in wages in exchange for bearing additional mortality risks. *See* Rowell, *supra* note 68, at 1524–32.

[95] *See* OFFICE OF MGMT. & BUDGET, CIRCULAR A-4, *supra* note 91, at 9.

[96] *See infra* Part III.A.*1.a.*

which can be used to value foreign lives in the context of climate change.[97] We then reviewed the RIAs and proposed rules themselves for evidence of agency policy in foreign life valuation.[98] The results are reported below.

a. Treatment of Foreign Lives in the Seven Largest Regulations. The first data set, of large regulations, was compiled by reference to a letter from President Barack Obama to John Boehner, the Speaker of the House of Representatives, identifying the seven largest regulations pending as of August 2011.[99] Each of these regulations was expected to have an impact of over $1 billion on the U.S. economy.[100] These RIAs were chosen for analysis on the grounds that they were large, important rules presumably with concurrently thorough RIAs and a higher chance of having international impacts, such that some valuation of foreign life might be appropriate.

As Table 1 summarizes, although all seven rules included a quantified cost-benefit analysis,[101] attached an explicit VSL to domestic life-saving ranging from $3.3 million to $9.1 million, and involved mortality risks that might be reasonably expected to also apply in some quantity abroad,[102] *none* of these rules attaches *any* explicit value to foreign lives.

---

[97] *See infra* Part III.A.*1.c*.

[98] *See infra* Part IV.

[99] *See* Letter from Barack Obama, President of the United States, to the Speaker of the House of Representatives (Aug. 30, 2011), *available at* http://www.whitehouse.gov/the_press_office/2011/08/30/letter-president-speaker-house-representatives.html (detailing the President's response to a request for pending rules that would cost over $1 billion).

[100] *Id.*

[101] Note that EPA considers itself to be barred from considering cost in setting National Ambient Air Quality Standards, under *Whitman vs. American Trucking*. *See, e.g.*, 78 Fed. Reg. 3086, 3089 ("In setting the NAAQS, EPA may not consider the costs of implementing the standards. This was confirmed by the United States Supreme Court in *Whitman v. American Trucking Associations*, 531 U.S. 457, 465–72, 475–76 (2001), as noted in section II.A of this rule. As has traditionally been done in NAAQS rulemaking, EPA has conducted a Regulatory Impact Analysis (RIA) to provide the public with information on the potential costs and benefits of attaining several alternative PM2.5 standards. In NAAQS rulemaking, the RIA is done for informational purposes only, and the final decisions on the NAAQS in this rulemaking are not in any way based on consideration of the information or analyses in the RIA.").

[102] In the Ozone rule, for example, EPA recognizes that ozone crosses borders in its discussion of the potential impact of Canadian and Mexican pollution on U.S. attainment of the standards. *See* National Ambient Air Quality Standards for Ozone, 75 Fed. Reg. 2938, 3038 (proposed Jan. 19, 2010) (to be codified at 40 C.F.R. §§ 50, 58).

Table 1. Domestic and Foreign VSLs in Seven Largest Regulations.[103]

RULE	AGENCY	SOURCE OF RISK	DOMESTIC VSL	FOREIGN VSL
Reconsideration of the 2008 Ozone National Ambient Air Quality Standard	EPA/ NHTSA	Air pollution - ozone and particulate matter emissions	$6.6 mil (2000$)	None
Mercury and Air Toxics Standards for the Oil and Natural Gas Industry	EPA	Air pollution - hazardous air pollutants, including mercury	$6.3 mil (2000$)	None
National Emissions Standards for Hazardous Air Pollutants for Major Sources	EPA	Air pollution - particulate matter precursors	$9.1 mil (2008$)/ *$6.6 mil (2000$)	None
Hazardous Solid Waste Mgmt System & Disposal of Coal Combustion Residuals from Electric Utilities	EPA	Groundwater contamination from coal combustion disposal	$8.8 mil (2008$)	None
Federal Motor Vehicle Safety Standard: Rearview Mirrors	NHTSA/ DOT	Backover automobile crashes	$6.1 mil (2006$)	None
Electronic On-Board Recorders for Hours-of-Service Compliance	FMCSA/ DOT	Automobile crashes due to driver fatigue	$3.3 mil & $8.7 mil (2008$)	None
Hours of Service of Drivers	FMCSA/ DOT	Automobile crashes due to driver fatigue	$6.0 mil (2008$)	None

[103] *See* OFFICE OF AIR & RADIATION, U.S. ENVTL. PROT. AGENCY, REGULATORY IMPACT ANALYSIS: FINAL NATIONAL AMBIENT AIR QUALITY STANDARD FOR OZONE (2011), *available at* http://www.epa.gov/glo/pdfs/201107_OMBdraft-OzoneRia.pdf (addressing mortality risk from ozone and particulate matter exposure); OFFICE OF AIR QUALITY PLANNING & STANDARDS, U.S. ENVTL. PROT. AGENCY, REGULATORY IMPACT ANALYSIS FOR THE FINAL MERCURY AND AIR TOXICS STANDARDS (2011), *available at* http://www.epa.gov/mats/pdfs/20111221MATSfina1RIA.pdf (addressing mortality risk from hazardous air pollutants, including mercury, from the electric power industry); OFFICE OF AIR QUALITY PLANNING & STANDARDS, U.S. ENVTL. PROT. AGENCY, REGULATORY IMPACT ANALYSIS: NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR INDUSTRIAL, COMMERCIAL, AND INSTITUTIONAL BOILERS AND PROCESS HEATERS (2011), *available at* http://www.epa.gov/ttnecas1/regdata/RIAs/boilersriafinal110221_psg.pdf (addressing mortality risk from particulate matter 2.5 precursors, primarily directly emitted particulate matter, sulfur dioxide, and volatile organic compounds (VOCs)); OFFICE OF RES. CONSERVATION & RECOVERY, U.S. ENVTL. PROT. AGENCY, REGULATORY IMPACT ANALYSIS FOR EPA'S PROPOSED RCRA REGULATION OF COAL COMBUSTION RESIDUES (CCR) GENERATED BY THE ELECTRIC UTILITY INDUSTRY (2010) (addressing mortality risks due to groundwater contamination by coal combustion residual disposal units); NAT'L HIGHWAY TRAFFIC ADMIN., U.S. DEP'T OF TRANSP., BACKOVER CRASH AVOIDANCE TECHNOLOGIES, NPRM FMVSS NO. 111 (2010) (addressing mortality risks due to backover crashes, where a vehicle "backs over" a pedestrian or cyclist); FED. MOTOR CARRIER SAFETY ADMIN., U.S. DEP'T OF TRANSP., ELECTRONIC ON-BOARD RECORDERS AND HOURS-OF-SERVICE SUPPORTING DOCUMENTS (2011) (addressing mortality risk due to driver fatigue); FED. MOTOR CARRIER SAFETY ADMIN., U.S. DEP'T OF TRANSP., 2010–2011 HOURS OF SERVICE RULE REGULATORY IMPACT ANALYSIS (2011), *available at* http://www.fmcsa.dot.gov/documents/hos/2011_HOS_Final_Rule_RIA.pdf (addressing mortality risk due to driver fatigue).

Before we describe the process of analyzing these rules, we would like to emphasize that determining the practice of foreign life valuation for these rules was highly time-intensive. It involved review of hundreds of pages of rules, RIAs, and other documentation, as well as educated guesses about the apparent assumptions underlying the analysis. We believe the table above to represent the functional practice of agencies in valuing the impact of domestic regulatory policies on foreign lives and health, at least as that practice is represented by these recent rules. Given the difficulty involved in determining these practices, however, we would characterize current U.S. regulatory policy towards foreign life valuation as highly opaque.

What does it mean that these regulations do not identify a foreign VSL? We see two plausible interpretations: agencies may fail to attach distinctive VSLs to U.S. and foreign lives because they (a) value the lives equally or (b) only value U.S. lives (and therefore implicitly value foreign lives at zero). Importantly, the proposed rules themselves do not clarify the agencies' reasoning in this area. For example, in the 115-page proposed rule for revising the National Ambient Air Quality Standards for Ozone, not a single line addresses the question of what value that EPA has attached to foreign lives. Nor is this omission attributable to an (implausible) assumption that ozone fails to traverse political boundaries. EPA explicitly recognizes the possibility of trans-boundary emissions—of ozone crossing the borders between the United States and neighboring countries—but only from the perspective considering "[t]he impact of foreign emissions on domestic air quality in the United States."[104] Thus, while EPA clearly acknowledges that air pollutants cross borders, it does so only to note that there may be risks to United States' inhabitants from foreign emissions—not to address any risks imposed on foreign inhabitants from U.S. emissions.

Because the proposed rules themselves do not explain agencies' foreign life valuation practices, the only way to determine agencies' actual practice of foreign life valuation is to dig into the RIAs underlying the proposed rules. Reviewing these documents

---

[104] *See* National Ambient Air Quality Standards for Ozone, 75 Fed. Reg. at 3038. In 115 published pages addressing the $19–$90 billion rule, the portion of the rule addressing "trans-boundary emissions" comprises a single paragraph. *Id.*

is highly technical and requires a number of synthetic logical steps to glean agency practices: in this sense, it is extremely opaque. As an example of the significant analytical cost of determining agency practice in this realm, consider the 2011 ozone rule. Ascertaining EPA's foreign valuation practice requires review of two different RIAs: one 558-page RIA created by EPA in 2008, and another 87-page RIA created in 2011 after the 2008 rules were overturned.[105] No section of these 600+ pages explicitly addresses foreign life valuation. There are, however, specifications for the model that EPA used to calculate the total mortality risk reduction that would result from ozone reduction.[106] This model presents the analysts' methods for calculating the population exposed to decreased ozone levels.[107] To calculate population in year *t*, the model starts with population in U.S. counties in the previous year (t-1), adds births, subtracts deaths, and adds (or subtracts) "net international migration in year *t*."[108] This population figure is then used to calculate the total mortalities likely to be prevented by decreasing ozone exposure: in this case, sixteen fewer deaths were expected in 2020 as a result of the change in the rule.[109] EPA then monetizes the benefits of life-saving to create a valuation of the rule's expected benefit, based upon research of people's willingness to pay to avoid the types of domestic risks prevented. As per EPA's typical practice, this involved a $6.6 million VSL (in 2020 dollars) for persons included in the protected population.[110] This led EPA to conclude that the monetized benefits of the mortality risk reductions from the proposed rule were $41.9 million at a 3% discount rate.[111] Because populations *outside U.S. counties* are excluded from the analysis, however, this calculation of the total

---

[105] ENVTL. PROT. AGENCY, FINAL OZONE NAAQS REGULATORY IMPACT ANALYSIS (2008); ENVTL. PROT. AGENCY, REGULATORY IMPACT ANALYSIS: FINAL NATIONAL AMBIENT AIR QUALITY STANDARD FOR OZONE (2011). The 2011 RIA explicitly incorporates the 2008 RIA. *Id.* at 4.

[106] *See* ENVTL. PROT. AGENCY, FINAL OZONE NAAQS REGULATORY IMPACT ANALYSIS, *supra* note 105, at 61-1-6d-2 (explaining the agency's calculation method).

[107] *See id.* at 6d-13 to 6d-17 (identifying the factors used in the calculations).

[108] *Id.* at 6d-14.

[109] *Id.* at 6d-24. This was the central estimate for mortalities averted; the range given was between 11.0 and 21.3. *Id.*

[110] *Id.* at 6d-20.

[111] *Id.* at 6d-24. This was the central estimate of monetized benefit for deaths at a 3% rate; at a 7% rate, the central estimate was $19.9 million. *Id.* at 6d-25.

benefits of the rule does not appear to include any foreign persons affected by decreased ozone exposure. As a result, we conclude that for this particular rule, EPA has chosen to attach *no value*—i.e., $0 in resource valuation—to foreign lives imperiled by U.S. ozone emissions. This is in stark contrast to the $6.6 million that the agency would have been willing to commit for each additional domestic life saved.[112]

As another example, let us consider another rule: the National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters.[113] This seventy-seven-page rule focuses on setting emissions standards for major sources of hazardous air pollutants. In the published rule, EPA estimates that, as a result of decreased exposure to air pollutants, the rule will save between 3,000 and 7,900 lives per year, which it monetizes at $6.6 million per life saved.[114] But does that estimate include both domestic and foreign life-saving, or only the impacts of the rule on U.S. lives? The rule itself does not say. Rather, it refers the reader to the Regulatory Impact Analysis for the explanation of benefits assessment.[115] But the 262-page RIA, while quite detailed in many respects, also fails to answer the question. It provides no explicit analysis of the question of whether foreign health or mortality impacts are included in the calculation of benefits. And in fact, at least on our review, it is impossible to determine from the RIA alone whether foreign persons are part of the population included in the analysis of health impacts. Rather, to determine the population included in the health impacts analysis, the RIA refers the reader to analysis of another rule issued by EPA—in fact, the 414-page RIA to another rule issued by EPA, the so-called "Transport Rule."[116] Only then, by reading about the "air quality

---

[112] *Id.* at 6d-20.

[113] 78 Fed. Reg. 7138 (Jan. 31, 2013) (to be codified at 40 C.F.R. pt. 63). Note that this is the Reconsideration.

[114] *Id.* at 7157. The domestic VSL is expressed in (2000$), or in the dollar-equivalent of the year 2000.

[115] *Id.*

[116] *See* OFFICE OF AIR & RADIATION, U.S. ENVTL. PROT. AGENCY, REGULATORY IMPACT RESULTS FOR THE RECONSIDERATION FINAL RULE FOR NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR INDUSTRIAL, COMMERCIAL, AND INSTITUTIONAL BOILERS AND PROCESS HEATERS AT MAJOR SOURCES 7–8 (2012) [hereinafter NATIONAL EMISSION STANDARDS FOR MAJOR SOURCES RIA], *available at* http://www.epa.gov/airquality/combustion/

modeling platform" used in that rule, can the reader determine that the analysis only applies within the United States.[117]

To determine whether EPA has identified, counted, or monetized the foreign health impact of the National Emission Standards for Major Sources rule, then, any interested reader would need to review 753 pages of dense technical documentation. At which point, the answer appears to be that, for this rule, EPA effectively treats foreign lives (and, in fact, foreign health benefits of all kinds) as having $0 value. This is true despite the fact that EPA itself identified this rule as having potential international impacts,[118] and that its RIA shows multiple maps with expected pollutant exposures stretching over U.S. borders into Canada and Mexico.[119]

In sum, for this set of regulations, the impact of agencies' implicit practices is to value foreign lives at zero; that is, to commit *no* domestic resources towards the protection of foreign lives. This practice has been adopted with no transparent rationale. Furthermore, this apparently untheorized practice is

---

docs/boilerreconfinalria121220.pdf ("For a detailed description of the underlying functions, studies, baseline incidence rates, and population data used in this analysis, please refer to Chapter 5 of the recently proposed Transport Rule (U.S. EPA, 2010e).)." For the referenced Transport Rule, see OFFICE OF AIR & RADIATION, U.S. ENVTL. PROT. AGENCY, REGULATORY IMPACT ANALYSIS FOR THE FEDERAL IMPLEMENTATION PLANS TO REDUCE INTERSTATE TRANSPORT OF FINE PARTICULATE MATTER AND OZONE IN 27 STATES; CORRECTION OF SIP APPROVALS FOR 22 STATES 187 (2011) [hereinafter TRANSPORT RULE RIA], *available at* http://www.epa.gov/airtransport/pdfs/FinalRIA.pdf. Note that this rule also addresses the likely impact of particulate and ozone emissions on foreign persons when it explains that EPA regulators "expect the Transport Rule to produce important public health benefits for populations living in Canada," and that "[a]pproximately 90% of the Canadian population lives within 100 miles of the U.S. border, suggesting that some of the air quality improvements projected in areas near the U.S.-Canada border would be enjoyed by Canadian populations as well." *Id.* at 187. Yet this rule also refuses even to quantify the foreign benefits. That is to say, it not only fails to monetize those benefits; it also provides no estimate of the expected impacts of reductions in pollution exposure to the 90% of the Canadians whom it recognizes are likely to be affected by the rule.

