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The Promise and Peril of Paternalistic Approaches to Flood Risk

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THE PROMISE AND PERIL OF PATERNALISTIC APPROACHES TO FLOOD RISK

ALEXANDER B. LEMANN*

Our country's ever-growing exposure to flood risk has been the target of policy reform for decades. To many experts, it is clear that we must stop subsidizing flood-prone development and begin the process of moving people away from flood-prone areas. And yet, despite the seemingly obvious benefits of abandoning areas that will be permanently underwater in a generation, flood-prone living has been a difficult habit to kick.

Examining the problem against the background of the philosophical literature on paternalism helps show why. Paternalism—government intervention in people's choices for the good of those same people—has long been controversial. The insistence that people be permitted to expose themselves to the risk of flooding if they choose to do so is arguably a product of a deep anti-paternalist, libertarian strain in our political culture.

The thorny problem of flood risk presents two obstacles to those who would embrace paternalistic policies as promoting a more rational approach to risk. First, a purely rational approach to the problem of flood risk is elusive. Judgments about when and where it makes sense to expose oneself to some risk of flooding are inherently value laden. Second, paternalistic policies raise distributive concerns, regardless of how they're structured. While paternalists are fond of pointing out that libertarian attitudes favor "good choosers" by allowing bad choosers the freedom to suffer worse outcomes,

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paternalistic policies similarly favor good choosers by mandating choices that align with their values.

These observations suggest that flood risk is a problem that is not susceptible to being “solved.” There is not an optimal approach we can be nudged towards. Our commitment to freedom, on one hand, and our unwillingness to let the victims of natural disasters suffer alone, on the other, create a cycle of risk that we are not likely to break in any clean, satisfying way. The best we can do is to empower people by sharing the information (about flood risk) and resources (to help relocate) they need to make judgments of their own.

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INTRODUCTION

Flooding is the most common and most costly natural disaster in the United States. Thanks to climate change, the toll it takes is growing.¹ Warmer air holds more moisture, warmer seas provide more power to tropical storms, and a warmer planet contains less ice, causing rising sea levels that are expected to inundate roughly \$1 trillion of real estate in the United States alone over the next eighty years.²

1. U.S. GLOB. CLIMATE CHANGE RSCH. PROGRAM, CLIMATE SCIENCE SPECIAL REPORT: FOURTH NATIONAL CLIMATE ASSESSMENT 25–27 (Donald J. Wuebbles, et al. eds., 2017), <https://science2017.globalchange.gov> [<https://perma.cc/WW74-DRWP>].

2. UNION OF CONCERNED SCIENTISTS, UNDERWATER: RISING SEAS, CHRONIC FLOODS, AND THE IMPLICATIONS FOR US COASTAL REAL ESTATE 5 (2018), <https://www.ucsusa.org/sites/default/files/attach/2018/06/underwater-analysis-full-report.pdf> [<https://perma.cc/FDX4-F7VH>]; see also Ebru Kirezci et al.,

Experts have been sounding the alarm about this situation for decades. To them, the solutions are obvious and relatively simple: we must stop subsidizing flood-prone living and begin moving people away from flood zones as soon as possible.³ Doing this entails, among other things, eliminating the subsidies that flow to owners of flood-prone houses in the form of artificially cheap flood insurance premiums, reducing or eliminating the generous post-disaster aid that helps people and governments rebuild after floods, and instituting some form of “managed retreat,” in which flood-prone areas are permanently abandoned.

And yet, despite the seemingly obvious benefits of these interventions, they have proved surprisingly difficult to enact into law. The last time Congress attempted major reform of the National Flood Insurance Program’s rate structure, it reversed

Projections of Global-Scale Extreme Sea Levels and Resulting Episodic Coastal Flooding over the 21st Century, 10 SCI. REPS. 1 (2020), <https://www.nature.com/articles/s41598-020-67736-6.pdf> [<https://perma.cc/QM45-BZB3>] (finding a possible 52 percent increase in global population at risk by 2100); NAT’L OCEANIC & ATMOSPHERIC ADMIN., U.S. DEP’T OF COM., NOS CO-OPS 092, 2019 STATE OF U.S. HIGH TIDE FLOODING WITH A 2020 OUTLOOK 7 (2020), https://tidesandcurrents.noaa.gov/publications/Techrpt_092_2019_State_of_US_High_Tide_Flooding_with_a_2020_Outlook_30June2020.pdf [<https://perma.cc/LY3T-FJ58>] (noting an “extraordinary” five-fold increase in high-tide flooding since 2000 in many cities).

3. Katharine J. Mach & A. R. Siders, Opinion, *Is Your Town Threatened by Floods or Fires? Consider a ‘Managed Retreat.’*, N.Y. TIMES (July 16, 2021), <https://www.nytimes.com/2021/07/16/opinion/managed-retreat-climate-change.html> [<https://perma.cc/Z2CA-2SPG>]; see also Steven Bingler & Martin C. Pedersen, Opinion, *Planners Talk About Resilience in the Face of Climate Change. We Need to Start Using a Different R Word.*, WASH. POST (Feb. 17, 2020), <https://www.washingtonpost.com/opinions/2020/02/17/climate-hope-best-prepare-worst/> [<https://perma.cc/2C5N-JRNC>]; Yuliya Panfil, Opinion, *The Case for ‘Managed Retreat’*, POLITICO (July 14, 2020, 11:49 AM), <https://www.politico.com/news/agenda/2020/07/14/climate-change-managed-retreat-341753> [<https://perma.cc/B44W-PZG8>]; JEFFREY PETERSON, A NEW COAST: STRATEGIES FOR RESPONDING TO DEVASTATING STORMS AND RISING SEAS (2019); A.R. Siders et al., *The Case for Strategic and Managed Climate Retreat*, 365 SCIENCE 761, 761 (2019); Andrea McArdle, *Managing “Retreat”: The Challenges of Adapting Land Use to Climate Change*, 40 U. ARK. L. REV. 605, (2018); ROBERT FREUDENBERG ET AL., LINCOLN INST. LAND POL’Y, BUY-IN FOR BUYOUTS: THE CASE FOR MANAGED RETREAT FROM FLOOD ZONE 4–5, 8 (2016), <https://www.lincolninst.edu/sites/default/files/pubfiles/buy-in-for-buyouts-full.pdf> [<https://perma.cc/EK4J-57PG>]; ORRIN H. PILKEY ET AL., RETREAT FROM A RISING SEA: HARD CHOICES IN AN AGE OF CLIMATE CHANGE 9, 83 (2016); Robert R.M. Verchick & Lynsey R. Johnson, *When Retreat Is the Best Option: Flood Insurance After Biggert-Waters and Other Climate Change Puzzles*, 47 J. MARSHALL L. REV. 695, 696 (2013); J. Peter Byrne, *The Cathedral Engulfed: Sea-Level Rise, Property Rights, and Time*, 73 LA. L. REV. 69, 73 (2012); Lisa A. St. Amand, *Sea Level Rise and Coastal Wetlands: Opportunities for a Peaceful Migration*, 19 B.C. ENV’T AFFS. L. REV. 1, 3 (1991).

itself fourteen months later.⁴ Post-disaster aid packages remain generous and overwhelmingly popular.⁵ And managed retreat is still largely theoretical.⁶

The reason is something of a puzzle. Opposition to measures designed to move people out of harm's way is typically dismissed as craven self-interest—the product of willful climate denialism and a political culture that seems unable to sacrifice short-term costs for long-term benefits.⁷ But there are signs that this explanation is unsatisfying. The problem of flood risk cuts across political and socioeconomic lines, and even progressives who have been at the forefront of action on climate change have found it impossible to enact managed retreat.⁸ A more complete understanding of the difficulty requires a turn to culture.

4. See Alexander Lemann, *Rolling Back the Tide: Toward an Individual Mandate for Flood Insurance*, 26 FORDHAM ENV'T L. REV. 166, 192–96 (2015).