[117] *See* TRANSPORT RULE RIA, *supra* note 116, at 61 ("Although air quality estimate are provided for the entire U.S., the focus of our analysis is on the Eastern U.S. since this is the geographic area of importance for this rule.").

[118] Why did EPA identify this rule as having international impacts if it was not going to address international health impacts? The answer may be that it foresaw impacts on international trade, which it does address. *See, e.g.*, NATIONAL EMISSION STANDARDS FOR MAJOR SOURCES RIA, *supra* note 116, at 4-3 ("In the near term, the Agency's economic model suggests that industries are able to pass on $0.5 billion (2008$) of the major source rule's costs to U.S. households in the form of higher prices. . . . As U.S. prices rise, other countries are affected through international trade relationships.").

[119] *Id.* at 7-17 to 7-19.

extraordinarily opaque, insofar as determining agency practice requires the review of many hundreds of pages of material per regulation and significant technical training to interpret the results.

b. Foreign Life Valuation in the Social Cost of Carbon. The two analyses above focused on determining how U.S. agencies like EPA attach resource valuations to foreign lives when they perform cost-benefit analyses to inform their decisions about whether and how much to regulate. This sub-section also deals with valuation in cost-benefit analysis, but it focuses more specifically on a particular source of mortality risk—mortality risk arising from carbon emission—and even more specifically on a particular monetized construct that is meant to quantify the impacts of carbon emission: the social cost of carbon. We find this a promising area of inquiry because the impacts of excess domestic carbon emissions—which include increased mortality risk from climate disruption—are likely to be felt primarily abroad.[120]

In recent years, analysis of the impacts of carbon emissions focus on creating a quantifiable measure of the "social cost of carbon," or "SCC"—"an estimate of the monetized damages associated with an incremental increase in carbon emissions in a given year."[121] Of course, a great deal of uncertainty exists in creating this measure, and prior to 2010, U.S. agencies adopted a variety of inconsistent practices when calculating the SCC.[122] In 2010, however, the Office of Management and Budget convened an Interagency Working Group (IWG) to create guidance for agencies on how to manage SCC calculations.[123]

---

[120] *Cf.* Jonathan S. Masur & Eric A. Posner, *Climate Regulation and the Limits of Cost-Benefit Analysis*, 99 CALIF. L. REV. 1557, 1591 (2011) (noting that a reduction of U.S. carbon emissions would mainly benefit foreigners).

[121] INTERAGENCY WORKING GROUP ON SOCIAL COST OF CARBON, U.S. GOV'T TECHNICAL SUPPORT DOCUMENT: SOCIAL COST OF CARBON FOR REGULATORY IMPACT ANALYSIS UNDER EXECUTIVE ORDER 12866, at 1 (2010) [hereinafter IWG REPORT], *available at* http://www.epa.gov/oms/climate/regulations/scc-tsd.pdf.

[122] *See* Masur & Posner, *supra* note 120, at 1560–62.

[123] *See* IWG REPORT, *supra* note 121, at 1 (discussing the process used to develop SCC estimates). The IWG converged on estimates that vary significantly—as with all climate disruption quantifications—based on the discount rate chosen. *Id.* at 48–49. For an introduction to the importance of discount rate choice on policy, see David A. Weisbach & Cass R. Sunstein, *Climate Change and Discounting the Future: A Guide for the Perplexed*, 27 YALE L. & POL'Y REV. 433 (2009).

To calculate these figures, the IWG "selected four SCC estimates for use in regulatory analyses."[124] To develop these estimates, the IWG used three models common to peer-reviewed SCC analyses.[125] In creating its estimates, the IWG chose to use *global* rather than domestic SCC estimates.[126] It justified this choice by noting that (1) Circular A-4 *allows* international analysis (while it requires domestic analysis); (2) greenhouse emissions involve global externalities; and (3) the United States cannot solve climate change unilaterally.[127] That said, the report also gives guidance for calculating *domestic* SCC.[128]

The choice between global and domestic SCC informs the question of foreign life valuation because global SCC incorporates some measure of the total global impacts of carbon emissions—including, among other things, the risks to foreign lives posed by climate disruptions like sea level rise.[129] It thus incorporates some level of valuation of foreign lives, insofar as SCC calculations are used to commit actual domestic resources to avert the accrual of global harm. In contrast, the domestic SCC represents only the social costs from carbon that are likely to accrue domestically, to domestic populations. Thus it incorporates only those mortality risks expected to be faced domestically.

Do agencies use SCC in their cost-benefit analyses, and if so, do they use global or domestic SCC in calculating costs and benefits? Jonathan Masur and Eric Posner address this question by analyzing fourteen regulations that have addressed the benefits of reduced carbon emission.[130] Some agencies used global SCC; some used the domestic estimates.[131] Or in other words, some agencies incorporated the foreign costs of carbon into their analyses of regulatory impact, and some of them excluded foreign costs of carbon from their analyses. There is no articulated rationale for agencies' choice of method. Furthermore, determining the

---

[124] IWG REPORT, *supra* note 121, at 3.
[125] *Id.* at 5.
[126] *Id.* at 11.
[127] *Id.* at 10.
[128] *Id.* at 11.
[129] *Id.* at 6 (discussing the calculations of Global SCC).
[130] Masur & Posner, *supra* note 120, at 1564–76.
[131] *See id.* at 1593 (noting that only some of the regulations distinguish global and domestic SCCs).

valuation practice of any particular agency in any particular regulation is so opaque that we are unable to replicate some aspects of Masur and Posner's findings.[132] This level of opacity is deeply problematic on its own, even separate from whether global SCC should be incorporated into domestic resource allocation. In general, however, domestic rules adopting a global SCC have the effect of valuing foreign lives at more than zero, although whether these valuations are undertaken as estimates of foreign willingness-to-pay or domestic willingness-to-pay remains opaque.

c. Environmental Statutes that Explicitly Address Foreign Effects. We now turn to the few statutes that do explicitly address foreign effects. While most domestic U.S. environmental statutes remain silent as to their extraterritorial reach, those that do directly consider foreign effects condition their analysis and recovery measures on reciprocity.[133]

The Clean Air Act explicitly addresses the possibility that U.S. emissions could create air pollution problems in a foreign country.[134] More specifically, it permits the EPA Administrator to require both federal and state mitigation of those problems—a substantial commitment of resources, given the exceedingly high costs of mitigation.[135] However, the statute limits the

---

[132] Our failure to replicate relates to the question of how SCC calculations are used by agencies—and specifically whether they are incorporated into the CBA or just used in so-called "sensitivity" analyses. Masur and Posner find that agencies "generally ignored the SCC when performing the cost-benefit analysis used to justify their regulations and instead employed it only in sensitivity tests," which determine "whether the regulation is sensitive to the price placed on alleviating carbon emissions." *Id.* at 1560–61. In our reviews of these same fourteen regulations, however, we find that only one appears to restrict SCC use to the sensitivity analysis. *Cf., e.g.*, Average Fuel Economy Standards Passenger Cars and Light Trucks Model Year 2011, 74 Fed. Reg. 14,196, 14,346, 14,351 (Mar. 30, 2009) (to be codified at 49 C.F.R. pts. 523, 531, 533, 534, 536, 537) (using SCC only in the sensitivity analysis), *with* Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engine and Vehicles, 75 Fed. Reg. 74,152 (proposed Nov. 30, 2010) (40 C.F.R. pts. 85, 86, 1036, 1037, 1065, 1066, 1068; 49 C.F.R. pts. 523, 534, 535 (presenting benefits based on SCC); Energy Conservation Standards for Certain Consumer Products and for Certain Commercial and Industrial Equipment, 75 Fed. Reg. 1122 (Jan. 8, 2010) (10 C.F.R. pt. 431) (using SCC to calculate benefits); Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, 75 Fed. Reg. 14,670 (Mar. 26, 2010) (to be codified at 40 C.F.R. pt. 80) (using SCC to calculate benefits).

[133] *See* Jonathan Remy Nash, *The Curious Legal Landscape of the Extraterritoriality of U.S. Environmental Laws*, 50 VA. J. INT'L L. 997, 1004 (2010) (discussing reciprocity requirements in the Clean Air Act and CERCLA).

[134] 42 U.S.C. § 7415(a)–(b) (2006).

[135] *Id.*

consideration of foreign effects to the extent that the affected foreign nation is one that "the Administrator determines has given the United States essentially the same rights with respect to the prevention or control of air pollution occurring in that country as is given that country by this section."[136]

Relatedly, CERCLA, which creates the Superfund for expenditures on hazardous waste cleanups, allows "foreign claimants" to access the fund so long as such recovery is "authorized" by a "treaty or an executive agreement between the United States and foreign country involved, or if the Secretary of State, in consultation with the Attorney General and other appropriate officials, certifies that such country provides a comparable remedy for United States claimants."[137]

Even here, where the directions to the implementing agency on the allocation of resources for foreign lives are relatively explicit, significant puzzles remain. For example, how should an agency determine whether a foreign country has given the U.S. "essentially the same rights" as given to it in the Clean Air Act gives to that country? Must the monetary remedies be similar or is it just the access to justice? But these provisions at least provide some roadmap to implementing agencies.

d. Extraterritoriality. When a statute is silent, what should agencies and courts assume, both about the regulation of foreign conduct with domestic effects, and the regulation of domestic conduct with foreign effects? As a general matter, in construing domestic statutes, courts typically disfavor the extraterritorial application of laws,[138] lest attempts to regulate overseas lead to "unintended clashes between [U.S.] laws and those of other nations which could result in international discord."[139] So courts

---

[136] *Id.* § 7415(c).

[137] *Id.* § 9611(l)(4).

[138] *See* Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2878 (2010) (explaining that it is a "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' " (citing EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991))); *see also* Nash, *supra* note 133, at 1000–03 (noting the judicial presumption against extraterritoriality); Masur & Posner, *supra* note 120, at 1591–93 (commenting on the judicial presumption against extraterritoriality).

[139] *See Aramco*, 499 U.S. at 248; *see also* Masur & Posner, *supra* note 120, at 1592 ("[T]he presumption is that Congress has no interest in regulating overseas because doing so may offend the sovereignty of other countries, while producing few benefits for Americans.").

and regulators "must presume '[a domestic law] is primarily concerned with domestic conditions.' "[140]

That said, there are three generally recognized exceptions to the presumption against extraterritoriality: express Congressional intent; where failure to extend the statute would result in adverse domestic effects; and where the activity being regulated is domestic.[141] The first exception to the presumption kicks in where Congress has expressed an intent to regulate extraterritorially.[142] The second exception arises where the impacts of foreign behavior are likely to have substantial domestic effects—what has come to be known as the "effects test" exception.[143] And the final exception occurs "when the conduct regulated by the government occurs within the United States."[144] As the D.C. Circuit explained in *Environmental Defense Fund v. Massey*:

> By definition, an extraterritorial application of a statute involves the regulation of conduct beyond U.S. borders. Even where the significant effects of the regulated conduct are felt outside U.S. borders, the statute itself does not present a problem of extraterritoriality, so long as the conduct which Congress seeks to regulate occurs largely within the United States.[145]

---

[140] *Aramco*, 499 U.S. at 248 (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)).

[141] Envtl. Def. Fund, Inc. v. Massey, 986 F.2d 528, 531 (D.C. Cir. 1993).

[142] *Id.*

[143] *See* Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV. 1455, 1478–82 (2008) (arguing that the effects test has been over-applied and is swallowing the general presumption against extraterritoriality).

[144] *Massey*, 985 F.2d at 531; *see also* Defenders of Wildlife v. Norton, 257 F. Supp. 2d 53, 66–68 (D.D.C. 2003) (holding that action taken within the United States—in damming and diverting the Colorado River—would threaten the well-being of an endangered bird species in Mexico, such that the Endangered Species Act required federal agencies to consult with the Secretary of Interior prior to action). *But see* Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668, 676 (S.D.N.Y. 1991) (holding that the Resource Conservation and Recovery Act (RCRA) did not evince congressional intent for extraterritorial application, such that a domestic defendant who shipped hazardous waste abroad could not be held liable for creating an "imminent and substantial" danger).

[145] *Massey*, 986 F.2d at 531–32 (citing Laker Airways v. Sabena, Belgian World Airlines, 731 F.2d 909, 921 (D.C. Cir. 1984); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 38 (1965) (noting that rules of U.S. statutory law "apply only to conduct occurring within, or having effect within, the territory of the United States"); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 492(1)(a), (b) (1987)).