5. In response to the disastrous 2017 hurricane season, Congress passed more than \$130 billion in aid funding. See Brett Lingle et al., *Federal Disaster Rebuilding Spending: A Look at the Numbers*, U. PA WHARTON: RISK MGMT. & DECISION PROCESSES CTR. (Feb. 22, 2018), <https://riskcenter.wharton.upenn.edu/disaster-aid/federal-disaster-rebuilding-spending-look-numbers> [<https://perma.cc/VM78-RS6F>]. The first appropriation (of about \$35 billion) passed the House by a vote of 353 to 69 and passed the Senate by a vote of 82 to 17. Thomas Kaplan, *House Approves \$36.5 Billion Hurricane and Wildfire Aid Package*, N.Y. TIMES (Oct. 12, 2017), <https://www.nytimes.com/2017/10/12/us/politics/house-congress-disaster-relief-hurricanes-wildfires.html> [<https://perma.cc/3YE9-JWBQ>]; see also Natalie Andrews, *Senate Approves \$36.5 Billion Disaster Relief Bill*, WALL ST. J. (Oct. 24, 2017, 5:21 PM), <https://www.wsj.com/articles/senate-approves-36-5-billion-disaster-relief-bill-1508880100> [<https://perma.cc/CTC8-2WQ6>].

6. Panfil, *supra* note 3 (“[D]espite an avalanche of studies proving that entire regions of our country will become uninhabitable in a matter of decades, political leaders have not even begun a conversation or started to develop a national strategy for the massive dislocation that is inevitable and already on the horizon.”); FREUDENBERG ET AL., *supra* note 3, at 56 (“Retreat has long been avoided in public dialogue as an adaptation strategy.”); J. Peter Byrne & Jessica Grannis, *Coastal Retreat Measures*, in THE LAW OF ADAPTATION TO CLIMATE CHANGE 267, 268 (Michael B. Gerrard & Katrina Fischer Kuh eds., 2012).

7. Panfil, *supra* note 3 (noting that managed retreat threatens to erode municipalities' tax base, creating a “perverse financial incentive” to oppose it); PILKEY ET AL., *supra* note 3, at 36–38 (criticizing political leaders in Florida for their “ineptitude” and refusal to acknowledge climate change).

8. For example, Pilkey and his coauthors praise Michael Bloomberg's “impressive leadership” on this issue as mayor of New York City, while noting with dismay Bloomberg's insistence that the city “cannot and will not abandon [its] waterfront” and must “protect it, not retreat from it”—a position they deride as “absurd.” PILKEY ET AL., *supra* note 3, at 52–55. More recently, FEMA's proposed overhaul of flood insurance premiums, “Risk Rating 2.0,” has attracted opposition from Democrats and Republicans alike. Christopher Flavelle & Emily Cochrane, *Chuck Schumer Stalls Climate Overhaul of Flood Insurance Program*, N.Y. TIMES, <https://www.nytimes.com/2021/03/18/climate/chuck-schumer-fema-flood->

The philosophical literature on paternalism helps shed light on why flood risk is such a thorny problem. The question of whether the government may intervene in people's decisions for the good of those same people has been hotly debated for centuries.⁹ While philosophers have staked out various positions in this debate, most agree that at least some paternalistic interventions are impermissible.¹⁰ Managed retreat, however accomplished, is paternalistic—and controversial for that reason.

But the problems are deeper than that; after all, many legal interventions are paternalistic yet relatively uncontroversial. There are features of the problem of flood risk that make it particularly resistant to being solved by enlightened bureaucrats, and they are features that pervade many aspects of our lives and are too often overlooked by those who favor a more paternalistic system of government.

First, deciding when and whether to expose oneself to flood risk involves a difficult, value-laden calculus that is not susceptible to objective, purely rational cost-benefit analysis. The problem of where to live involves weighing quantifiable costs against intangible benefits, an inherently subjective exercise. Indeed, even if the values at stake could be reduced to one unit of comparison, not everyone has the same sense of how valuable such units are. Some people resist the instinct that we should minimize our risk, whatever the cost.

Second, and perhaps even more troublingly, any paternalistic approach that is coercive risks imposing burdens unequally in ways that should concern us. Paternalists are fond of equating anti-paternalism with a laissez-faire emphasis on freedom of contract, and overemphasizing freedom of contract helps drive disparities in wealth and health by privileging “good choosers” over bad ones.¹¹ But unchecked paternalism has distributive

insurance.html [<https://perma.cc/9XY7-D4Z4>] (Sept. 24, 2021); Lyle Adriano, *Kennedy Tries to Thwart Biden NFIP Plan*, INS. BUS. AM. (June 14, 2021), <https://www.insurancebusinessmag.com/us/news/catastrophe/kennedy-tries-to-thwart-biden-nfip-plan-257759.aspx> [<https://perma.cc/8X7W-3TLZ>].

9. DONALD VANDEVEER, *PATERNALISTIC INTERVENTION: THE MORAL BOUNDS OF BENEVOLENCE* 10–12 (1986).

10. *Id.* at 423–24 (“[W]e cannot, in the absence of their valid consent, foist our conception of their good or the good on our moral equals when they choose and act in ways wronging no others.”).

11. Richard J. Arneson, *Joel Feinberg and the Justification of Hard Paternalism*, 11 *LEGAL THEORY* 259, 276 (2005) (calling anti-paternalism “an ideology of the good choosers[:] a doctrine that would operate to the advantage of the already better-off at the expense of the worse-off, the needy and vulnerable”); Richard J.

implications as well, privileging good choosers by leaving their choices unaffected while forcing bad choosers to give up goods that might be dear to them in pursuit of a life whose desirability is too often assumed.

This Article argues that appreciating these aspects of paternalism helps shed light on the problem of flood risk and helps explain why our habit of flood-prone development has been so difficult to kick. Part I provides background information on the problem of flood risk, with particular emphasis on current proposals to address it, along with a discussion of the literature on paternalism. Part II makes the case that the paternalism literature has important things to say about the problem of flood risk, despite the fact that addressing the problem might appear to involve nothing more than eliminating subsidies to flood-prone development. Parts III and IV argue that the problem of flood risk contains certain features to which both paternalists and the community of experts who write about flood risk have paid insufficient attention, specifically the importance of subjective values in making judgments about risk and the distributive problems that are created when those judgments are overridden. Part V concludes by offering some thoughts about how these observations might be put into practice and how we might think about solutions to the problem of flood risk in the coming century of rising seas.

I. BACKGROUND

A. *Flood Risk*

The country's ever-worsening flood risk is now familiar enough that it does not need a comprehensive retelling here.¹² For the purposes of this Article, it will suffice to review the ways in which flood risk is socialized and the rising cost of that shared burden. Most importantly, I will include here a survey of proposed reforms to our current approach to the problem, which range from stronger disclosure laws and other ways of

Arneson, *Paternalism, Utility, and Fairness*, in MILL'S ON LIBERTY: CRITICAL ESSAYS 83 (Gerald Dworkin ed., 1997).

12. For more background on the causes and costs of flood risk or the ways it will increase due to climate change, see Alexander B. Lemann, *Assumption of Flood Risk*, 51 ARIZ. STATE L.J. 163, 175–77, 197–211 (2019) [hereinafter *Assumption of Flood Risk*]; Alexander B. Lemann, *Stronger than the Storm: Disaster Law in a Defiant Age*, 78 LA. L. REV. 437, 445–57 (2018).

disseminating information about flooding to outright prohibitions on building or rebuilding in certain areas.

For at least a century, governments at various levels have taken steps to socialize the costs of flooding. Construction of flood-control levees was largely left to local and state governments until the disastrous Mississippi River flooding of 1927 highlighted weaknesses in this approach.¹³ Roughly since then, the U.S. Army Corps of Engineers has invested many billions of dollars in a valiant but perhaps misguided attempt to flood-proof the country.¹⁴ The resulting infrastructure includes the levees around New Orleans,¹⁵ dams in North Dakota,¹⁶ artificial dunes in New Jersey,¹⁷ and the concrete wash known as the Los Angeles River.¹⁸

The federal government also subsidizes flood risk by providing massive aid packages in the wake of large disasters. These Congressional allocations are enormously popular, routinely passing both houses of Congress with no more than token opposition. They can reach eye-popping sums. After Hurricanes Harvey, Irma, and Maria struck in 2017, for example, Congress appropriated roughly \$120 billion in aid.¹⁹ As this Article goes to press, Congress is debating a roughly \$30 billion allocation related to Hurricane Ida.²⁰ Most of this money generally flows to state and local governments and is used to help them pay for the direct costs of disaster relief and to repair infrastructure

13. *Multipurpose Waterway Development*, U.S. ARMY CORPS OF ENG'RS, <https://www.usace.army.mil/About/History/Brief-History-of-the-Corps/Multipurpose-Waterway-Development> [<https://perma.cc/9ZMQ-59E8>].

14. See JOSEPH L. ARNOLD, U.S. ARMY CORPS OF ENG'RS, *THE EVOLUTION OF THE 1936 FLOOD CONTROL ACT* 23 (1988), https://www.publications.usace.army.mil/Portals/76/Publications/EngineerPamphlets/EP_870-1-29.pdf [<https://perma.cc/9923-7TLZ>].

15. See CRAIG E. COLTEN, *AN UNNATURAL METROPOLIS: WRESTLING NEW ORLEANS FROM NATURE* (2005).

16. See MARC REISNER, *CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER* 18, 184, 187, 201–02 (reprt. 1993).

17. See GILBERT M. GAUL, *THE GEOGRAPHY OF RISK: EPIC STORMS, RISING SEAS, AND THE COST OF AMERICA'S COASTS* 146–65 (2019); CORNELIA DEAN, *AGAINST THE TIDE: THE BATTLE FOR AMERICA'S BEACHES* 99–105 (1999).

18. See BLAKE GUMPRECHT, *THE LOS ANGELES RIVER: ITS LIFE, DEATH, AND POSSIBLE REBIRTH* 173 (1999).

19. Lingle et al., *supra* note 5.

20. Scott Wong, *Louisiana Delegation Split over Debt Hike Bill with Disaster Aid*, THE HILL (Sept. 21, 2021, 12:25 PM), <https://thehill.com/policy/finance/573192-louisiana-delegation-split-over-debt-hike-bill-with-disaster-aid> [<https://perma.cc/44SH-PSZ8>].

damaged in floods.²¹ The amounts that individuals stand to receive are generally modest: the current maximum available is \$34,000, but the average grant is only \$5,000.²² Such grants are primarily intended to cover short-term needs, such as gas, food, and shelter, rather than the cost of rebuilding a flood-damaged home.²³

Far more significant for individuals is the National Flood Insurance Program (NFIP). The NFIP was created in 1968 in the wake of Hurricane Betsy, which was the first storm to cause more than \$1 billion dollars in damage.²⁴ At that time, private insurance for flood risk was not available; insurers had learned that the risk of flooding was too highly correlated and too difficult to precisely estimate to manage successfully.²⁵ The federal government stepped in and has been the dominant player in the market for flood insurance ever since.²⁶ The NFIP was self-sustaining and largely uncontroversial until Hurricanes Katrina, Rita, and Wilma combined to cause more than \$17 billion in covered losses, sending the program into a debt—currently about \$20.5 billion²⁷—that has plagued it ever since.²⁸ To many commentators, this debt is a measure of the degree to which the

21. *Id.*

22. *Id.*; Notice of Maximum Amount of Assistance Under the Individuals and Households Program, 82 Fed. Reg. 196 (Oct. 12, 2017).

23. *Individuals and Households Program*, FEMA, <https://www.fema.gov/assistance/individual/program> [<https://perma.cc/H7W6-5AFV>] (Oct. 4, 2021).

24. Edward T. Pasterick, *The National Flood Insurance Program*, in *PAYING THE PRICE: THE STATUS AND ROLE OF INSURANCE AGAINST NATURAL DISASTERS IN THE UNITED STATES* 125, 126 (Howard Kunreuther & Richard J. Roth, Sr. eds., 1998).

25. Charlene Luke & Aviva Abramovsky, *Managing the Next Deluge: A Tax System Approach to Flood Insurance*, 18 CONN. INS. L.J. 1, 23–24 (2011). In the insurance industry, a risk is said to be “correlated” when it “generally occur[s] simultaneously for a large swath of individuals.” *Id.* at 23.

26. CAROLYN KOUSKY ET AL., UNIV. OF PA., *THE EMERGING PRIVATE RESIDENTIAL FLOOD INSURANCE MARKET IN THE UNITED STATES* 11 (2018), <https://d1c25a6gwz7q5e.cloudfront.net/reports/07-13-18-Emerging%20Flood%20Insurance%20Market%20Report.pdf> [<https://perma.cc/7PA3-P9B5>].

27. FED. INS. & MITIGATION ADMIN., FED. EMERGENCY MGMT. AGENCY, *THE WATERMARK: FISCAL YEAR 2021, SECOND QUARTER* (2021), https://www.fema.gov/sites/default/files/documents/fema_fima-watermark-fy21-q2.pdf [<https://perma.cc/D45F-YT4X>].

28. See NAT’L RSCH. COUNCIL, *REDUCING COASTAL RISK ON THE EAST AND GULF COASTS* 50 (2014); see also UNION OF CONCERNED SCIENTISTS, *OVERWHELMING RISK: RETHINKING FLOOD INSURANCE IN A WORLD OF RISING SEAS* 8 (2013), <https://www.ucsusa.org/sites/default/files/2019-09/Overwhelming-Risk-Full-Report.pdf> [<https://perma.cc/B6ZY-NYFU>].

NFIP's premiums are underpriced and the degree to which taxpayers generally subsidize residents of flood-prone houses.²⁹ In part because of the total value of the assets insured by the NFIP—currently about \$1.3 trillion³⁰—much of the reformist zeal currently directed at our approach to flood risk focuses on the NFIP.

With sea levels rising, heavy rainfall getting worse, and billion-dollar storms more frequent than ever, there is a palpable sense that something must be done about our approach to flood risk.³¹ The problem is often framed in terms of the government's exposure and the extent to which taxpayers will be on the hook for future losses, but it could also be framed in starker terms: current estimates anticipate that by 2100 the homes of 4.7 million people and 107,000 businesses—collectively worth more than \$1 trillion—will face chronic inundation (at least twenty-six floods per year).³²

The proposals for what to do about this can be placed on a spectrum from least to most coercive, which helps frame the discussion of how ideas about paternalism apply to this problem. One theme common to all proposals is how controversial they are. At the “least coercive” end of the spectrum are various forms of disclosure. There is currently no federal law requiring sellers to notify buyers of a home's flood history. Some states have relatively strong laws on this, but many, including many with high risk of flooding, do not.³³ This is the closest thing the problem of

29. Ike Brannon & Ari Blask, *The Government's Hidden Housing Subsidy for the Rich*, POLITICO (Aug. 8, 2017, 5:38 AM), <https://www.politico.com/agenda/story/2017/08/08/hidden-subsidy-rich-flood-insurance-000495> [<https://perma.cc/Q6YS-RR6V>].

30. Fed. Ins. & Mitigation Admin., *supra* note 27.

31. See UNION OF CONCERNED SCIENTISTS, *supra* note 2, at 2–3.

32. *Id.* at 4–5; see also Tatiana Schlossberg, *Rising Sea Levels May Disrupt Lives of Millions, Study Says*, N.Y. TIMES (Mar. 14, 2016), <http://www.nytimes.com/2016/03/15/science/rising-sea-levels-global-warming-climate-change.html> [<https://perma.cc/3T4D-FW4L>]; Mathew E. Hauer et al., *Millions Projected to Be at Risk from Sea-Level Rise in the Continental United States*, 6 NATURE CLIMATE CHANGE 691, 691 (2016) (concluding that coastal inundation could lead to a population shift comparable to the “Great Migration” of Black Americans from the South in the twentieth century).