That said, legal analyses of the extraterritoriality of U.S. environmental statutes are shockingly rare; in a recent survey of the extraterritorial reach of U.S. environmental statutes, Jonathan Nash could find only eight cases on point.[146] Because the category of cases is so small, the extent of extraterritorial application of U.S. environmental laws remains somewhat murky. Generally, however, courts are most willing to apply U.S. environmental regulations extraterritorially when the statute in question explicitly permits extraterritorial application.[147] When a

---

[146] *See* Nash, *supra* note 133, at 1005–11 (finding only eight post-*Aramco* U.S. cases dealing with the extraterritorial reach of domestic U.S. environmental laws). The eight cases are: *Envtl. Def. Fund, Inc. v. Massey*, 986 F.2d 528 (D.C. Cir. 1993) (holding that NEPA applied to the National Science Foundation's decision to incinerate waste in Antarctica because the decisionmaking for whether to burn the waste was not extraterritorial and because of Antarctica's special status as a global commons); *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-AAM, 2004 WL 2578982, at *1 (E.D. Wash. Nov. 8, 2004), *aff'd*, 452 F.3d 1066 (9th Cir. 2006) (holding that CERCLA applied to a Canadian factory that caused a "release" of a hazardous substance within U.S. borders, because waste emitted by the factory had "come to be located" in U.S. portions of the Columbia River); *Arc Ecology v. U.S. Dep't of the Air Force*, 294 F. Supp. 2d 1152, 1160 (N.D. Cal. 2003), *aff'd*, 411 F.3d 1092 (9th Cir. 2005) (holding that "CERCLA does not apply extraterritorially to property located within a sovereign nation is consistent with the decision made by the U.S. Air Force and Navy."); *Defenders of Wildlife v. Norton*, 257 F. Supp. 2d 53, 66 (D.D.C. 2003) (holding that the Endangered Species Act required federal agencies to consult with the Secretary of the Interior where domestic actions would cause environmental effects in Mexico, because the general presumption against extraterritoriality "is inapplicable . . . to federal agency actions within the United States that have extraterritorial effects"); *Natural Res. Defense Council v. U.S. Dep't of the Navy*, No. CV-01-07781, 2002 WL 32095131 (C.D. Cal. Sept. 17, 2002) (holding that NEPA applies to Navy SONAR tests that are performed in "littoral" waters along the United States' continental shelf, and which affect marine mammals because those waters have no competing sovereign); *Blue Water Fishermen's Ass'n v. Nat'l Marine Fisheries Serv.*, 158 F. Supp. 2d 118 (D. Mass. 2001) (holding that the Magnuson-Stevens Act, which regulates fishery resources and fishing activities in U.S. federal waters, applied extraterritorially to vessels operating outside the U.S. Exclusive Economic Zone (beyond 200 miles from the U.S. coast) because the act explicitly provides for extraterritorial application); *NEPA Coalition of Japan v. Aspin*, 837 F. Supp. 466, 467 (D.D.C. 1993) (refusing to apply NEPA to actions taken by the U.S. Department of Defense in regards to American military installations in Japan on the grounds that there was "a substantial likelihood that treaty relations will be affected"); and *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 676 (S.D.N.Y. 1991) (holding that the RCRA did not evince congressional intent for extraterritorial application, such that a domestic defendant who shipped hazardous waste abroad could not be held liable for creating an "imminent and substantial" danger).

[147] *See Blue Water*, 158 F. Supp. 2d at 122 (applying the Magnuson-Stevens Act extraterritorially on the grounds that the Act explicitly provides for extraterritorial application); *Arc Ecology*, 294 F. Supp. 2d at 1158 (recognizing that CERCLA permits suits

statute is silent as to extraterritorial reach, courts appear to be more willing to assert that domestic environmental regulations apply extraterritoriality when that application will be primarily analytical, as where the ESA would require federal agencies to confer with the Secretary of the Interior,[148] or where NEPA would require an environmental impact statement or an environmental assessment.[149] Courts are not willing to require even analytical implementation, however, where that application could threaten another nation's sovereignty.[150] Nor are they willing to enforce domestic environmental statutes where doing so would require a physical imposition on foreign soil, as would be required by hazardous waste cleanup.[151]

As a practical matter, then, how does extraterritoriality doctrine affect the valuation of foreign lives? Except where extraterritorial statute application could affect foreign sovereignty,[152] the doctrine appears to provide little or no guidance.

---

by foreign claimants, but finding that the foreign claimants at issue did not meet the relevant requirements).

[148] *See Norton*, 257 F. Supp. 2d at 55–59 (explaining that the ESA requires agencies to consult with the Secretary of the Interior to insure that their actions are not likely to jeopardize any endangered or threatened species).

[149] *See Massey*, 986 F.2d at 537 (applying NEPA to activities in Antarctica); Natural Res. Defense Council v. U.S. Dep't of the Navy, No. CV-01-07781, 2002 WL 32095131, at *10 (C.D. Cal. Sept. 17, 2002) (applying NEPA to waters on the U.S. continental shelf).

[150] *See NEPA Coal. of Japan*, 837 F. Supp. 468 (refusing to require the Department of Defense to comply with NEPA in regards to U.S. military installations in Japan, reasoning that "[w]e determine that the presumption against extraterritoriality not only is applicable, but particularly applies in this case because there are clear foreign policy and treaty concerns involving a security relationship between the United States and a sovereign power," and explaining that it does not address "whether NEPA applies in other factual contexts"); *Massey*, 986 F.2d at 533 (noting that Antarctica " 'is not a foreign country,' but rather a continent that is most frequently analogized to outer space"). This is in line with general readings of extraterritoriality in other substantive areas of law. *See* Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) (refusing to infer congressional intent of extraterritoriality where enforcement would have interfered with the exercise of foreign sovereignty); EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991) (explaining the necessity of the presumption against extraterritoriality as a protection against clashes between sovereigns).

[151] *See Arc Ecology*, 294 F. Supp. 2d at 1158–59 (refusing to apply CERCLA to former U.S. military bases that had reverted to control of the Philippines); *Amlon Metals,* 775 F. Supp. at 676 (refusing to apply RCRA where hazardous waste was located in the United Kingdom); *cf. Pakootas*, 2004 WL 2578982, at *5 (applying CERCLA to emissions by a Canadian factory, where the site to be cleaned up was within U.S. borders).

[152] *See NEPA Coalition of Japan*, 837 F. Supp. at 467 n.5 ("The preparation of EISs would necessarily require the DOD to collect environmental data from the surrounding residential and industrial complexes, thereby intruding on Japanese sovereignty. In addition, the DOD

2. Summary of U.S. Regulatory Practice. In sum, regulatory analyses of foreign valuation are (1) highly opaque, such that they require extensive technical expertise to interpret, and even then remain extraordinarily confusing; and (2) indicative of some tension, insofar as the general practice appears to be to allocate zero resources towards foreign lives, except when the risk vector is carbon emissions, and where agencies choose to use the global SCC.

In our view, these practices are deeply problematic. Multiple approaches to valuation—valuing foreign lives equally to domestic ones, or valuing them at nothing—might be justified under some account of U.S. institutions' obligations, but as of yet, no theory justifying both practices in some regulatory contexts has been presented. In (apparently) treating foreign lives as having no resource valuation in the vast majority of regulatory contexts, agencies are thus not only adopting what should be a controversial stance to foreign life valuation, but they are doing so in a particularly opaque way—one that obfuscates the underlying normative and political questions of what domestic institutions owe foreign persons. As we discuss in Part IV, at the very least, this practice should change so foreign life valuation by agencies is transparent.

B. NON-REGULATORY CONTEXTS

This section now turns to some non-regulatory settings in which foreign effects are a primary concern. Examining these non-regulatory decisions should illuminate some of the values and rationales for foreign life valuation as well as provide some examples of the mechanisms by which valuation occurs. We look at three settings: the valuation of foreign victims by U.S. military during international armed conflict;[153] the provision of tort damages to foreign victims of the U.S. armed forces;[154] and the provision of foreign disaster aid.[155] In each of these contexts, the government must decide whether and how to account for U.S. effects on foreign lives. Notably, and in contrast to typical regulatory practice, all of these non-regulatory contexts reveal a government

---

would have to access the impact of Japanese military activities at these bases."). The court provides no further explanation of its reasoning. *Id.*

[153] *See infra* Part III.B.*1.*

[154] *See infra* Part III.B.*2.*

[155] *See infra* Part III.B.*3.*

acknowledgement that resources ought to be allocated towards protecting foreign lives, notwithstanding a general reluctance to provide the same resources as would be provided for domestic lives. To the extent the contexts differ by purpose, government obligation, or other criteria, we want to note whether or how those distinctions might be relevant for how the government should engage in formal regulation. We also flag where potential discontinuities in valuation practices give us pause about continuing with current approaches in hopes of revisiting the normative desirability of some of these valuations in future works.

Table 2. Valuation in Non-Regulatory Contexts.[156]

SETTING	RELEVANT LAW	LEGAL TRIGGER	RISK SOURCE	VALUATION METHOD	COMPARISON TO DOMESTIC LIFE VALUATION
Int'l Armed Conflict	Hague & Geneva Conventions Rules of Engagement	Existence of Int'l Armed Conflict	U.S. combatants	**Front-end** Commit financial resources Mortality or military objective risk tradeoff **Back-end** Compensation	Higher if targeting civilian Equal if sick and wounded Less if collateral damage Negative if targeting combatant
Torts	Foreign Claims Act	Tort liability under local law	U.S. armed forces	**Front-end** Constrained by local & domestic tort law **Back-end** Compensation	Less, but still positive
Disaster Aid	Domestic aid regulations	Home state incapable of dealing with problem	Natural causes	**Front-end** Commit financial resources for prevention and planning **Back-end** Commit financial resources for crisis alleviation	Less, but still positive

[156] *See infra* Part III.B.*1–3*.

1. International Armed Conflict. Unlike in the regulatory setting, the United States has a relatively consistent and comparatively transparent approach to valuing foreign lives in international armed conflict. By way of quick summary, the United States military engages in extensive resource valuation during armed conflicts. In such situations, the United States is governed by international laws of war, domestic laws, and regulations embodied in the Rules of Operations.[157] Although the United States does sometimes expend resources to target enemy combatants—a form of negative valuation—it also expends resources to protect foreign civilians, foreign sick and wounded persons, and foreign persons at collateral risk from the targeting of combatants. U.S. military policy sometimes even dictates that U.S. soldiers should endure additional mortality risk to protect foreign lives.[158] In addition to the front-end valuation through laws of war regulation, the United States often chooses to provide back-end compensation when protected lives are lost as a result of an armed conflict.[159] In such instances, the compensation generally varies as a result of the U.S. military's intention during the action as well as the nature of the deaths.[160] The ensuing subsection details this approach.

Why does the United States choose to value foreign lives during international armed conflict? One might initially find the idea of valuing foreign lives in such a setting counterintuitive, but all nation states have joined treaties requiring such behavior. In this context, we identify at least four overlapping and mutually reinforcing reasons to value foreign lives. First, states may wish to restrain and discipline their militaries.[161] Second, states know that the legal protections are reciprocal to all other treaty

---

[157] *See* Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT'L L. & POL'Y 101, 113–14 (2010) (discussing the various sources of law applicable to drone warfare).

[158] *See* Colonel David L. Hayden, *Targeting Issues in Afghanistan*, 9 INT'L PEACEKEEPING 219, 223 (2005) (discussing the risk to U.S. forces under the Rules of Engagement).

[159] *See infra* note 188 and accompanying text.

[160] *See infra* pp. 546–48.

[161] Rules limiting resort to force promote peaceful relations and discourage the waste of human lives in pursuit of political goals. Similarly, rules protecting civilians and combatants encourage militaries to pursue their state's chosen ends and discourage wanton bloodlust and pillage. Lesley Wexler, Is International Humanitarian Law Humanitarian (unpublished manuscript) (on file with author).

parties.[162] Third, states may find the humanitarian principles in the laws of war treaties compelling.[163] Lastly, states may benefit from complying with or exceeding their international valuation obligations by winning the hearts and minds of other populations. All of these might be conceived of as domestic benefits.[164]

Under the laws of war, states engage in valuation of foreign lives as governed by status-based categories. The Geneva Conventions provide everyone a status. Relevant statuses include combatants, sick and wounded persons, prisoners of war, and civilians.[165] Under the Geneva Conventions and other laws of war, state armed forces may kill opposing combatants at any time during an armed conflict.[166] In contrast, states may not

---

[162] States value their opponents' civilians and POWs with the knowledge the other side is committed to the same.

[163] This seems increasingly true as a parallel body of human rights law has grown to inform some aspects of the laws of war.

[164] Though adherence to the laws of war obviously benefits the foreign population as well.

[165] *See* Yoram Dinstein, *The System of Status Groups in International Humanitarian Law*, *in* INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES: SYMPOSIUM IN HONOUR OF KNUT IPSEN 145, 146–50 (Wolff Heintschel von Heinegg & Volker Epping eds., 2007) (discussing the process for classifying individuals under the Geneva Protocol).

[166] *See* Gabriella Blum, *The Dispensable Lives of Soldiers,* 2 J. LEGAL ANALYSIS 115, 117–18 (2010) (discussing the lack of an obligation for states to warn combatants prior to the attacking). Once a combatant attempts surrender, however, the state may no longer kill the individual. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 41, June 8, 1977, 1125 U.N.T.S. 3, 22. States may kill combatants regardless of whether such persons are armed, uniformed, or present an immediate threat. Dinstein, *supra* note 167, at 148. Nor must the state's own combatants face any individualized threat to engage in an armed attack. Vogel, *supra* note 157, at 134 (discussing the laws of war in the context of a UAV operator far removed from danger). Some scholars actively question this unrestrained approach to the lives of combatants and support additional protections for them; Gabriella Blum (a) proposes a new obligation "to assess the individual threat emanating from any particular human target" and (b) endorses a least harmful means restriction in which soldiers must capture if it achieves the same benefits as wounding and must wound when it achieves the same benefits as killing. Blum, *supra*, at 176. But the international law remains that any combatant may be lawfully targeted during an armed conflict. *Id.* at 160. That said, the laws of war do still constrain the manner of negative valuation of combatants' lives. While core laws of war provisions authorize belligerents to injure and kill the enemy, they also make clear that the means of doing so are "not unlimited." *See* Hague Convention Respecting the Laws and Customs of War on Land, arts. 22, 23, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631. In particular, several laws of war treaties, along with customary international law, outlaw unnecessary suffering. *Id.* One might fairly view these treaties then as permitting the negative valuation of foreign lives.

intentionally kill prisoners of war[167] or sick and wounded combatants.[168] Furthermore, states must provide status-based protections that require the expenditure of resources. For instance states must undertake to "respect and protect" the wounded and sick.[169] These per se prohibitions do not even allow states to make discretionary valuation judgments; no balancing of any kind is permitted. By way of example, the state's armed forces must provide nondiscriminatory medical treatment[170] with the order of care based solely on medical necessity and feasibility.[171] Thus, under the laws of war, at least for purposes of medical treatment, foreign lives are treated as equal to domestic ones.

The laws of war also forbid states from intentionally targeting civilians[172] or employing indiscriminate attacks.[173] These rules

---

[167] Combatants who have "fallen into the power of the enemy" become prisoners of war. Geneva Convention Relative to the Treatment of Prisoners of War, art. 4A, Aug. 12, 1948, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[168] These rights may not be waived or otherwise renounced. *Id.* art. 7.

[169] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 12, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 ("Reprisals against the wounded, sick, personnel, buildings or equipment protected by the Convention are prohibited."); *id.* art. 46 ("Members of the armed forces and other persons mentioned in the following Article, who are wounded or sick, shall be respected and protected in all circumstances."). The "respect" obligation calls for "humane treatment" and in so doing, creates a host of negative duties. States must refrain from harmful actions or attacks directed against the wounded and sick, including reprisals. *Id.* art. 12 ("Any attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular, they shall not be murdered or exterminated, subjected to torture or to biological experiments. . . ."). In addition, the "protect" obligation creates positive duties. States must: search for, promptly collect, shelter, care for, and defend them from further harm or victimization. *Id.* arts. 12, 15.

[170] *Id.* art. 12 ("They shall be treated humanely and cared for . . . without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria.").

[171] *Id.* ("Only urgent medical reasons will authorize priority in the order of treatment to be administered."). Additional Protocol I further elucidates this principle by commanding that medical personnel must make prioritization decisions solely on the basis of their expert knowledge and their medical ethics. Protocol I, *supra* note 166, art. 15.

[172] Article 3 of the Fourth Geneva Convention prohibits "violence to life and person, in particular murder of all kinds" against "[p]ersons taking no active part in the hostilities." Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 273 (Adam Roberts & Richard Guelff eds., 2d ed. 1989); Article 48 of Additional Protocol I demands that parties to the conflict "shall at all times distinguish between the civilian population and combatants . . . and accordingly shall direct their operations only against military objectives." Protocol I, *supra* note 166, art. 48

[173] Indiscriminate attacks are those attacks that are not or cannot be directed or limited to a military objective. *Id.* art. 51(4).

preclude any consideration of military necessity or other balancing tests even if a state believes that civilian targeting is essential to protecting its own combatants. As such, these rules value some foreign lives more than domestic lives, because the state must often accept risks to its own combatants in order to avoid directly targeting foreign civilians.[174] In sum, even when a life-life tradeoff exists, the military must value the foreign civilian more than the domestic combatant, at least when it comes to intentional and indiscriminate targeting.

The United States utilizes rules of engagement (ROEs) to operationalize these status-based requirements.[175] By way of example, mission-specific ROEs in Iraq and Afghanistan made clear that U.S. combatants could not harm civilians even if the failure to do so risked significant casualties.[176] Such requirements are not paper tigers. We know of several instances in which hiding U.S. soldiers, discovered by children and other civilians, chose not to harm these individuals and the soldiers then faced deadly fire fights in response.[177]

If armed forces satisfy the principle of distinction by targeting combatants or other military objectives, then the military proceeds to a proportionality analysis.[178] In contrast to direct targeting of

---

[174] Such risks might arise from limits on the deployment of force as well as restrictions on the kind of force that may be deployed. By way of illustration, combatants may not kill civilians even if they fear those civilians might inform hostile forces of their presence.

[175] CHAIRMAN, JOINT CHIEFS OF STAFF, Instruction 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR US FORCES (June 13, 2005). The document is designed to "establish fundamental policies and procedures governing the actions to be taken by US commanders and their forces during all military operations and contingencies and routine Military Department functions occurring outside US territory. . . ." *Id.* at 1.

[176] Hayden, *supra* note 158, at 223–24 (describing OEF specific ROEs that emphasized reduction of collateral damage to the extent that U.S. forces allowed enemy elements to escape or withheld fire in cases of legitimate self-defense—both of which increased risk to U.S. forces).

[177] *See* AL SANTOLI, LEADING THE WAY: HOW VIETNAM VETERANS REBUILT THE U.S. MILITARY: AN ORAL HISTORY 316–19 (1993) (discussing a Special Forces reconnaissance team that was first discovered by children, moved locations but was discovered again, and then was forced to fight Iraqi soldiers while pinned down); MARCUS LUTTRELL, LONE SURVIVOR: THE EYEWITNESS ACCOUNT OF OPERATION REDWING AND THE LOST HEROES OF SEAL TEAM 10, 200–26 (2007) (describing a SEAL Team on a kill/capture mission in Afghanistan that was discovered by shepherds; the Team let them escape, only to face "over 140 Taliban fighters." Twenty-seven American soldiers died in the ensuing fire fight.).

[178] *See* Gregory S. McNeal, Draft, *Targeted Killing and Accountability*, 102 GEO. L.J. (forthcoming Mar. 2014) (manuscript at 76), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=189583 (discussing when proportionality assessments are required).

civilians, the laws of war sometimes permit the foreseeable but unintentional death of a civilian in order to accomplish a legitimate military objective.[179] That said, forces must take all feasible precautions in the choice of means and methods of attack so as to avoid or minimize incidental damage to civilians.[180] In international armed conflicts, commanders must determine whether the expected loss of civilian life will exceed the anticipated concrete and direct military advantage from the attack.[181] Only if the military advantage outweighs the expected civilian loss may commanders proceed with the attack.[182]

The United States has also operationalized these international law requirements.[183] When it engages in pre-planned operations, the United States uses the "collateral damage estimation methodology" or "CDEM."[184] If after all preventative steps, collateral damage still appears inevitable, a commander must seek final authorization to engage in the operation.[185] If the expected civilian casualties exceed the presidentially-set Non-Combatant Casualty Cut-Off Value (NCV), the President or Secretary of

---

[179] *See id.* (discussing the case by case nature of proportionality assessments).

[180] Protocol I, *supra* note 166, art. 57.

[181] *Id.* art. 51(5)(b) ("Among others, the following types of attacks are to be considered as indiscriminate . . . an attack which may be expected to cause incidental loss of civilian life, injury to civilians, . . . which would be excessive in relation to the concrete and direct military advantage anticipated.").

[182] *Id.* art. 57 ("[A]n attack shall be cancelled or suspended . . . which would be excessive in relation to the concrete and direct military advantage anticipated. . . .").

[183] *See* McNeal, *supra* note 178, at 57 (explaining that the U.S. claims to conduct all targeted killings in accordance with the law of armed conflict).

[184] *Id.* at 65. Rules of Engagement may allow targeting decisions to be made without CDEM when "troops face fleeting and time sensitive targets" or when friendly ground forces are in contact with enemy forces and the time constraints will expose ground forces to excessive risks. *Id.* at 67. Even then, these operations are governed by ROE, some of which place an even higher value on civilian lives than required by international law. Luke N. Condra et al., *The Effect of Civilian Casualties in Afghanistan and Iraq* 5 (Nat'l Bureau of Econ. Research, Working Paper No. 16152, 2010). Once commanders ensure with reasonable certainty the positive identification of a legitimate military target, they must then determine whether civilians are present. McNeal, *supra* note 178, at 63. Although a commander would be justified under the laws of armed conflict in moving directly to a proportionality analysis, under the CDEM commanders instead "employ a series of mitigation techniques intended to ensure with a high degree of certainty that there will not be an unacceptable probability of damage or injury to collateral concerns." *Id.* at 71. These mitigation techniques include drawing an effects radius around the target and considering different weapons. *Id.* at 63.

[185] McNeal, *supra* note 178, at 77.

Defense must make the final determination.[186] Although classified, some publicly available evidence suggests that the NCV number is thirty civilian casualties.[187] In other words, negative valuation of foreign lives beyond thirty during international armed conflict requires the highest possible level of governmental authorization.

Finally, states may also engage in a back-end resource allocation via compensation for foreign deaths during armed conflict.[188] International law does not dictate how states value those foreign lives, rather, each state determines its own willingness to pay in these instances. For instance, the United States often provides remuneration to families for their losses under either condolence or solatia programs.[189] While the government has not released systematic data or information about the factors that govern voluntary pay outs for intentional crimes against foreign civilians,[190] individual incidents from Iraq and Afghanistan suggest a range from $11,000[191] to $50,000[192] per life.[193]

The United States also sometimes chooses to provide compensation for those lives it has lawfully taken[194] during armed

---

[186] *Id.*

[187] Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 87 INT'L REV. RED CROSS 445, 457–58 (2005) (citing Bradley Graham, *US Moved Early for Air Supremacy*, WASH. POST 26, July 20, 2003, at 26).

[188] The government also provides aid through the Afghan Civilian Assistance Program, which "helps families and communities that have suffered losses as a result of military operations." Assistance for Civilian Casualties of War: Hearing Before a Subcomm. of the Committee on Appropriations, 111th Cong. 49-742 (2009) (statement of Sen. Patrick J. Leahy, Chairman, Subcomm. on State, Foreign Operations, and Related Programs).

[189] *See* U.S. FORCES, AFGHANISTAN, MONEY AS A WEAPON SYSTEM—AFGHANISTAN 13–14 (2009) [hereinafter MAAWS-A] (discussing the distinction between Solatia and Condolence payments).

[190] Matthew Rosenberg & Sangar Rahimi, *U.S. Pays Families of Afghan Victims in Massacre by Soldier*, N.Y. TIMES, Mar. 25, 2012, http://www.nytimes.com/2012/ 03/26/world/asia/us-compensates-afghan-villagers-for-soldiers-attack.html (noting the privacy surrounding such practices).

[191] *Id.* (documenting money paid to the families of those killed or injured by Army Sgt. Bales in Afghanistan).

[192] Luke Mogelson, *A Beast in the Heart of Every Fighting Man*, N.Y. TIMES MAG., Apr. 27, 2011, http://www.nytimes.com/2011/05/01/magazine/mag-01KillTeam-t.html?pagewanted=all (noting that the families of those murdered in Iraq by Operation Kill Team "reportedly each received $11,300").

[193] By way of contrast, the Afghan government provided compensation payments of $2,000 per life. Rosenberg & Rahimi, *supra* note 190.

[194] *See* CAMPAIGN FOR INNOCENT VICTIMS IN CONFLICT, ADDRESSING CIVILIAN HARM IN AFGHANISTAN: POLICIES AND PRACTICES OF INTERNATIONAL FORCES 5 (2010) (noting that in practice, the U.S. sometimes also pays when the harm was likely inflicted by militants).

conflict.[195] While the Department of Defense declined to offer any compensation in the initial stages of the Afghan operation,[196] the United States soon provided *ex-gratia* payments in Afghanistan and Iraq[197] as an expression of sympathy.[198] Local commanders possess discretion in determining payment amounts,[199] but the process seems somewhat systematized[200] with a $2,500 payment as the baseline.[201] This $2,500 serves as a standard amount, but the government will look at a range of factors to determine the ultimate payment.[202] As the possible payment increases, the U.S. government requires higher levels of approval before payout. While we think good justifications for such payouts may exist, we have some concern that insufficient reflection has gone into the setting of the baseline and the subsequent determination of the monetary range.[203]

In sum, in military contexts, the United States has a complex set of foreign life valuation practices. These practices range from

---

[195] International Law does not establish a right to reparation absent a violation of the laws of armed conflict. INTERNATIONAL LAW ASSOCIATION, THE HAGUE CONFERENCE: REPARATION FOR VICTIMS OF ARMED CONFLICT 6, 9 (2010). To take a recent example, under international law and the terms of agreements with the Afghanistan government, International Security Assistance Force Troops are not liable for civilian deaths incurred during lawful operations. INTERNATIONAL SECURITY ASSISTANCE FORCE, MILITARY TECHNICAL AGREEMENT: BETWEEN THE INTERNATIONAL SECURITY ASSISTANCE FORCE (ISAF) AND THE INTERIM ADMINISTRATION OF AFGHANISTAN C'INTERIM ADMINISTRATION') A-3, http://www.operations.mod.uk/isafmtma.pdf.

[196] CAMPAIGN FOR INNOCENT VICTIMS IN CONFLICT, *supra* note 194, at 5.

[197] UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, THE DEPARTMENT OF DEFENSE'S USE OF SOLATIA AND CONDOLENCE PAYMENTS IN IRAQ AND AFGHANISTAN 20 (2007), http://www.gao.gov/new.items/d07699.pdf.

[198] In contrast, U.S. Special Forces lack a clear policy on addressing civilian harms. CAMPAIGN FOR INNOCENT VICTIMS IN CONFLICT, *supra* note 194, at 5. Other actors may step in to fill their gap. *See, e.g.*, Jerome Starkey, *Karzai Offers Families 'Blood Money' for Sons Killed in Raid*, TIMES (London), Mar. 8, 2010, http://www.thetimes.co.uk/tto/news/world/asia/afghannistan/article2463222.ece.

[199] CAMPAIGN FOR INNOCENT VICTIMS IN CONFLICT, *supra* note 194, at 5.

[200] Will Oremus, *In Defense of Blood Money*, SLATE (Mar. 29, 2012, 2:31 PM), http://www.slate.com/articles/news_and_politics/foreigners/2012/03/Robert_bales_why_obama_paid_50_00_to_the_victims_of_the_massacre_in_afghanistan_.html (suggesting that the program has become "standardized and streamlined").

[201] CAMPAIGN FOR INNOCENT VICTIMS IN CONFLICT, *supra* note 194, at 5.

[202] *Id*.

[203] The concern about the possibly arbitrary nature of these payments, as well as their low amount, is shared by others. *See* CAMPAIGN FOR INNOCENT VICTIMS IN CONFLICT, CIVILIAN CLAIMS ACT: FAIR COMPENSATION FOR CIVILIAN CASUALTIES OF US MILITARY OPERATIONS (describing Senator Lenhy's Proposed CCA as a permanent, effective civilian claims system).

valuing foreign lives negatively (as in the case of foreign combatants), to valuing them positively but less than domestic lives (as in the case of civilians imperiled by collateral damage), to valuing them equally to domestic lives (as where foreign persons are wounded and need medical care), to valuing them above domestic lives (as in the case of some foreign civilians). The United States also systematically provides back-end compensation for lives it has lawfully taken in armed conflict.

2. Torts Committed by Armed Forces. In addition to condolence payments for collateral damage inflicted during armed conflict, the military also offers compensation to foreign nationals it harms during noncombat activities[204] under the Foreign Claims Act (FCA).[205] Although the creation of Foreign Claims Commissions is discretionary,[206] once established, the United States can be held liable for the negligence of its armed forces abroad.[207] For example, if a U.S. military driver is stationed in France during peace time and runs over a French citizen, the FCA would govern compensation.

The United States enacted this legislation during World War II with the explicit purpose of "promoting and maintaining friendly relations" with the inhabitants of foreign countries.[208] John Fabian Witt has postulated two other reasons for the Act's endurance—to serve corrective justice principles and to achieve tactical flexibility.[209] Like front-end protections enshrined in the laws of war, the United States may find attempts to win hearts and minds facilitated by careful and consistent valuation of foreign lives through back-end payments for mistakes.

---

[204] *See* John Fabian Witt, *Form and Substance in the Law of Counterinsurgency Damages* 11 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 08-181, 2008), *available at* http://ssrn.com/abstract=1096587 (discussing when payments are owed under the FCA).

[205] 10 U.S.C. §§ 2734–2736 (2006).