33. Joel Scata, *Home Buyers Face Stacked Deck to Learn of Past Floods*, NAT'L RES. DEF. COUNCIL (Aug. 16, 2018), <https://www.nrdc.org/experts/joel-scata/home-buyers-face-stacked-decks-learn-past-floods> [<https://perma.cc/ZPU7-W5VU>] (noting that Florida has no law mandating disclosure of flood risk); Steve Bohnstedt & Quincy Herald Whig, *How States Stack Up on Flood Disclosure*, NAT'L RES. DEF. COUNCIL, <https://www.nrdc.org/flood-disclosure-map> [<https://perma.cc/L5K8-UKAD>].

flood risk has to a “nudge,” a tweak made to the information people face when they make decisions about where to live in the hope that it will lead them to make different decisions. Despite the seeming mildness of disclosure laws, they are controversial,³⁴ mostly because of the (not inaccurate)³⁵ sense that they would negatively affect property values for those already living in flood-prone houses.³⁶

More coercive are measures that would increase the premiums charged by the NFIP. Homeowners who have a mortgage and live in what is colloquially known as the “100-year flood zone” are required to maintain flood insurance.³⁷ Certain categories of homeowners are legally entitled to pay rates that do not reflect the full magnitude of the risk they face.³⁸ Even outside of these categories (which represent roughly 26 percent of policyholders),³⁹ NFIP premiums are often thought to be underpriced, especially in high-risk areas, for a range of reasons. Some of

34. Mose Buchele, *In Texas, Home Sellers Must Now Disclose More About the Risk of Flooding*, NPR (Oct. 27, 2019, 7:00 AM), <https://www.npr.org/2019/10/27/772996585/in-texas-home-sellers-must-now-disclose-more-about-the-risk-of-flooding> [<https://perma.cc/9N2M-J4TN>] (noting that the National Association of Realtors opposes a national flood risk disclosure law).

35. Miyuki Hino & Marshall Brke, *The Effect of Information About Climate Risk on Property Values*, 118 PROC. NAT'L ACAD. SCI. U.S., no. 7, 2021, at 1, <https://www.pnas.org/content/pnas/118/17/e2003374118.full.pdf> [<https://perma.cc/U9DB-PNYG>] (finding the price penalty for flood risk is larger in states where sellers must disclose information about flood risk to potential buyers); Jaren C. Pope, *Do Seller Disclosures Affect Property Values? Buyer Information and the Hedonic Model*, 84 LAND ECON. 551, 553 (2008) (finding that a North Carolina flood-disclosure law's passage reduced prices of flood prone houses by 4 percent).

36. In previous work I have supported similar ideas, like monuments indicating the extent and depth of past floods and blue paint on streets that would map flood zones onto physical reality. Lemann, *Assumption of Flood Risk*, *supra* note 12, at 219–21. Nicolas Cornell has expressed concern that nudges exact an “aesthetic toll,” meaning they clutter up the world and ruin the simple joy of various experiences. Nicolas Cornell, *Implications, Extensions, and Applications: The Aesthetic Toll of Nudging*, 14 GEO. J.L. & PUB. POL'Y 841 (2016) (citing, among other things, morbid road signs along scenic highways in South Dakota). I imagine he would object to these ideas as prime examples.

37. 42 U.S.C. § 4012a(b). Unfortunately, the requirement is underenforced. *E.g.*, LLOYD DIXON ET AL., RAND CORP., THE NATIONAL FLOOD INSURANCE PROGRAM'S MARKET PENETRATION RATE: ESTIMATES AND POLICY IMPLICATIONS (2006).

38. U.S. GOV'T ACCOUNTABILITY OFF., GAO 17–18, FLOOD INSURANCE: COMPREHENSIVE REFORM COULD IMPROVE SOLVENCY AND ENHANCE RESILIENCE (2017), <https://www.gao.gov/assets/690/684354.pdf> [<https://perma.cc/25Z7-E6CK>].

39. DIANE P. HORN, CONG. RSCH. SERV., R45999, NATIONAL FLOOD INSURANCE PROGRAM: THE CURRENT RATING STRUCTURE AND RISK RATING 2.0 7–8 (2021).

those reasons have to do with limitations in the data FEMA uses to estimate flood risk—for instance, it is purely backwards-looking and does not take into account anticipated changes in sea level or rainfall patterns⁴⁰—while other reasons have to do with the way the rate structure of the program is designed.⁴¹

The most significant recent development on that latter score has been FEMA's new "Risk Rating 2.0" plan, which would revise rates to be more "actuarial" (meaning more reflective of each individual property's risk).⁴² This would reduce the cross-subsidy in the risk pool that currently transfers money from low-risk properties to high-risk properties.⁴³ One anticipated benefit of these changes is that they have the potential to discourage flood-prone living, or put another way, to reduce the moral hazard associated with flood insurance. For these reasons, calls to scale back or eliminate the current system of subsidized flood insurance premiums have been widespread for many years.⁴⁴

40. FED. EMERGENCY MGMT. AGENCY., DEP'T OF HOMELAND SEC., TECHNICAL MAPPING ADVISORY COMMITTEE REPORT: FISCAL YEAR 2015 REPORT TO CONGRESS 21–22 (2016).

41. Pasterick, *supra* note 24, at 132–34.

42. *Risk Rating 2.0: Equity in Action*, FEMA, <https://www.fema.gov/nfiptransformation> [<https://perma.cc/S4N6-MWGR>]; HORN, *supra* note 39 (noting that under Risk Rating 2.0, structural features of individual properties and flood events with a less than 1 percent chance of occurring in a year will be incorporated into rate calculations for the first time); see also MILLIMAN, INC., NATIONAL FLOOD INSURANCE PROGRAM: RISK RATING 2.0 METHODOLOGY AND DATA SOURCES (2021) (reporting from contractor Milliman, Inc. to FEMA, detailing the Risk Rating 2.0 rate-calculation methodology).

43. Notably, FEMA also says that by setting premiums on an individual basis (as opposed to a zone basis), the NFIP will be able to reduce the problem of overcharging low-value homes—the source of many attention-grabbing headlines about the affordability of flood insurance over the years. FEMA, *supra* note 42; Coral Davenport, *Popular Flood Insurance Law Is Target of Both Political Parties*, N.Y. TIMES (Jan. 28, 2014), <https://www.nytimes.com/2014/01/29/us/politics/popular-flood-insurance-law-is-target-of-both-political-parties.html> [<https://perma.cc/P3WJ-NCDW>].

44. See Michael Pappas & Victor B. Flatt, *Climate Changes Property: Disasters, Decommodification, and Retreat*, 82 OHIO STATE L.J. 331, 400 (2020) ("Beginning with NFIP, we join the chorus of those lamenting the well documented perverse incentives of this program and calling for improvement."); Scott Gabriel Knowles & Howard C. Kunreuther, *Troubled Waters: The National Flood Insurance Program in Historical Perspective*, 26 J. POLY HIST. 327, 343 (2014) (characterizing the moral-hazard argument as a "key critique that has plagued the NFIP"); Omri Ben-Shahar & Kyle D. Logue, *The Perverse Effects of Subsidized Weather Insurance*, 68 STAN. L. REV. 571, 571 (2016) ("[E]xisting government subsidies induce excessive development (and redevelopment) of storm-stricken and erosion-prone areas."); Robin Kundis Craig, *Harvey, Irma, and the NFIP: Did the 2017 Hurricane Season Matter to Flood Insurance Reauthorization?*, 40 U. ARK. LITTLE ROCK L. REV. 481 (2018); U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 38; Chad J.

This brings us to the most coercive option for addressing flood risk, which is to ban permanent habitation in flood-prone areas, either by forcing people out before a disaster or forbidding them from rebuilding after one.⁴⁵ This has been tried, but in no case has it been implemented on any significant scale. In the wake of Hurricane Katrina, the city of New Orleans briefly flirted with the idea of preventing rebuilding in certain especially hard-hit, low-lying neighborhoods. The idea was so controversial that it was dropped almost immediately.⁴⁶ Political pressure is but one obstacle to mandated retreat; another is the Constitution's Takings Clause, under which governments that prevent building or rebuilding would almost certainly be required to compensate property owners, a daunting prospect.⁴⁷

Nevertheless, over the past few decades, there have been some notable successes. In response to disastrous flooding in the Midwest in 1993, the town of Valmeyer, Illinois, relocated itself to a higher site nearby.⁴⁸ After Hurricane Sandy, New York instituted a voluntary buyout program that was notably well-funded and ambitious.⁴⁹ Participation rates have been somewhat disappointing,⁵⁰ although one particularly hard-hit

McGuire, *Examining Legal and Regulatory Barriers to Climate Change Adaptation in the Coastal Zone of the United States*, 4 COGENT ENV'T SCI. 1, 9 (2018) ("[T]he inherent subsidies created in national flood insurance and disaster relief must be removed so the public can properly gauge coastal risk."); Editorial, *Hold Strong on Flood Insurance*, WASH. POST (Feb. 2, 2014), https://www.washingtonpost.com/opinions/hold-strong-on-flood-insurance/2014/02/02/5305ac62-8ab5-11e3-833c-33098f9e5267_story.html [<https://perma.cc/FTJ9-PPCC>]; Editorial, *How Federal Flood Insurance Puts Homes at Risk*, N.Y. TIMES (Aug. 31, 2017), <https://www.nytimes.com/2017/08/31/opinion/flood-insurance-program.html> [<https://perma.cc/FA7K-L346>] ("The biggest change would be to have premiums reflect the actual overall risk.").

45. McArdle, *supra* note 3, at 618–21 (surveying various forms of managed retreat).

46. ROBERTA BRANDES GRATZ, WE'RE STILL HERE YA BASTARDS: HOW THE PEOPLE OF NEW ORLEANS REBUILT THEIR CITY 41 (2015) (noting that the proposal was "explosive" and "galvanized a potent, citywide opposition"); GARY RIVLIN, KATRINA: AFTER THE FLOOD 217 (2015).

47. Byrne and Grannis, *supra* note 6, at 275; John R. Nolon, *Land Use and Climate Change: Lawyers Negotiating Above Regulation*, 78 BROOK. L. REV. 521, 548–58 (2013).

48. David A. Lewis, *The Relocation of Development from Coastal Hazards Through Publicly Funded Acquisition Programs: Examples and Lessons from the Gulf Coast*, 5 SEA GRANT L. & POL'Y J. 98, 130 (2012).

49. FREUDENBERG ET AL., *supra* note 3, at 28–29.

50. Christopher Flavelle, Opinion, *A New Strategy for Climate Change? Retreat*, BLOOMBERG (Aug. 22, 2016, 6:00 AM), <https://www.bloomberg.com/opinion/>

neighborhood moved virtually its entire population inland.⁵¹ A small handful of isolated Native American communities, most notably in Alaska and Louisiana, have also begun efforts to relocate to drier land, although again, not without dissent and significant expense.⁵²

More recently, the Corps of Engineers has been tying eligibility for voluntary buyout programs to the use of eminent domain, such that local governments must first agree to use eminent domain to purchase eligible homes before federal funding is made available for targeted buyouts.⁵³ Homes are targeted if they fail a financial test: whenever the estimated cost of flooding over the next fifty years exceeds the assessed value of the house plus moving costs, the house is condemned.⁵⁴ Many cities have

articles/2016-08-22/nj-s-blue-acres-program-a-new-strategy-for-climate-change [https://perma.cc/Z7FL-XYQD].

51. FREUDENBERG ET AL., *supra* note 3, at 28, 44–45 (noting a 99 percent participation rate in Oakwood Beach); ELIZABETH RUSH, *RISE: DISPATCHES FROM THE NEW AMERICAN SHORE* 113–32 (2019) (describing a successful buyout program in Oakwood Beach, a neighborhood of Staten Island); Nathalie Baptiste, *When a Hurricane Takes Your Home*, SLATE (Oct. 30, 2017, 11:42 AM), <https://slate.com/technology/2017/10/the-staten-island-community-that-didnt-rebuild-after-sandy.html> [https://perma.cc/TFN5-3ZWS].

52. Residents of Shaktoolik, Alaska, a 250-person town that sits on a rapidly disappearing barrier island and faces periodic flooding from storm surges, recently decided *not* to relocate to higher ground. The town's mayor explained that they would “stay and defend.” Erica Goode, *A Wrenching Choice for Alaska Towns in the Path of Climate Change*, N.Y. TIMES (Nov. 29, 2016), <https://www.nytimes.com/interactive/2016/11/29/science/alaska-global-warming.html> [https://perma.cc/5XSC-XGG4]. Shishmaref, a small Inupiat community in Alaska that also sits on a barrier island, recently voted to relocate to a new site five miles inland. The vote was eighty-nine to seventy-eight. Christopher Mele & Daniel Victor, *Reeling from Effects of Climate Change, Alaskan Village Votes to Relocate*, N.Y. TIMES (Aug. 19, 2016), <https://www.nytimes.com/2016/08/20/us/shishmaref-alaska-relocate-vote-climate-change.html> [https://perma.cc/AL8A-KLMQ]; see also Robin Bronen, *Climate-Induced Community Relocations: Creating an Adaptive Governance Framework Based in Human Rights Doctrine*, 35 N.Y.U. REV. L. & SOC. CHANGE 357, 373–92 (2011) (describing challenges involved in the effort to relocate Newtok, Alaska).

53. Christopher Flavelle, *Trump Administration Presses Cities to Evict Homeowners from Flood Zones*, N.Y. TIMES, <https://www.nytimes.com/2020/03/11/climate/government-land-eviction-floods.html> [https://perma.cc/8R4A-9UYG] (June 29, 2021); U.S. ARMY CORPS OF ENG'RS, NO. PB 2016-01, CLARIFICATION OF EXISTING POLICY FOR USACE PARTICIPATION IN NONSTRUCTURAL FLOOD RISK MANAGEMENT AND COASTAL STORM DAMAGE REDUCTION MEASURES 2 (2015), https://planning.ercd.dren.mil/toolbox/library/pb/PB2016_01.pdf [https://perma.cc/6VZG-M6J4] (“A 100-percent voluntary participation plan for acquisition, relocation, [or] permanent evacuation is . . . not acceptable for USACE participation.”).

54. Flavelle, *supra* note 53.

refused to participate, with Nashville so far being the most notable exception.⁵⁵

In sum, proposals to reform our approach to flood risk range from relatively mild interventions like mandatory disclosure of flood risk to coercive measures like changing the way flood insurance is priced and mandatory relocation. It is worth emphasizing how difficult any significant change is. As noted above, even reforms as seemingly benign as mandatory disclosure laws are controversial. The last time Congress passed significant reforms to the NFIP's rate structure it largely repealed them fourteen months later, bowing to significant grassroots pressure. Every revision to a flood-insurance rate map is capable of attracting opposition in the affected community, contributing to the problem of maps that are in many places decades old.⁵⁶ Mandatory resettlement remains a political nonstarter. Meanwhile, many of the projects aimed at building resilience around the country arguably involve more socialization of flood risk, not less.⁵⁷

It would be easy to dismiss the opposition to reforming our approach to flood risk as craven self-interest. People object to new flood maps not out of principle, the argument goes, but

55. *Id.*

56. Sarah Pralle, *Drawing Lines: FEMA and the Politics of Mapping Flood Zones*, 152 CLIMATIC CHANGE 227 (2018); Michael T. Wilson & Carolyn Kousky, *The Long Road to Adoption: How Long Does It Take to Adopt Updated County-Level Flood Insurance Rate Maps?*, 10 RISK, HAZARDS & CRISIS PUB. POLY 403 (2019); OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-17-110, FEMA NEEDS TO IMPROVE MANAGEMENT OF ITS FLOOD MAPPING PROGRAMS 3 (2017), <https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-110-Sep17.pdf> [<https://perma.cc/3FVV-8M8X>] (finding that only 42 percent of FEMA's maps were up-to-date); see also Michael Keller et al., *Outdated and Unreliable: FEMA's Faulty Flood Maps Put Homeowners at Risk*, BLOOMBERG (Oct. 6, 2017), <https://www.bloomberg.com/graphics/2017-fema-faulty-flood-maps> [<https://perma.cc/8T6Q-2L8N>].