[206] *Id.* § 2734(a); *see also* Aaskov v. Aldridge, 695 F. Supp. 595, 599 (D.D.C. 1988) (discussing the discretionary nature of the FCA).

[207] Witt, *supra* note 204, at 8.

[208] Foreign Claims Act, ch. 645, 55 Stat. 880 (1942) (current version at 10 U.S.C. § 2734 (2006)); *see also* Witt, *supra* note 204, at 5 ("Claimants who are nationals of a country at war with the United States may only recover if . . . [they are found] to be friendly to the United States.").

[209] Witt, *supra* note 204, at 9.

The U.S. government currently authorizes Foreign Claims Commissions to pay between $15,000 and $50,000 per legitimate claim[210] and may pay no more than $100,000 for multiple claims from the same event.[211] Since the FCA mandates local tort law be applied when evaluating and awarding claims,[212] one might think that damage awards would be a more accurate gauge of how the local nation values its domestic lives rather than how the United States values foreign lives. However, evidence suggests that widespread use, an emphasis on tactical flexibility, and contradictions built into FCA regulations have made the applicable rule of law more a mixture of local law, U.S. law, and command discretion rather than a good faith attempt to apply local custom.[213] In fact, the history of payments made by the FCA indicates that local law and local valuation play only a small role in the viability of claims and damage amounts.[214]

Of the relatively few claims paid in Iraq and Afghanistan between 2003 and 2006,[215] the average payment for loss of life under the FCA is slightly more than $4,200.[216] However, much variance exists, with one family being paid $33,000 for the loss of three of their children's lives and payments at the lower end reaching about $2,400.[217] Given the variations in ease of claims and

---

[210] Colonel R. Peter Masterton, *Claims Office Management*, 2011 ARMY LAW. 48, 56 (2011).

[211] Legal Services: Claims, Army Reg. 27-20, § 8-8 (2008), *available at* http://www.army.mil/usapa/epubs/pdf/r27_20.pdf (noting that the Secretary of the Army may override the cap).

[212] 32 C.F.R. § 536.139 (2007); *id.* § 536.41 (establishing use of local tort law, though it excludes any strict liability torts).

[213] Witt, *supra* note 204, at 8 (discussing the FCA's contradictions with American law, including the exclusion of joint and several liability and punitive damages).

[214] *Id.*

[215] A total of 490 FCA claims submitted in Iraq and Afghanistan between 2003 and 2006 can be found in documents released by the Department of Defense in response to a 2007 ACLU Freedom of Information Act request. Of these claims, 404 were denied, most due to the combat exclusion rule or for a lack of evidence. MARLA B. KEENAN & JONATHAN TRACY, CTR. FOR CIVILIANS IN CONFLICT, US MILITARY CLAIMS SYSTEM FOR CIVILIANS (2008), *available at* http://civiliansinconflict.org/uploads/files/publications/2008_Civilian_Casualties_White_Paper.pdf (discussing the denial of FCA claims).

[216] Witt, *supra* note 204, at 14. From 2001–2007, legal claims in Iraq and Afghanistan have garnered plaintiffs about $32 million. Paul von Zielbauer, *Confusion and Discord in U.S. Compensation to Civilian Victims of War*, N.Y. TIMES, Apr. 12, 2007, http://www.nytimes.com/2007/04/12/world/americas/12iht-abuse.l.5246758.html.

[217] Witt, *supra* note 204, at 14. Rather disturbingly, the awards for property damage are often greater than the awards for lost lives. *Id.*; *see also* ACLU FOIA Report, Claims Filed Under the Foreign Claims Act by Civilians in Afghanistan and Iraq, Army Bates No. 1292-

in the amounts paid, we echo John Fabian Witt's call for additional systemization in this realm, for example through the development of disposition and payment matrixes similar to the Federal Sentencing Guidelines.[218]

While no study provides a true apples-to-apples comparison to the valuation of U.S. lives, domestic benefits for the deaths of citizens and inhabitants of the United States[219] under the similarly styled Military Claims Act[220] are capped at $100,000.[221] It seems fair to identify this as another context in which the government chooses to value foreign lives positively but not equivalently to domestic lives.[222]

3. Disaster Assistance. While both armed conflict and armed forces' torts implicate the United States in a causal chain of responsibility for harm, the United States also allocates domestic resources towards foreign lives when no such responsibility exists. Many examples of such practices exist; we focus on disaster assistance as this is often given as the paradigmatic example of when people and states should feel morally obliged to provide help. Interestingly, no international law obligation exists to compel disaster assistance. Rather, when the U.S. provides over three billion dollars in annual disaster assistance,[223] it does so voluntarily.

1295 (June 27, 2005), http://www.aclu.org/natsec/foia/log.html (awarding $12,000 solely in compensation for property damage and none for the simultaneous loss of her husband).

[218] Witt, *supra* note 204, at 16.

[219] 32 C.F.R. § 842.47(a), (c) (2011) (allowing for damages for persons in foreign countries, but who are not inhabitants of the foreign country).

[220] *See* 32 C.F.R. § 536.74(c) (2007) (requiring claimants to be inhabitants of the United States).

[221] 10 U.S.C. § 2733(b) (1996). The Secretary of the Treasury may authorize additional payment. *Id.* § 2733(d).

[222] One can imagine many reasons for this disparity. Some possibilities include a decision to provide payouts somewhat comparable to what the foreigner would receive from his own government, concerns about judicial administrability, and finite domestic support for the program.

[223] *See* RHODA MARGESSON, CONG. RESEARCH SERV., RL33769, INTERNATIONAL CRISES AND DISASTERS: U.S. HUMANITARIAN ASSISTANCE RESPONSE MECHANISMS 2 (Aug. 1, 2013), *available at* http://www.fas.org/sgp/crs/row/RL33769.pdf (discussing the U.S. government's contribution of $4 billion to disaster relief in fiscal year 2012).

In deciding when to make aid available for emergencies,[224] the Office of Foreign Disaster Assistance cites humanitarian concerns as its "overriding principle."[225] Three criteria must be satisfied for fund disbursement: a disaster with a magnitude that exceeds the affected community's ability to cope;[226] "recognized representatives of the affected population desire the assistance"; and the aid serves the U.S. government's interest.[227] While the last criteria sounds overtly political, in practice, government actors need only show that the provision of money would "demonstrate the generosity and goodwill of the American people."[228]

Fatalities, used as a rough proxy for magnitude of need, seem to drive the disbursement of assistance,[229] but other factors also play an important role. Empirical evidence demonstrates a strong inverse correlation between "U.S. federal deficits and domestic disaster costs" and the award of any foreign disaster aid.[230] Media salience also affects both the decision to assist and the amount given.[231] Relatedly, high salience of non-disaster news can crowd out coverage for foreign disasters and depress assistance.[232] The

---

[224] Long term development assistance generally comes out of a different budget. CURT TARNOFF & LARRY NOWELS, CONG. RESEARCH SERV., FOREIGN AID: AN INTRODUCTORY OVERVIEW OF U.S. PROGRAMS AND POLICY CRS-12 n.10 (updated Jan. 19, 2005).

[225] UNITED STATES AGENCY INTERNATIONAL DEVELOPMENT (USAID), ADS CHAPTER 251: INTERNATIONAL DISASTER ASSISTANCE 5 (last revised Feb. 13, 2012), *available at* http://transition.usaid.gov/policy/ads/200/251.pdf.

[226] David Strömberg, *Natural Disasters, Economic Development, and Humanitarian Aid*, 21 J. ECON. PERSP. 199, 205 (2007) (discussing the effect of disasters on countries with differing quality levels of government).

[227] *See* USAID, *supra* note 225, at 5.

[228] Anita Menghetti & Jeff Drumtra, *Improving the U.S. Government's Humanitarian Response*, 18 ETHICS & INT'L AFF. 45, 47 (2004). Anecdotal evidence suggests that in recent years, the United States government has never "refused to respond on purely or even primarily political grounds." *Id.* This practice marks a rather significant change in U.S. policy as earlier granting decisions were strongly political. *See* A. Cooper Drury, Richard Stuart Olson & Douglas A. Van Belle, *The Politics of Humanitarian Aid: U.S. Foreign Disaster Assistance, 1964–1995*, 67 J. POL. 454, 466 (2005) (showing that from 1964–1995, non-allies were only 11% likely to have their requests granted).

[229] *See* Strömberg, *supra* note 226, at 214 (noting the strong correlation between number of fatalities and the probability of receiving relief).

[230] Drury et al., *supra* note 228, at 470.

[231] *See id.* ("[O]ne New York Times article [is] worth more disaster aid dollars than 1,500 fatalities."); Strömberg, *supra* note 226, at 215 (arguing that the news increases relief for more newsworthy disasters).

[232] *See* Thomas Eisensee & David Strömberg, *News Droughts, News Floods & U.S. Disaster Relief*, 122 Q. J. ECON. 693, 693 (2007) (discussing the effect of news cycles on disaster relief).

geographic distance of the affected country from the donor also appears to be quite significant.[233] In contrast, concerns about the limits of foreign infrastructure or government corruption seem to play little role in amounts given.[234]

Conducting an apples-to-apples comparison of life valuation between domestic and foreign disaster assistance is quite difficult. The literature sometimes uses dollars-provided-per-fatality as a measure.[235] Using this as an imperfect proxy, a back-of-the-envelope calculation reveals that between 1964 and 1995, the Office of Foreign Disaster Assistance provided a foreign government about $400 for each disaster related fatality.[236] In contrast, FEMA, the agency responsible for domestic emergencies, has extended approximately $2 million per domestic life lost.[237]

We conclude by noting that the government seems to view resources for disaster assistance as finite and that willingness to spend abroad is somewhat cabined by need to spend domestically even when no actual budget tradeoff exists. This seems to reflect a political decision that foreign lives justify some expenditure of domestic resources, albeit not as much as domestic lives. More troublingly, we find the somewhat randomized nature of payment to be problematic. It would be nice to see a more systematic disbursement based on ability to prevent future fatalities or the magnitude of the problem, but we recognize the need for some flexibility in the disbursement process.

This Part has sought to begin the task of determining how governments value foreign lives across various contexts by looking at current U.S. regulatory and non-regulatory practices. We welcome the efforts of others to look at other contexts, as well as to begin to describe how foreign governments approach these questions. In addition to the descriptive goal, we also think these

---

[233] *See* Strömberg, *supra* note 226, at 218 (noting a "country on the other side of the earth gets one-third of the funds of a country at distance zero").

[234] *See id.* at 213 (discussing the role of corruption in humanitarian aid).

[235] This measure is frequently used, but problematic since dollars are used to prevent loss of life, not to cope with existing fatalities. But as this number, rather than lives saved, is often used in the literature, we will use it as well.

[236] Drury et al., *supra* note 228, at 469.

[237] *See* FEDERAL EMERGENCY MANAGEMENT AGENCY, SEISMIC REHABILITATION OF FEDERAL BUILDINGS: A BENEFIT/COST MODEL 8-1 (June 30, 1994), *available at* http://www.fema.gov/media-library-data/20130726-1453-20490-9582/fema_255.pdf.

various non-regulatory examples suggest some lessons for the regulatory context. First, the United States often chooses to expend public resources on foreign lives in surprising contexts. It may do so as part of an international law obligation, as with the Geneva Conventions, or as a discretionary choice, as with foreign torts committed by American forces and with foreign disaster assistance. These decisions suggest that an unquestioned default of zero dollars for foreign lives in the regulatory context may be inappropriate.

Second, as discussed in more detail in the following section, international law can be a useful tool in helping guide resource allocation. As with the laws of war, states may use international negotiations to determine when foreign lives ought to receive resource valuation on par with, or even in excess of, domestic lives. These laws demonstrate that when lives are likely to be lost on both sides, states are sometimes able to resolve reciprocal valuation questions. Of course, such international obligations may still afford some discretion to states. But the laws of war show that when states agree to such a delegation, they may still require a rigorous process to assess possible harms to foreign lives and, when such harms are unavoidably necessary, to provide reasoning and justifications for such losses.

Similarly, domestic statutes requiring reciprocity for foreign valuations suggest that the U.S. sometimes wishes to secure the same type of benefits for its domestic persons before imparting such benefits on foreign persons. International negotiation is only one possible strategy among many to attain this result.

Lastly, the example of disaster aid demonstrates that the U.S. may also choose to expend resources to protect foreign lives without any expectation of or demand for reciprocity. Sometimes the government simply manifests a willingness to expend resources on foreign lives with only attenuated domestic benefits, like enhancing soft power or satisfying domestic preferences to help foreigners in emergency situations. With these observations in mind, we turn to the next Part.

IV. HOW SHOULD FOREIGN LIVES BE VALUED? A FEW PRESCRIPTIONS

The theory and practice of foreign life valuation deserves both a full description and a robust debate. The descriptive portion of this Article has demonstrated that current U.S. practices varies significantly as between regulatory and non-regulatory contexts. In this Part, we identify several paths for improving the current practice of foreign life valuation. These can be deployed even without reaching consensus on the best possible theoretical approach. As we hope to start a larger discussion over the valuation of foreign lives, we begin with a few concrete recommendations and observations to inform future valuation practices. First, we further specify our suggestion that decisionmakers approach foreign life valuation as a distinct analytical category worthy of attention.[238] Second, we seek to increase transparency of foreign life valuations—particularly in the regulatory system—to further inform the debate that needs to occur.[239] Third, we identify some specific implications of non-regulatory and international law contexts for the regulatory valuation of foreign lives.[240] Finally, we contend that regulators ought to develop a methodology for thoughtfully attaching resource valuations to foreign lives, and we disaggregate how they might choose among various plausible approaches, as well as identify the implications of those decisions.[241]

A. IDENTIFYING AND USING FOREIGN LIFE VALUATION AS A DISTINCT ANALYTICAL CATEGORY

As we have shown above, governmental decisions about which activities to allow and how to regulate them often have foreign impacts. These impacts are perhaps easiest to see in environmental contexts, such as climate change, where activities performed entirely within the ambit of national borders have global implications. But as we have discussed,[242] domestic decisions often create foreign impacts across a spectrum of

---

[238] *See supra* Part II and *infra* Part IV.A.
[239] *See infra* Part IV.B.
[240] *See infra* Part IV.C.
[241] *See infra* Part IV.D.
[242] *See supra* Part II.

activities, from military action to product manufacture, and from export to disaster aid. Such choices can imperil (or protect) the lives of people across political borders.