57. For instance, even though some types of flood-control infrastructure have fallen out of favor, the idea of preventing flooding in large cities with massive engineering projects retains some appeal. The Corps of Engineers recently unveiled a series of proposals to help protect New York City from flooding, one of which was a \$119 billion moveable barrier across the entrance to the city's harbor. Anne Barnard, *The \$119 Billion Sea Wall That Could Defend New York . . . or Not*, N.Y. TIMES, <https://www.nytimes.com/2020/01/17/nyregion/sea-wall-nyc.html> [<https://perma.cc/HC5X-JRTB>] (Aug. 21, 2021); U.S. ARMY CORPS OF ENG'RS, NEW YORK-NEW JERSEY HARBOR AND TRIBUTARIES COASTAL STORM RISK MANAGEMENT INTERIM REPORT (2019), <https://www.nan.usace.army.mil/Portals/37/docs/civil-works/projects/ny/coast/NYNJHAT/NYNJHAT%20Interim%20Report%20-%20Main%20Report%20Feb%202019.pdf?ver=2019-02-19-165223-023> [<https://perma.cc/84BV-DSPJ>].

because they do not want their premiums to go up; they are greedy, as are those who would prefer not to disclose their home's flood history to prospective buyers when the time comes to sell. This naked greed, many feel, deserves none of our respect.⁵⁸ These arguments may in some—or even many—cases be fair.

On the other hand, mandated retreat has proved impossible, even in places whose economies are not built on their proximity to the water. Opposition to retreat may be unsurprising in the Outer Banks of North Carolina⁵⁹ or the barrier islands of New Jersey,⁶⁰ but it has proved to be similarly intractable in Queens,⁶¹ Boston,⁶² New Orleans,⁶³ and myriad other places, many of them places whose leaders have no interest in denying the realities of climate change. As others have noted, part of the reason mitigating flood risk is so difficult is our deep anti-paternalist commitment to the freedom to expose ourselves to danger and to make choices that may ultimately prove to be unwise.⁶⁴ At the very least, as long as we live in a representative democracy where local interests enjoy significant political power,⁶⁵ it

58. See, e.g., *Hold Strong on Flood Insurance*, *supra* note 44 (criticizing NFIP policyholders for their “chutzpah” in “act[ing] entitled to subsidies”).

59. See Isaac Stanley-Becker, *Scientists Warned of Rising Sea Levels in North Carolina. Republican Lawmakers Shelved Their Recommendations.*, WASH. POST (Sept. 14, 2018), <https://www.washingtonpost.com/news/morning-mix/wp/2018/09/14/scientists-warned-of-rising-sea-levels-in-north-carolina-republican-lawmakers-shelved-their-recommendations> [<https://perma.cc/8KVS-6HFS>].

60. Steven Ashley, *Letting Go of Paradise*, HAKAI MAG. (Oct. 29, 2015), <https://www.hakaimagazine.com/features/letting-go-paradise> [<https://perma.cc/8QEN-EBW2>].

61. GAUL, *supra* note 17, at 144–45.

62. Steven Mufson, *Boston Harbor Brings Ashore a New Enemy: Rising Seas*, WASH. POST (Feb. 19, 2020), <https://www.washingtonpost.com/climate-solutions/2020/02/19/boston-prepares-rising-seas-climate-change> [<https://perma.cc/VFB2-S44P>].

63. See *supra* note 46 and accompanying text.

64. Panfil, *supra* note 3 (“[T]he right to property is so deeply enshrined in the national psyche that even the suggestion that people must abandon their homes seems almost un-American.”); see DENNIS S. MILETI, *DISASTERS BY DESIGN: A REASSESSMENT OF NATURAL HAZARDS IN THE UNITED STATES* 145 (1999) (“Individualism and the sanctity of private property are important cultural values in the United States, and they influence the laissez-faire, persuasion-oriented approach that is generally taken to encourage hazard reduction activities.”).

65. Alice Kaswan, *Climate Adaption and Land Use Governance: The Vertical Axis*, 39 COLUM. J. ENV'T L. 390, 394 (2014) (“[L]ocal control over land use remains a deep governance norm.”); Raymond J. Burby, *Hurricane Katrina and the Paradoxes of Government Disaster Policy: Bringing About Wise Governmental Decisions for Hazardous Areas*, 604 ANNALS AM. ACAD. POL. & SOC. SCI. 171, 178–81 (2006) (describing “local government paradox,” under which local governments fail to take

behooves reformists to think of changes that will be acceptable to the people affected. The looming question remains why the problem of flood risk is such a tough one for the would-be paternalist to solve.

B. Paternalism

Paternalism—an intervention in the conduct of another person for that person's own good—has long been a subject of lively debate among philosophers. Paternalism presents something of a puzzle: many, at least in the United States, share the intuition that some set of the choices we make about our own lives should be beyond state interference.⁶⁶ But why is that so, and if it is, how should that set of choices be defined? The philosophical literature on paternalism is a mixture of descriptive and proscriptive that will be familiar to readers of traditional legal scholarship. That is, philosophers attempt to offer accounts of what paternalism is and why it is objectionable that readers will find persuasive to the extent that they align with modern American law. Those accounts are then used to help resolve edge cases, settle matters of current debate, or suggest some change in longstanding practice.⁶⁷ This Article proceeds in a similar manner, using a descriptive account of when and why Americans find paternalism objectionable to then suggest, proscriptively, ways to reduce our exposure to flood risk without running afoul of the anti-paternalist streak in our laws and culture.

John Stuart Mill argued that government could not restrain individuals' behavior except to prevent harm to others.⁶⁸ He reconciled this position with his famous utilitarianism by arguing that when the state intervenes in individuals' decision-making for their own good, it infantilizes them and hinders the development of their own judgment and individuality, ultimately harming them and society.⁶⁹ On this view, we're all in danger of

action to mitigate the effects of flood risk even though their citizens are most exposed to such risks).

66. Nicolas Cornell, *A Third Theory of Paternalism*, 113 MICH. L. REV. 1295, 1296 (2015) ("Paternalism is widely understood to have a negative connotation . . . in legal and public policy discourse.").

67. See, e.g., JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW III: HARM TO SELF* 24–25 (1986).

68. Jonathan Klick & Gregory Mitchell, *Government Regulation of Irrationality: Moral and Cognitive Hazards*, 90 MINN. L. REV. 1620, 1623 (2006).

69. *Id.*

becoming, at great cost to society, like rebellious teenagers, in that our ability to make sound judgments of what's in our own interest will be impaired by the ever-present constraints imposed by the state.

Mill's effort to join a libertarian, anti-paternalist view of the scope of state power with a utilitarian moral system, which takes as its touchstone doing the greatest good for the greatest number of people, has been controversial ever since and is widely thought to be unsatisfying.⁷⁰ Indeed, the issue of paternalism usually divides commentators into the two viewpoints Mill sought to join. Paternalists, often arguing from utilitarian premises, generally take the view that government should override individuals' choices whenever doing so would make them better off, while anti-paternalists appeal to various non-utilitarian reasons to limit the state's power to intervene in citizens' own lives.⁷¹ Between these two poles exist near-infinite gradations on which philosophers have fallen on questions including how to define paternalism, which paternalistic interventions are problematic, and what makes them so.