In addition, as noted in Part II, governmental decisions about foreign lives may be meaningfully different along multiple parameters.[243] Decisionmakers may also hold a wide array of views about the role of the state's obligations to those outside its political boundaries.[244] Furthermore, such decisions may be guided by cognitive mechanisms such as psychic numbing[245] or by sociological or cultural factors such as otherness and foreign-ness.[246]

Unfortunately, current practice renders it incredibly difficult to determine whether policymakers are even giving the matter any sustained or reasoned attention, even in contexts that we believe should be relatively transparent. We urge policymakers to begin to systematically address foreign life valuation as a distinct category worthy of sustained attention. We find this preferable to the status quo practices of ignoring the issue, or of using an unreasoned default.

B. INCREASING TRANSPARENCY OF FOREIGN LIFE VALUATIONS

Once foreign lives have been recognized as a distinct analytical category, our next recommendation is that such valuation should be made transparent. Analyses of large federal U.S. regulations required by Executive Order are transparent about the valuation of domestic lives and ought to be as transparent about the valuation of foreign lives. As we have seen, foreign lives necessarily have some valuation that is attached to them in these contexts,[247] but determining that valuation is extremely difficult.[248] At the very least, regulatory practice should be adjusted to explicitly identify and calculate foreign life valuation (or foreign VSL), just as it currently identifies and calculates domestic VSL.

---

[243] *See supra* Part II.B.*1*.

[244] *See supra* Part II.B.*2*.

[245] *See supra* Part II.B.*3*.

[246] *See supra* Part II.B.*4*.

[247] *See supra* Part III.

[248] *See supra* Part III.A (noting the value is typically $0, with no explanation given either for that approach to valuation or for deviations from it). Even concluding that the value is $0 requires in-depth analysis of what is *missing* from documents many hundreds of pages long.

We see several potential benefits of transparent foreign life valuation. Transparency might both be a value in itself and a mechanism to facilitate other goals. For instance, if one believes that CBA renders decisionmaking more rational and more coherent, transparency in this context helps achieve that goal by allowing both internal and outside reviewers to determine whether agencies are making consistent and/or reasoned determinations both within and across agencies.[249] To the extent that such determinations vary, one can begin to have a conversation about whether such differences are justified by agency purpose, statutory mandate, or other reasons.[250] Similarly, as Eric Posner has argued in regards to CBA more generally, a full accounting of costs and benefits provides policymakers the information they need to determine not only if a regulation is efficient, but whether the regulation satisfies various interests and preferences.[251] In contrast, for those skeptics who believe that CBA obscures value choices and controversial assumptions, disclosure here allows these choices to be subject to greater scrutiny and public debate. Last, and most simply, such disclosure fulfills existing statutory and regulatory obligations committing our government to the values of transparency.

In addition, transparency can be particularly helpful in this specific CBA context by encouraging reciprocal protection for foreign governments' treatment of U.S. lives. As explained above, states may negotiate to address resource allocation for cross-boundary problems. Transparency in domestic valuation practices regarding foreign lives can provide the sort information helpful to jumpstart or provide a baseline for such negotiations. And even without international negotiations, acting as a transparent first mover on this issue may cause other governments to investigate and alter their own regulatory practices in this area.

---

[249] *See* RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 12–13 (2008) (arguing that CBA makes decisionmakers more accountable for their decisions, gives taxpayers a more accurate sense of the costs of regulation, and imposes structure on an otherwise discretionary process); MATTHEW ADLER & ERIC POSNER, NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS 62–100 (2006) (arguing that CBA is best understood as a decision procedure).

[250] *See infra* Part IV.C.

[251] Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137, 1143 (2001).

Transparency about foreign valuation is not costless. Publicizing anything other than an equal valuation of foreign lives may negatively affect relationships with other countries. Advertising to foreign countries that the United States values foreign lives lower or at zero may raise uncomfortable conversations reminiscent of the three-fifths debate about slaves. Though we take this concern seriously, we also think it appropriate that decisionmakers be asked to publicly defend such reasoning. If equality rationales are persuasive, then policymakers ought to expend the same resources on domestic and foreign lives; if they are not, policymakers ought to be able to articulate the reasons why. Moreover, as we discuss above, such valuations are merely a starting point. If another country feels strongly that the prevailing valuation methodology is inequitable or a violation of international law, international law provides a mechanism for international negotiations about valuation methodologies in specific contexts, discussions about direct resource transfers independent of the regulations, or a public justification of the existing approach.

We wish to be modest about the scope of this suggestion. While we think that transparency is generally appropriate, and may be particularly so in the regulatory context, discrete settings may raise overwhelming objections.[252] To take an example from the non-regulatory setting, if the United States explicitly revealed the Non-Combatant Casualty Valuation number it uses during international armed conflicts, enemies could use this bright-line standard to manipulate casualty statistics to falsify violations. Transparency might also counteract attempts to win hearts and minds by quantifying exactly how disposable the United States finds foreign lives to be. Of course, it is also plausible that revealing the number might demonstrate that the United States in fact values foreign lives quite highly, even in armed conflicts, and generally complies with its own valuation metrics. It might also be used as a tool to encourage greater compliance.[253] But our larger point is simply that

---

[252] *See generally* Lesley Wexler, *International Humanitarian Law Transparency*, 23 FL. ST. J. TRANSNAT'L L. & POL'Y 299 (2014).

[253] *See* Lesley Wexler, Civilian Casualty Counts (Mar. 5, 2014) (unpublished manuscript) (on file with author) (listing among the goals and justifications for gathering and

some specialized contexts might raise distinct concerns unlikely to plague the average domestic regulatory decision and that recommendations about foreign life valuation need to remain sensitive to context.

C. INFORMING VALUATION METHODOLOGY CHOICE

Of course, to make transparent their treatment of foreign lives, policymakers must decide what value they should attach to foreign VSLs. We think policymakers may wish to consider the following overlapping questions in approaching this choice. First, what are the decisionmakers' theoretical priors? Second, what factual and institutional considerations should inform or supplement the satisfaction of those theoretical priors? Similar questions must be asked and answered in the domestic lives context, but as foreshadowed in Parts I and II, we believe the foreign lives context can complicate and complexify the answers.

1. Theories. Drawing from our earlier observations, we see multiple plausible theories of foreign life valuation, which vary based upon whether domestic obligations to foreign persons are best thought of as cosmopolitan or not; on what we believe the appropriate resource distribution role of a particular institutional decisionmaker is; and on what we see as the domestic benefit of protecting foreign lives.

Any of these factors might reasonably lead a decisionmaker to increase the estimate of the appropriate foreign VSL above zero. We might expect the highest estimates to come under a cosmopolitan approach to moral obligations that attaches no important distinctions to national borders; where international law recognizing the inherent valuation of all lives is seen as a necessary or at least contributing factor in the creation of an obligation to expend resources to protect those lives; where the institution (public, private, regulatory, or non-regulatory) is seen as legitimate in devoting the resources it controls towards foreign life valuation; and where there is substantial domestic benefit that accrues from protecting foreign persons.

---

disseminating foreign civilian casualty data, "enhanced compliance with International Humanitarian Law transparency and substantive requirements").

These justifications are potentially segregable from one another. For example, a cosmopolitan need not necessarily believe, even if all lives have intrinsic value, that value necessarily demands a commitment of scarce domestic governmental resources to protect foreign lives. Note, however, that even one of these justifications alone may be sufficient to ground significant expenditures of domestic resources to protect foreign lives.

Consider the last possible reason given: the possibility that foreign lives should be protected because, on average, the protection of foreign lives creates some benefit to domestic persons. One way to operationalize this reasoning is to assume that if Americans value the protection of foreign lives, they should be willing to pay some kind of identifiable resource—such as money—to protect foreign lives. This approach has the appeal of straightforwardly harmonizing with current approaches to domestic regulatory valuation, which rely upon people's willingness to pay money to secure domestic benefits,[254] and with contingent valuation studies showing that Americans do in fact appear to be willing to allocate significant resources towards the protection of foreign lives.[255] If this is a reasonable measure of the benefit that Americans see in protecting foreign lives and civilizations, these studies suggest valuing foreign lives at zero—as appears to be the norm in non-climate-change regulatory contexts—massively understates even the domestic benefit of protecting those lives.[256] Although most theories point in favor of positive valuation, policymakers must still determine how to assign a resource value to foreign lives.

2. Relevant Factors. We believe that comparisons across valuation contexts can help generate an appropriate theory and guide policymakers' decisionmaking process. These factors include: international law obligations; the role of causal

---

[254] *See* Cass R. Sunstein & Arden Rowell, *On Discounting Regulatory Benefits: Risk, Money, and Intergenerational Equity*, 74 U. CHI. L. REV. 171, 173 (2007) (explaining that existing valuations of mortality risk are based on willingness to pay); Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537, 560–61 (2005) (comparing theories of valuation in tort damages and regulatory willingness to pay).

[255] *See* David A. Dana, *Valuing Foreign Lives and Settlements*, 1 J. BENEFIT-COST ANALYSIS, art. 4, 2010, at 10 (discussing willingness of U.S. residents to spend money to save foreign lives).

[256] *See id.* at 22 (discussing a study that found a majority of Americans were willing to spend money to save foreign lives).

responsibility; the ability of the affected state to prevent or address the harm; the existence and importance of reciprocity; the contribution or harm to the national interest; the significance of the harm to foreign lives; and the role, if any, of a foreign state's sovereignty. We acknowledge that these factors might sometimes be in tension, but as a first cut, we think all are important.

We believe the easiest cases for foreign resource valuation are ones in which the United States has already undertaken a binding obligation to do so.[257] Such obligations may have emerged as part of international law as they did with the laws of war. One might also use international law to infer a policy preference in favor of foreign resource valuation, even when the international law does not directly require it. Such instances might include those treaties which encourage resource transfer or ask for assistance as states are able to provide.[258] A review of existing practices and international law obligations may reveal additional regulatory areas for resource valuation. That said, this factor does not dictate when the United States ought to undertake new obligations; it merely points in favor of compliance with existing ones.

Relatedly, the ability to form an international agreement and the ability to generate reciprocity might also be relevant to the choice to value and the choice of methodology. To the extent that the United States can encourage the valuation of its domestic lives by other states, that would certainly be in the national interest, particularly as foreign effects on domestic lives grow increasingly significant. Right now, the United States has some regulations that call for foreign valuation if the affected states also value U.S. lives.[259] But as an empirical matter, it is unclear whether this is the only or best way to encourage other states to include U.S. lives in their regulatory processes. We think it also plausible that a unilateral choice to routinely engage in foreign life valuation could encourage other states to follow suit voluntarily.

A broad factor encouraging foreign life valuation is to do so whenever it is in the national interest. Of course, the difficulty

---

[257] For existing obligations, the thornier issue is determining what behavior triggers the obligations.

[258] LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979) (noting that most states comply with most international law most of the time).

[259] *See supra* note 133 and accompanying text.

comes in defining what counts as national interest. At the very least, it ought to include discrete quantifiable benefits such as satisfying domestic preferences. It might also consist of something more amorphous, such as creating global goodwill or extending soft power. Conversely, if the domestic benefits, broadly defined, do not outweigh the total costs, one might argue, as Jack Goldsmith does, that the state ought not adopt such policies.[260] For instance, if a regulation saved some foreign lives but posed a meaningful threat to national security, it would not be justified under his view. This restriction makes sense for those who believe the state must pursue the national interest even if the universalist Rawlsian or universalist utilitarian perspectives cut in the opposite direction. Regulators might also look to their agency's mission or a statutory mandate to help get a sense of the types of national interests they ought to promote and weigh most heavily.

In trying to assess those interests and how to value them, we should remember that different institutions serve different functions and operate under different mandates as they engage in resource distribution. As noted earlier, the purposes of non-regulatory foreign life valuations vary widely and may not be designed to seek the same ends as regulatory foreign life valuations. Once one decides that valuation above zero is appropriate, one must still decide on a methodology of how to engage in that valuation. There is no inherent reason to think one must use the same method for disaster assistance, tort remedies, and regulatory decisionmaking. Rather, one might look to a variety of sources including an international or statutory mandate, and these sources may push towards differing final choices of valuation methodology.

Lastly, institutional capacities might also inform the decision whether and how to value foreign lives. The tallying of foreign costs and benefits may be more complicated and expensive in some contexts than others. An agency's anticipation that the administrative expense of determining costs and benefits will exceed the likely actual benefit provided, or that it simply lacks (and cannot acquire) the capacity to engage in the enterprise at all, would weigh against even the limited endeavor of quantifying—much less monetizing—foreign life loss. Such considerations are

---

[260] *See supra* note 34 and accompanying text.

consistent with both domestic and international law, which often fail to analyze or regulate activities with *de minimis* effects.[261]

D. CRAFTING A METHOD OF ECONOMIC VALUATION

Given our prescriptions that regulators should engage in transparent, reasoned valuation of foreign lives, at least as a default approach, we wanted to sketch out what plausible valuation methods might look like. As we have discussed, in U.S. regulatory contexts, which routinely rely on elicitations of people's willingness to pay to avert mortality risks, current practice does not distinguish between different persons or types of persons in valuing domestic mortality risks. Agencies set a single VSL, of around $6–$9 million, and use that value to monetize the benefits of a policy that can be expected to save any domestic life.[262]

In the context of foreign life valuation, we think that extending domestic economic valuation practices might be done through four distinct approaches: through reference to (1) the amount that *domestic* persons would pay to protect *domestic* lives; (2) the amount that *domestic* persons would pay to protect *foreign* lives; (3) the amount that *foreign* persons would pay to protect *their own* lives; or (4) no value at all.[263]

The choice among these methods implicates a variety of concerns. Practically speaking, the method chosen is likely to affect the quantity of domestic resources allocated towards protecting foreign lives: at two ends of this spectrum would be allocating $9 million towards each foreign life saved by a domestic action (as might be required under a valuation method treating

---

[261] For example, the United States per se excludes many regulatory activities under NEPA it believes to have *de minimis* environmental impact. *See* City of Olmsted Falls v. F.A.A., 292 F.3d 261, 268 (D.C. Cir. 2002) (discussing NEPA's *de minimis* threshold requirements). Also, the international norm against trans-boundary pollution from Trail Smelter is often limited to significant harm or significant damage. *See* Jutta Brunnée, *The United States and International Environmental Law: Living with an Elephant*, 15 EUR. J. INT'L L. 617, 628 (2004) (discussing the genesis of the significant harm test).

[262] *See supra* notes 91–94 and accompanying text.

[263] We note it may also reflect the amount domestic persons would pay to imperil foreign lives. In exceptional circumstances, a state might attach negative value to foreign lives. In so doing, it would allocate domestic resources to end, rather than save, foreign lives. As we believe that negative valuations raise distinctive issues not normally present in regulatory analysis, we believe this category deserves separate analysis.

foreign and domestic lives the same), and allocating $0 to protect the same life (under the zero valuation method). Beyond these practical concerns, however, these various methods also have differing potential justifications, perform differently well along parameters that we might think are important to resource allocation policy, and indicate that different quantities of domestic resources should be allocated towards foreign life valuation. We summarize some important differences in Table 3, and discuss the implications of each of the approaches in more detail below.