Strong paternalists' views are perhaps the most straightforward. Taking some objectively defined value, strong paternalists argue that government may regulate individual decision-making whenever doing so improves people's lives, as measured by the quantity of that value thus attained. Sarah Conly is one prominent modern example. For Conly, our choices are not entitled to respect to the extent that they are the product of flawed, irrational decisions. The mere fact of a seemingly free choice should be afforded no weight at all; what matters is whether the choices we make are good ones.⁷² And the measure of a good choice is whether it hews closely to an optimal outcome.⁷³ When

70. Gerald Dworkin, *Paternalism*, in *MILL'S ON LIBERTY: CRITICAL ESSAYS* 61, 70 (Gerald Dworkin ed., 1997) (noting that Mill's argument "has been subjected to vigorous attack from the moment it appeared—most often by fellow utilitarians").

71. VANDEVEER, *supra* note 9, at 140 ("[I]t is wrong paternalistically to interfere invasively in a certain range of cases, even if the consequences of doing so may be, in some fashion, good promoting or good maximizing on balance"—a view that is "anti-utilitarian in outlook.").

72. SARAH CONLY, *AGAINST AUTONOMY: JUSTIFYING COERCIVE PATERNALISM* 1–3 (2013) ("The truth is that we don't reason very well, and in many cases there is no justification for leaving us to struggle with our own inabilities and to suffer the consequences.").

73. *See id.* at 2 ("[T]he ground for valuing liberty is the claim that we are preeminently rational agents, each of us well suited to determining what goes in our own life [But] the incidence of irrationality is much higher than our

our choices are irrational, Conly argues, they should be entitled to no moral weight.⁷⁴

In realms like smoking cigarettes, eating fast food, and saving for retirement, choice is thus seen as a distraction. Nobody in their right mind, Conly argues, would smoke cigarettes, given the immense costs in terms of health and life expectancy.⁷⁵ The same can be said of consuming large servings of fast food⁷⁶ or borrowing money at usurious interest rates.⁷⁷ The fact that apparently sane people choose to do all these things every day shows only that they are acting at the mercy of what behavioral economists call cognitive biases.⁷⁸ We smoke because we're addicted and can't stop, even though we'd like to; we eat junk food because it's cheap, well-advertised, and chemically engineered to be delicious; and we spend because we lack the willpower to save. In all these realms (and many more), paternalists argue that our choices—the outward manifestations of our will—are the product of a never-ending struggle between two versions of ourselves, one rational and one impulsive. When the state intervenes by banning cigarettes, taxing junk food, and forcing us to save, it is thus not really overriding our free will but rather taking sides in the perpetual war between two versions of our will and, to paternalists anyway, helping the better side win.⁷⁹

If paternalism can make us healthier, wealthier, and longer-lived, why should it ever be problematic? Philosophers have offered a constellation of answers that clusters around a few basic ideas. First, paternalism is often said to be insulting or offensive in that it implies that the government knows better than you what is best for yourself.⁸⁰ Joel Feinberg, widely regarded as one of the leading figures in the literature, argues that paternalism “seems arrogant and demeaning” in that it gives others the right

Enlightenment tradition has given us to believe, and keeps us from making the decisions we need to reach our goals.”).

74. *See id.* at 17.

75. *Id.* at 169–72.

76. *Id.* at 162–69.

77. *Id.* at 174–75.

78. *See* RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 17–73 (2009) (surveying findings of behavioral economics); CONLY, *supra* note 72, at 20–23.

79. CONLY, *supra* note 72, at 20–24, 32–33 (arguing that coercive paternalism “help[s] us do what we want to do, which is to lead longer and happier lives”).

80. *Id.* at 33–36. (“[T]o many, using coercion to stop people from doing what they have decided, however foolishly, that they want to do, seems somehow to devalue them, to degrade them . . .”).

to “intervene even against my protests to ‘correct’ my choices and then (worst of all) justify their interference on the ground (how patronizing!) that they know my own good better than I know it myself.”⁸¹ The resentment one feels at being coerced in this way, Feinberg continues, “is not mere frustration or antipathy” but rather “has the full flavor of moral indignation and outrage.”⁸² This is because people subjected to paternalistic interventions have in a sense “been violated, invaded, belittled. They have experienced something analogous to the invasion of their property or the violation of their privacy.”⁸³ We all, in other words, value our autonomy to one degree or another, and paternalism violates that autonomy by infringing on what should be a sphere of personal activity.⁸⁴

Others have placed more emphasis on the motivation behind the interference, preferring to ask whether it is insulting or disrespectful.⁸⁵ Still other accounts focus not on the intention behind the law but on its external meaning, such that a law passed even by well-intentioned legislators can be impermissibly paternalistic if it is understood as insulting by those it governs.⁸⁶ Finally, Mill’s argument that paternalistic interference in our decisions is actually bad for us because it hinders our capacity for self-government retains a certain appeal.⁸⁷

Crucially, even paternalists like Conly do not deny that there is a valid interest in autonomy at stake in the debate. While Conly titled her book *Against Autonomy*, she allows that “we value our liberty, and resent being told what to do.”⁸⁸ Conly and other paternalists of various stripes favor coercive intrusion in people’s choices only when doing so would make them better off *by their own lights* or in their own judgment.⁸⁹ Even

81. FEINBERG, *supra* note 67, at 23.

82. *Id.* at 27.

83. *Id.*

84. Gerald Dworkin, *Paternalism*, in *MORALITY AND THE LAW* 107, 112 (Richard A. Wasserstrom ed., 1971).

85. See Seana Valentine Shffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 *PHIL. & PUB. AFFS.* 205 (2000); VANDEVEER, *supra* note 9, at 4–5; JOHN KLEINIG, *PATERNALISM* 38 (1983).

86. Cornell, *supra* note 66, at 1308 n.43.

87. FEINBERG, *supra* note 67, at 24 (“If adults are treated . . . ‘as children,’ they will in time come to be like children. Deprived of the right to choose for themselves, they will soon lose the power of rational judgment and decision.”).

88. CONLY, *supra* note 72, at 16.

89. *Id.* at 102–12; THALER & SUNSTEIN, *supra* note 78, at 5; VANDEVEER, *supra* note 9.

paternalists, in other words, insist that they would stop short of making people better off as judged by other people. Where Conly parts ways with anti-paternalists like Feinberg is her sense that autonomy is not an absolute right but rather an interest to be weighed against others, one that has been overvalued and that must give way when needed in pursuit of a greater good.⁹⁰

With an understanding of what makes paternalism troubling, the next question for anti-paternalists becomes when paternalistic intervention is justified. Because there are many long-standing and relatively uncontroversial paternalistic laws on the books, philosophers have sought to establish where lines between permissible and impermissible forms of paternalism can and should be drawn. Feinberg called himself a "soft paternalist" and argued that paternalism is permissible when it interferes with choices that aren't really choices at all.⁹¹ In Feinberg's view, respect for autonomy demands respect for our choices, but only when those choices are, in a meaningful sense, "voluntary."⁹² The government is thus permitted to override choices that are the product of "ignorance, coercion, derangement, drugs, or other voluntariness-vitiating factors."⁹³

Gerald Dworkin, also a hesitant paternalist, proposed a different line between permissible and impermissible government interference in the choices of citizens. Rather than focusing on the quality of the choices people make, like Feinberg or Conly do, Dworkin proposed a lawyerly balancing test in which the permissibility of paternalism turns on the importance of the interests affected and the degree of coercion being used to affect them. Mandatory seat belt laws are thus, on Dworkin's account, unobjectionable, since being required to buckle up "interferes not at all with the use or enjoyment of the activity" (i.e., driving).⁹⁴ Prohibiting mountain climbing, on the other hand, is objectionable because it "completely prevents a person from engaging in an activity, which may play an important role in his life and his conception of the person he is."⁹⁵

Another twist on the paternalism debate was offered by Richard Thaler and Cass Sunstein in their hugely influential