Table 3. Comparison of Foreign Life Valuation Methods.

Valuation Theory	**Sample value range (2013$)**	**Importance of transparency**	**Usefulness in international negotiation**	**Effectiveness in meeting obligation to steward public funds**
Domestic = Foreign	$6 to 9 mil[264]	Mid	Low	Low
Domestic WTP	~$3,000-1.5 mil[265]	Mid	Low/Mid	High
Foreign WTP	$150,000[266] to $22 mil[267]	Mid	Low	Low
Foreign = zero value	$0	High	High	Mid

[264] *See* Cass R. Sunstein, *The Real World of Cost-Benefit Analysis: Thirty-Six Questions (and Almost as Many Answers*) n.54 (Harv. Law Sch. Pub. Law & Legal Theory, Working Paper No. 13-11, 2013) ("I am aware of no agency using a VSL as low as $4 million; agencies tend to be in the range of $6 million to $9 million.") (citing OFFICE OF MGMT. & BUDGET, DRAFT 2012 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2199112).

[265] *See, e.g.*, Wojciech Kopczuk, Joel Slemrod & Shlomo Yitzhaki, *The Limitations of Decentralized World Redistribution: An Optimal Taxation Approach*, 49 EUR. ECON. REV. 1051, 1075 (2005) (finding that Americans value the well-being of foreign lives at between 1/6 and 1/2000 of an American life; range calculated as 1/2000 of $6 million to 1/6 of $9 million); *see also* Dana, *supra* note 255, at 13 (performing a stated preference survey to determine U.S. residents' willingness to pay to protect foreign lives and settlements). Dana found that, when members of the U.S. public were surveyed, they expressed a willingness to pay to reduce the chance of foreign deaths from heat waves. *Id.* at 20–22. Unfortunately, the methodology was not designed to allow for calculation of a domestic valuation of a foreign statistical life—what we might call a VFSL—but it did establish that Americans are willing to spend their own resources to protect foreign lives under some circumstances. *Id.*

[266] This is the estimate for developing countries' VSL in the Second IPCC Report.

[267] *See, e.g.*, Naomi Miyazato, *Estimating the Value of a Statistical Life Using Labor Market Data*, 38 JAPANESE ECON. 65, 71 (2012) (finding a Japanese VSL of ¥820 million to ¥2.14 billion, or approximately $8 million to $22 million). *See generally* W. Kip Viscusi & Joseph E. Aldy, T*he Value of a Statistical Life: A Critical Review of Market Estimates Throughout the World* (Nat'l Bureau of Econ. Research, Working Paper No. 9487, 2003) (surveying VSL estimates from around the world and analyzing their relationship to income); Ted R. Miller, *Variations Between Countries in Values of Statistical Life*, 34 J. TRANSP. ECON. & POL'Y 169 (2000) (surveying VSL studies across countries).

1. Value Foreign Lives the Same as Domestic Lives. This approach might be best undergirded by a strong form of cosmopolitanism such as Peter Singer's, and perhaps animated by the intuition that all lives have equal value.[268] This approach would result in an equal quantity of domestic public resources dedicated to protecting foreign lives as are used to protect domestic lives, typically ranging between $6 and $9 million.

This approach would benefit from transparency for two reasons, one a general benefit from transparency and the other more specific to this approach. As we discussed in more detail above, transparency may be helpful in informing domestic democratic decisionmaking processes. More specific to this method, transparently treating foreign lives equally with domestic ones might be understood to provide an international political benefit, which might be particularly important where a nation is seeking to "win hearts and minds" internationally, or to build up its international reputation as a sympathetic global actor.

This approach would, however, provide a very poor basis for advantageous negotiations with foreign states, insofar as foreign states would typically have no incentive to offer the United States any inducement to regulate in favor of foreign persons (since it would already be doing so without need for reimbursement).[269]

This approach also faces significant institutional challenges regarding the responsible administration of public funds. Even if people have equal intrinsic value, it is unclear—or at least ought to be controversial—to claim that intrinsic value creates an obligation in public servants to equally allocate domestic public resources to protect every person.

That said, this objection can be resisted on two separate grounds, one psychological and one ethical. On the psychological front, it might be resisted on paternalist grounds, on the assumption that it is irrational to be willing to expend fewer resources to protect foreign lives than domestic ones, and/or that

---

[268] *See generally* Singer, *supra* note 18.

[269] An exception might occasionally arise where the United States is negotiating with countries with higher VSLs, for example Japan. Miller, *supra* note 267, at 177. In such circumstances, this approach might at least lay the groundwork for having Japan convey additional resources to further regulate to protect its citizens. However, very few countries have a higher VSL than the United States. *Id.* Therefore, this is unlikely to occur frequently, and thus would be a poor basis for default policy.

valuations of foreign life may be particularly subject to biases like psychic numbing that might otherwise lead people to undervalue foreign life-saving. On the ethical front, a cosmopolitan might object that it is unethical to discriminatorily allocate resources as between domestic and foreign persons, and that any public direction otherwise should ethically be resisted.

In sum, we see the method of equal variation as most helpful where the parameters of a project are particularly focused on gaining an international political benefit; where the public institutional aspect is relatively less worrisome (as where a private organization is allocating resources); where behavioral or cognitive phenomena make lower valuations particularly problematic; or where policymakers seek to implement a strong cosmopolitan approach to valuation that overwhelms concerns about institutional responsiveness. That said, we do not feel comfortable recommending this approach as a default valuation strategy, because of what we believe to be the seriousness of concerns about stewardship of public funds. Rather, we encourage policymakers to consider the next method we discuss—using domestic valuations of foreign lives—as a default that can be overcome where circumstances make an alternative valuation method more appropriate.

2. Domestic Valuation of Foreign Statistical Lives. Under this approach, policymakers would determine the quantity of domestic resources to devote to protecting foreign lives by reference to domestic interests. This might be done either country by country, by different types of risks, or as a general figure that attaches to any foreign life. This approach is the one that appears to undergird current U.S. practice in non-regulatory contexts, such as disaster relief.

This approach—essentially, calculating the domestic value of a foreign statistical life—offers transparency benefits in that it at least offers the international community the assurance that the nation is willing to provide some domestic resources to protect foreign persons. And of course, here, as elsewhere, transparent adoption of this approach might allow for democratic discussions regarding the accuracy and application of the method.

This method of valuation has both benefits and drawbacks as a basis for international negotiations. It would at least create a

baseline that is defensible regardless of whether negotiation might yield foreign compensation. That said, it could also allow foreign nations to supplement in circumstances where they wished the United States to allocate additional resources towards the welfare of their citizens. However, this method clearly provides less negotiating leverage than a zero valuation approach.

A significant and important advantage of this approach is that it fits consistently with the valuation practices widely used within the U.S. regulatory system, which routinely relies on willingness to pay to determine how many resources should be allocated towards regulatory goods and to prevent harms.[270] In this case, the regulatory benefit to be calculated is simply the protection of foreign lives, and what limited empirical data we have does suggest that Americans are willing to pay non-zero amounts to protect foreign lives and settlements.[271] This makes this approach particularly appealing for circumstances where the policymaker is institutionally responsible for the management of public funds.

Because this method is particularly well-suited to satisfying obligations for managing public funds in the face of scarce resources, we recommend it as the default valuation method for policymakers engaged in public projects. That said, this approach is not superior to the other potential approaches in all circumstances, and when certain aspects of a policy-making situation are particularly important, other methods may be preferable.[272]

For instance, where policymakers are engaged in "winning hearts and minds," they might consider using the "domestic = foreign" method. Where they are engaged in international negotiations, and seek foreign compensation for domestic resource

---

[270] For a detailed discussion on the U.S. practice, see *supra* Part III.A.

[271] *See* Dana, *supra* note 75.

[272] The willingness-to-pay paradigm has been rightly criticized as imperfect on multiple fronts, not least of which are that elicitations of willingness to pay (or accept) exhibit significant framing effects and do nothing to address existing distributional inequities. These limitations have yet to be thoroughly addressed in the context of *foreign* willingness to pay, and may well deserve a much longer treatment than we can offer here. At a basic cut, however, we might reasonably think that framing effects experienced in domestic willingness-to-pay contexts may only be exacerbated when participants are asked to value foreign impacts that implicate "otherness" and limited numeracy, and we might worry that international distributional inequity cannot be addressed with willingness-to-pay paradigms.

allocation, they might prefer methods that provide greater negotiating leverage, i.e., zero valuation or negative valuation. Where international negotiation opportunities are robust, and they are satisfied with foreign levels of compensation for domestic resource allocation, or where they seek optimal global welfare regardless of institutional commitment, they might better adopt the foreign value of a statistical life method.

Finally, an additional thorny aspect of this puzzle relates to the question of what to do if domestic preferences about foreign lives are altruistic. A popular strain in economic valuation literature rejects the inclusion of altruistic preferences in policy decisions about resource allocation.[273] A chief concern underlying this rejection is that policymakers will end up "double counting" the value of a good, because they will be eliciting its value from more than one source.[274] What counts as an altruistic value varies with theorist, and some theorists will have a hard time incorporating foreign life valuation into policy. Policymakers who believe that they should reject altruistic preferences for simplicity's sake—or for any other reason—would do better to opt for the approach of zero valuation.

3. Foreign Valuation of Foreign Statistical Lives. This approach would use foreigners' willingness to pay to protect their own lives to determine how many domestic resources should be dedicated towards protecting those lives. In effect, this would have the United States adopt foreign countries' VSLs when valuing foreign life. This might be done either country by country, as adjusted by gross national income or matched to foreign countries' own domestic valuation policies, or it might be calculated as a general figure to be applied to any foreign life. This approach might be used to justify occasional U.S. regulatory practice of incorporating the global social cost of carbon into U.S. regulatory decisionmaking; in such circumstances, one way to understand the estimate of global costs is as the costs that foreign countries would attach to their own harms.

---

[273] *See, e.g.*, Chris Dockins et al., *Valuation of Childhood Risk Reduction: The Importance of Age, Risk Preferences, and Perspective*, 22 RISK ANALYSIS 335, 339 (2002) (discussing the possibility for double-counting when policymakers consider altruistic concerns).

[274] *Id.*

Other than the general domestic benefits provided from transparency, this method also would seem to provide an international political benefit, insofar as it would advertise to foreign nations that the United States is willing to devote substantial resources to protecting foreign persons. If valuations were country-specific, however, transparency might lead to some awkward comparisons, as the calculation of the value of a statistical life is typically income-sensitive, and this method would result in the United States paying significantly less to protect lives in poor countries than in wealthy ones. From a negotiating standpoint, this method does not provide a particularly strong initial position, since it gives foreign countries minimal incentive to contribute to the effective protection of their citizens.

At least at first blush, this method would appear to result in a form of Kaldor-Hicks efficiency, such that it would tend to maximize global welfare.[275] However, without any system of routinized compensation, this method—as with any Kaldor-Hicks improvement—has potential distributional problems. In this case, the distributional problem arises from the costs being pulled from domestic funds while the benefits accrue in the foreign column. This distributional aspect creates an institutional problem wherever policymakers are seeking to responsibly allocate public funds.

Another consideration in adopting this method on a country-by-country basis is its imposition of particularly high administrative costs. It introduces major complexity into decisionmaking as policymakers must generate different numbers for each country. This complexity is magnified for policies with multilateral rather than bilateral effects.

For this reason, we do not advise adoption of this approach as a default method of foreign life valuation. That said, it might be significantly more desirable in circumstances where there is

---

[275] According to the Kaldor-Hicks criterion, a policy change is considered efficiency enhancing if the winners gain more than the losers give up. Gene M. Grossman & Henrick Horn, *Economic Independence and International Externalities*, *in* LEGAL AND ECONOMIC PRINCIPLES OF WORLD TRADE LAW 9, 14 (Henrick Horn & Petros C. Mavroidis eds., 2013). In a sense, it would be possible to transfer resources ex post form the direct winners to the direct losers in a way that enables no one to be left worse off than before the policy change. *Id.*

opportunity for significant international negotiation, and where compensation schemes are available and implementable.

4. Zero Valuation. This method would attach zero value to foreign lives, insofar as it would allocate no domestic resources towards the protection of foreign lives. This is the method that appears to be the general regulatory default, as lives ignored by regulatory cost-benefit analyses are functionally treated as justifying $0 of domestic resource allocation.[276]

A distinctive characteristic of this method is its simplicity. It requires neither a determination of the number of foreign lives affected nor an assessment of their value. This benefit may be particularly useful in situations with poor or extremely costly information.

This approach to valuation is also easily communicated and understood. From the transparency perspective, this ease of communication contains both drawbacks and benefits. Transparent practices, here as elsewhere, allow for reasoned interrogation. In addition, this method does give the adopting country a strong starting position in international negotiations, as foreign countries desiring the dedication of resources towards foreign lifesaving would have a particular incentive to convey up to their own value of the intervention to the foreign state. From the perspective of international reputation, however, it might be detrimental for a country to advertise that it values foreign lives at zero.

Institutionally, this method seems like an odd fit with existing policies that account for domestic preferences, insofar as—by premise—it would refuse to allocate domestic resources to protect foreign lives, even when domestic persons would want those resources to be allocated or it would otherwise serve domestic interests. For this reason, we do not advise adoption of this approach as a default policy. However, a paternalistic view that saw the allocation of domestic resources to foreign policy as irrational, or a view particularly concerned with the complexity of incorporating altruistic preferences into policy, might justify adoption of this type of valuation. This approach would also be particularly desirable where policymakers judge that it is

---

[276] *See supra* Part IV.D.*4.*

important to set up a strong bargaining position at the international table.

5. Applying and Comparing Methods of Valuation. We conclude this Part by demonstrating that different valuation methods can lead to different outcomes. Let us imagine the United States is considering passing a variety of regulations that will save both foreign and domestic lives. No existing international or domestic regulation mandates a particular method of foreign life valuation. Yet, as illustrated below, the choice of a foreign valuation methodology may, but need not always, change whether a policy appears to be cost-justified.

Stipulated Policy Conditions

Domestic Value of a Statistical Life (VSL) = $6 million[277]
Domestic Willingness to Pay (WTP) for Foreign Life = $1 million[278]
Country 1 Foreign WTP for Foreign Life = $3 million[279]
Country 2 Foreign WTP = .5 million

Situation 1: Imagine a domestic regulation costing $12 million saves 15 domestic lives, 1 foreign life in Country 1, and 1 foreign life in Country 2. In this situation, the regulation would pass a cost-benefit analysis regardless of the foreign life valuation approach chosen.

	Domestic + Foreign Valued at Domestic	Domestic + Domestic WTP for Foreign	Domestic + Foreign WTP for Foreign	Domestic + Zero Foreign
Costs & Benefits	12 < 90 + 12	12 < 90 + 2	12 < 90 + 3.5	12 < 90 + 0
Outcome	Pass	Pass	Pass	Pass

Situation 2: Imagine a domestic regulation costing $91 million saves 15 domestic lives, 1 foreign life in Country 1, and 1 foreign

---

[277] This number is within the commonly used range for U.S. regulators. *See supra* Part II.A.*5*.

[278] While we do not know what number the domestic population would assign to foreign lives, we have good reason to suspect that it would be less than the number used for domestic lives but greater than zero. *See supra* Part II.

[279] As mentioned above, the range for foreign valuation of foreign lives is a significant one. We picked two different numbers both well within that range.

life in Country 2. In this situation, the regulation could pass or fail a cost-benefit analysis depending upon the foreign life valuation approach chosen. Here, the regulation would fail only under the zero valuation method.

	Domestic + Foreign Valued at Domestic	Domestic + Domestic WTP for Foreign	Domestic + Foreign WTP for Foreign	Domestic + Zero Foreign
Costs & Benefits	91 < 90 + 12	91 < 90 + 2	91 < 90 + 3.5	91 > 90 + 0
Outcome	Pass	Pass	Pass	Fail

Situation 3: Imagine a domestic regulation costing $93 million saves 15 domestic lives, 1 foreign life in Country 1, and 1 foreign life in Country 2. In this situation, the regulation could pass or fail a cost-benefit analysis depending upon the foreign life valuation approach chosen. Here, the regulation would pass under the foreign willingness to pay or the foreign valued at domestic approach, but fail under the zero valuation and domestic willingness-to-pay for foreign lives methods.

	Domestic + Foreign Valued at Domestic	Domestic + Domestic WTP for Foreign	Domestic + Foreign WTP for Foreign	Domestic + Zero Foreign
Costs & Benefits	93 < 90 + 12	93 > 90 + 2	93 < 90 + 3.5	93 < 90 + 0
Outcome	Pass	Fail	Pass	Fail

Situation 4: Imagine a domestic regulation costing $100 million saves 15 domestic lives, 1 foreign life in Country 1, and 1 foreign life in Country 2. In this situation, the regulation could pass or fail a cost-benefit analysis depending upon the foreign life valuation approach chosen. Here, the regulation would pass only under the foreign valued at domestic method.

	Domestic + Foreign Valued at Domestic	Domestic + Domestic WTP for Foreign	Domestic + Foreign WTP for Foreign	Domestic + Zero Foreign
Costs & Benefits	100 < 90 + 12	100 > 90 + 2	100 > 90 + 3.5	100 > 90 + 0
Outcome	Pass	Fail	Fail	Fail

Situation 5: Imagine a domestic regulation costing $130 million saves 15 domestic lives, 1 foreign life in Country 1, and 1

foreign life in Country 2. In this situation, the regulation would fail a cost-benefit analysis regardless of foreign life valuation approach chosen.

	Domestic + Foreign Valued at Domestic	Domestic + Domestic WTP for Foreign	Domestic + Foreign WTP for Foreign	Domestic + Zero Foreign
Costs & Benefits	130 > 90 + 12	130 > 90 + 2	130 > 90 + 3.5	130 > 90 + 0
Outcome	Fail	Fail	Fail	Fail

We have worked through these examples to show that conversation about foreign life valuation is not merely an abstract, theoretical one. It has deeply practical consequences for states trying to decide how to allocate resources as well as for foreign individuals affected by potential domestic regulations and their governments who may wish to negotiate over valuation methodologies. In sum, for reasons explained above, we generally prescribe that domestic policymakers adopt (a) transparent methods of foreign life valuation[280] and (b) the domestic valuation of a foreign statistical life as a default method of valuation.

V. OBJECTIONS, PUZZLES, AND AREAS FOR FURTHER RESEARCH

This Article has focused on identifying foreign life valuation as a distinct analytical category, on canvassing important policy making contexts for which foreign life valuation matters, and on providing a set of prescriptions that policymakers can use both to adopt reasonable default policies of foreign life valuation and to tailor their valuation approach to the specifics of their decision contexts.

That said, we have not attempted here to be exhaustive either in our approach to valuation, in our discussion of important policy making contexts, or in our prescriptions. In this section, we flag a number of additional puzzles and challenges that we believe deserve additional discussion and research.

---

[280] This may not be true for negative valuation of foreign lives. *See supra* note 263 and accompanying text.

A. THE ROLE OF INTERNATIONAL LAW

First, much more needs to be said about the role of international law in valuation of life and what duties or encouragements it gives to states to value foreign lives. When, if ever, does international law require valuation of foreign lives? Promising candidates include: (a) where a state bears causal responsibility for imperiling another state's citizens; (b) for intervention in failed states; and (c) in the context of cooperative transfers. How do the theoretical approaches to valuation that we discussed in Part IV apply to international contexts such as: prohibitions on threatening activities; requirements of compensation; mandates to undertake mortality risks; and duties to provide financial, intellectual, or technical assistance.

There is more work to be done on the relationship between the international law and existing domestic foreign life valuation practices and whether the correct balance has been struck. These questions deserve their own treatment.

B. THE BALANCING OF FOREIGN BENEFITS AND COSTS

Another puzzle involves the attempt to make cost-benefit analysis synchronous across domestic and foreign life valuation. This Article has focused on a single foreign benefit—life saving—without any acknowledgement of other inputs. Yet current domestic CBA analyses include not only domestic lives saved, but also domestic costs incurred. We think that to fairly engage in CBA, one must fully assess both sides of the ledger. Yet how should we conceive of foreign costs? What if the failure to regulate creates a loss of foreign lives but generates foreign economic benefits? Or what if it causes foreign deaths in one country but reduces foreign deaths in another? Do we look at how our domestic population would value such benefits or how a foreign population would value such benefits? Do we have the informational and institutional capacities to assess and monetize on both sides of the ledger? Need we use the same valuation methodology for foreign lives and foreign economic costs? Again, we believe these questions too warrant their own analysis.

C. NEGATIVE VALUATIONS

We also think the category of negative life valuation poses challenges but intriguing questions for both domestic and foreign lives. States sometimes expend resources with the goal of ending, rather than preserving lives, as with the death penalty, armed conflicts, genocides, crimes against humanity, and assassinations. When does the law permit negative resource valuation, and what role do cost arguments play in the arguments for or against such activities and their regulation? These are controversial and difficult issues that may be informed by a thoughtful comparison of negative valuations in foreign and domestic contexts.

D. VALUING HARMS BEYOND DEATH

In addition to thinking about negative as well as positive valuations of foreign lives, we also think the scope of the inquiry should be expanded beyond death. While we limit this Article to the harm of foreign deaths, domestic policies cause many types of nonlethal and noneconomic harms. Do theoretical intuitions about the life-saving context map onto other contexts such as suffering and economic loss? This raises similar questions to the foreign costs puzzle, but it does not merely collapse into a concern about synchronizing the costs and benefits sides of the ledger. Rather, this presents a concern about ensuring that the ledger contains all the relevant inputs.

E. EXPANDING REGULATORY AND INTERNATIONAL ANALYSES

Lastly, we think many opportunities exist for expanding our analysis of the regulatory implications of foreign life valuation. In this Article, we focused on developing an understanding of general regulatory practice regarding foreign life valuation. Our regulatory analysis was focused on large regulations and on SCC contexts, because we wished to detect any treatment of foreign life valuation and reasoned that these contexts would be most likely to show us some form of analysis of the impacts of foreign life valuation.

That said, it is possible to imagine significant additional descriptive work on current practices of valuation. In the United

States, for instance, one might draw relevant information from how the United States treats the exports of dangerous products. A variety of agencies such as the Consumer Product Safety Commission (CPSC), the Food & Drug Administration (FDA), and the Environmental Protection Agency (EPA) must make determinations about the domestic regulation of such items. They may even institute domestic sales bans and recalls for highly dangerous products.

To take one example, the CPSC's regulatory mandate is to prevent or reduce "unreasonable risk of injury,"[281] and it issues recalls for those products deemed to be "imminently hazardous to consumers."[282] Domestic product bans or recalls, however, do not guarantee an automatic foreign export ban. Rather, the agency has repeatedly shifted its position on whether items subject to a domestic recall may be sold abroad.[283] At the very least, U.S. manufacturers must notify the CPSC when they export goods that do not meet U.S. safety standards, and the CPSC then notifies the importing country.[284] In practice, identifying truly dangerous products being sold abroad under these schemes is difficult, with companies claiming that typical goods exported under the notification provision simply fail to meet technical requirements rather than significant safety standards.[285] While we welcome a more in-depth look at this example, at first blush, it appears the CPSC sometimes values foreign lives the same as domestic lives for purposes of regulatory decisionmaking, while at other times accords them a value of zero.

Another relevant example concerns the treatment of tobacco. The United States vigorously regulates tobacco products for domestic consumption, including age, locational, and advertising restrictions, along with significant warning requirements.[286]

---

[281] Consumer Product Safety Act, 15 U.S.C. § 2051(a)(3) (2012).

[282] *Id.* § 2061(b)(1).

[283] *US May Lift Ban Against Selling Unsafe Products Overseas*, DAILY REPORTER 29 (May 15, 1984) (discussing rule); *Hazard in Aisle 5*, CONSUMER REPORTS, Nov. 2004, at 12–17 (discussing relaxation of original prohibition).

[284] Renae Merle, *Products that Miss Safety Standards Sent Overseas by U.S. Companies*, WASH. POST, Sept. 1, 2007, at D1.

[285] *Id.*

[286] *See generally* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (exemplifying Congressional efforts to regulate tobacco products);

When it comes to the sale of domestic tobacco abroad, however, the United States has refused to join the international tobacco treaty,[287] nor does it limit domestic companies in their aggressive pursuit of foreign sales[288] of domestically regulated and banned tobacco.[289] Moreover, the United States government has pressured other countries to drop tobacco tariffs and restrictions on tobacco advertisements.[290] Notably, the United States does not provide any significant foreign aid to reduce or eliminate the dangers posed by smoking. Again, while we welcome more detailed analysis, it appears that the United States is not willing to expend any regulatory resources to protect foreign lives from domestically produced tobacco products.

These are examples of possible topics for expanding the study of domestic regulatory practice regarding foreign life valuation. Another set of extensions, however, might focus on developing descriptive information of how countries across the world deal with foreign life valuation. In some cases, as where regulatory decisionmaking is modeled on the United States, the analysis of such practices may look similar to our analysis here. In regulatory regimes premised on alternative theories, such as those based on the precautionary principle, this analysis might include additional and difficult questions—for example, whether domestic policies ought to be precautionary only as to effects within the country, or whether they ought to be globally precautionary as well.

Health Cigarette Smoking Act, Pub. L. No. 91-222, 84 Stat. 87 (1970) (same); Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 (2012) (same).

[287] The United States has signed, but not ratified, the World Health Organizations Framework Convention on Tobacco Control. *Parties to the WHO Framework Convention on Tobacco Control*, WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL, http://www.who.int/fctc/signatories_parties/en/ (last visited Nov. 27, 2013).

[288] *See* Andrew Townsend, *Misplaced Marketing: Dangers for Misplaced Tobacco Marketing in Eastern Europe*, 17 J. CONSUMER MARKETING 103, 104 (2000) (discussing U.S. companies entry into the European market).

[289] For instance, the Family Smoking Prevention and Tobacco Control Act merely requires a report on the public health implication of such exports and recommendations of policy alternatives to reduce the health impacts of such exports. Pub. L. No. 111-31, 123 Stat. 1776, § 302(b).

[290] *See* ACTION ON SMOKING AND HEALTH, TOBACCO AND THE DEVELOPING WORLD 2 (2009), *available at* http://ash.org.uk/files/documents/ASH_126.pdf (discussing U.S. trade policies regarding tobacco).

F. EXPANDING VALUATION

One important limitation of this Article comes from our decision to focus on valuations of foreign human lives as determined by domestic allocation of resources. This approach has limitations that are worth identifying, the implications of which we hope future work can more thoroughly explore.

First, in focusing on humans' actions in allocating their resources through law, our emphasis is on human choices within human institutions. We focus, in fact, on existing humans as a source of value in valuing other existing humans' lives. This approach is not inevitable: other important sources of value may exist, including future persons[291] and non-humans,[292] and many things may possess value over and above human life. Nevertheless, we believe human lives to be something worth valuing, and we believe other humans to be one important source of that value. And even if we did not believe this, the law generally takes a human-focused view to valuing human-centric harms.

Second, in focusing on the allocation of resources, we necessarily make some assumptions about the treatment of resources as property. In particular, we assume that the property rights currently recognized by existing law are an appropriate starting point from which to base resource allocations; or in other words, we assume that people have some kind of recognizable right to allocate the resources they control. This view is not inevitable,[293] and might be challenged with questions about the fairness and optimality of existing allocations of resources. Nevertheless, we operate based on the assumption that a pragmatic approach to resource allocation can be helpful, even if not morally exhaustive.[294]

And finally, the willingness-to-pay paradigm has been rightly criticized as imperfect on multiple fronts, not least of which are

---

[291] *See supra* note 70 and accompanying text.

[292] *See, e.g.*, John D. Echeverria & Julie Lurman, *"Perfectly Astounding" Public Rights: Wildlife Protection and the Takings Clause*, 16 TUL. ENVTL. L.J. 331 (2003) (discussing the value of wildlife).

[293] *See* discussion *supra* Part IV.D.*1* (entertaining cosmopolitanism-based arguments for resource allocations).

[294] *See* discussion *supra* Part IV.D.*1*.

that elicitations of willingness to pay (or accept) exhibit significant framing effects and do nothing to address existing distributional inequities. These limitations have yet to be thoroughly addressed in the context of *foreign* willingness to pay and may well deserve a much longer treatment than we can offer here. At a basic cut, however, we might reasonably think that framing effects experienced in domestic willingness-to-pay contexts may only be exacerbated when participants are asked to value foreign impacts that implicate "otherness" and limited numeracy, and we might worry that international distributional inequity cannot be addressed with willingness-to-pay paradigms. Additional analysis of these difficult questions may help further inform the treatment of foreign valuation.

VI. CONCLUSION

When decisions made by domestic institutions affect foreign as well as domestic lives, those institutions must make some choice about how to allocate resources to value foreign lives. This Article has described U.S. practices for foreign life valuation in regulatory and non-regulatory contexts and found U.S. policymakers'—and particularly U.S. regulators'—frequently unreasoned, opaque practices to be deeply problematic. We prescribe a tiered approach to building more transparent, better-theorized, and more thoughtfully negotiated policies of foreign life valuation.