90. CONLY, *supra* note 72, at 16–17.

91. FEINBERG, *supra* note 67, at 12, 26, 98–99.

92. *Id.* at 12

93. *Id.*

94. Dworkin, *supra* note 70, at 81.

95. *Id.*

body of work introducing and defending the idea of the “nudge,” a tweak to the environment made by a “choice architect” that uses our cognitive biases to push us toward some favorable decision.⁹⁶ Thaler and Sunstein defended nudges as permissible forms of paternalism: paternalistic because they are motivated by a desire to affect individuals’ choices for their own good, but permissible because they are not significantly coercive.⁹⁷ Their most famous example is rearranging the food in a school cafeteria so that the healthy options are near the cash register and the junk food is in some out-of-the-way corner.⁹⁸ To the determined shopper, the junk food remains freely available, but its relocation makes it much less likely that people will buy it in spite of themselves. Another famous example builds on behavioral insights into the stickiness of default options to suggest that participation in workplace retirement savings plans be the norm, with an opt-out available, rather than the reverse, which is the status quo.⁹⁹

In sum, while paternalism has generated a rich debate in the philosophical literature, several generalizations that are relevant in the flood context are possible. First is the broad recognition that we have an interest in our autonomy, meaning that we value the right to make decisions about which ends we choose to pursue. So while paternalists and anti-paternalists differ on the circumstances in which the state may override our decisions, all recognize (to varying degrees) the subjectivity of our values and the role those values play in our choices of which ends to pursue. To some, there are broad swaths of decisions that should be protected from state interference under any circumstances. Others call for balancing our interest in autonomy against other interests that may be furthered by paternalistic interventions. Examining how these arguments play out in the flood context will highlight several problems that paternalists are too quick to dismiss. First, however, comes an important threshold question: Why is paternalism an apt concept in evaluating the various measures designed to reduce our exposure to flood risk, given that the risk is so often socialized?

96. THALER & SUNSTEIN, *supra* note 78; Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003); Cass R. Sunstein, *The Storrs Lectures: Behavioral Economics and Paternalism*, 122 YALE L.J. 1826 (2013).

97. THALER & SUNSTEIN, *supra* note 78, at 5–6.

98. *Id.* at 1–4.

99. *Id.* at 109–11.

II. THE LIMITS OF SOCIALIZATION

Many measures designed to reduce our exposure to flood risk can be seen as paternalistic in that they intervene in people's lives for their own good. Those who favor such interventions might object, however, that they are not actually paternalistic for two reasons. First, some hold that a paternalistic intervention is not paternalistic at all if it is justified, at least in part, on the basis of avoiding the imposition of costs on third parties. So to the extent that flood risk is socialized, measures that reduce our exposure to flood risk are not paternalistic, even if they are also motivated by concern for those who would choose to expose themselves. Second, paternalistic interventions may be justified on the basis that they avoid "psychic harms" the broader community would experience at seeing the distress of victims. There are responses to both objections.

As an initial matter, all of the regulatory interventions canvassed above can be characterized as paternalistic in the basic sense that they are justified principally by a desire to influence people's behavior for their own good. Mandatory retreat is usually justified in these terms, both explicitly and implicitly.¹⁰⁰ Much writing on the problem of flood risk, echoing Conly, relies heavily on the idea that various cognitive biases prevent us from making rational decisions about where to live.¹⁰¹ Just as we find it hard to forego the certain benefit of spending money today to gain the uncertain benefit of having money in retirement, we find it hard to bear the certain cost of moving to higher ground in exchange for the uncertain benefit of avoiding a flood. Because our thinking is hopelessly irrational, the argument goes, the government is justified in overriding it with its own, better judgment. The main point of such interventions is to protect the

100. Flavelle, *supra* note 53 (describing Corps of Engineers program mandating use of eminent domain to acquire flood-prone properties as part of the Corps' "mission[, which] includes protecting Americans from flooding and coastal storms"); Verchick & Johnson, *supra* note 3, at 698 (noting that retreat "minimizes place-based risks that threaten uncertain harm to public safety").

101. See, e.g., ROBERT MEYER & HOWARD KUNREUTHER, *THE OSTRICH PARADOX: WHY WE UNDERPREPARE FOR DISASTERS* (2017); Robert J. Meyer, *Failing to Learn from Experience About Catastrophes: The Case of Hurricane Preparedness*, 45 J. RISK & UNCERTAINTY 25 (2012); Robert J. Meyer, *Why We Under-Prepare for Hazards*, in *ON RISK AND DISASTER: LESSONS FROM HURRICANE KATRINA* 153 (Ronald J. Daniels et al. eds., 2006).

people living in flood zones from the consequences of their own poor decisions.

Even mandatory disclosure of flood risk during real estate transactions is, on this view, paternalistic. Although it regulates the information exchanged in a transaction between two parties, thus arguably preventing one party from harming another by committing some form of deceit, mandatory disclosure's chief aim is to induce the buyer to account for the expected costs of flooding for the buyer's own benefit. It is, in that sense, much like nutrition labelling, which is often discussed as a form of paternalism—noncoercive, to be sure, and therefore arguably benign, but paternalistic nonetheless.¹⁰²

On the other hand, eliminating the subsidies that currently encourage flood-prone living would not in my view be paternalistic. Even to anti-paternalists, while the government may not forbid an individual from doing something on paternalistic grounds, it is free to reduce or eliminate a subsidy that *encourages* the individual from doing that same thing.¹⁰³ On this view, the government would be free to stop allocating disaster aid in the wake of massive floods and stop paying for flood prevention infrastructure like levees and beach replenishment without opening itself up to a charge of paternalism. Anti-paternalism does not require the government to protect its citizens from flooding or, to put it another way, to insulate people from the effects of natural disasters.

There may be other sources of such an obligation. Elizabeth Anderson, for example, argues that government has an obligation to ensure that its citizens have the basic goods they need to flourish as humans, including housing and food, and that this translates into an obligation to help victims of natural disasters.¹⁰⁴ Anderson may well be right; hers is not the only such argument. Indeed, perhaps based on an intuitive sense of these

102. Cf. Dworkin, *supra* note 84, at 110 (noting that disclosure laws “are often attacked as paternalistic” but arguing that they “should not be considered so” because “[t]here is no interference with the liberty of the consumer”).

103. Feinberg, for example, restricts his discussion to laws that are to some degree coercive and notes that laws that are paternalistic in motivation but not coercive—like subsidies for particular salutary behaviors—do not concern him. FEINBERG, *supra* note 67, at 8.

104. Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 315, 323 (1999). Notably, this obligation does not seem to require that people be housed in the same flood-prone locations they inhabited before.

moral arguments,¹⁰⁵ post-disaster aid remains overwhelmingly popular, and people do not generally argue against disaster aid as a means to reduce our exposure to flood risk.¹⁰⁶

But doesn't the fact that the government socializes the cost of flooding in a variety of ways give it license to reduce the costs of flooding, not only by building flood-control structures but also by proactively regulating flood-prone living? In other words, may government forbid people from exposing themselves to risk to the extent that the costs of that risk are socialized? People may be free to harm themselves, but they're not free to impose the costs of that harm on others.¹⁰⁷ So the argument goes.

While initially appealing, this argument is, on closer inspection, problematic. The government is free to stop directly subsidizing flood-prone living, but it may not subsidize this behavior and then use its subsidy to justify interfering with people's lives on paternalistic grounds. This type of intervention still violates the principles that make paternalism problematic in the first place. Intervening in people's choice of where to live intrudes on their autonomy in a way that is arguably insulting, as it represents the government telling people that it knows what is best for them in a realm as significant as where they make their homes.¹⁰⁸ The fact that the government stands ready to help if those choices end badly (by providing post-disaster aid) does not eliminate the problem with the interference, just as the socialization of medical care and retirement does not give the government license to tell us what to eat or how much to spend.¹⁰⁹ It

105. *Id.* at 323 (“[I]f the costs of [disaster] relief are too high, the proper response is not to leave . . . residents in the lurch but to designate their relief toward helping them relocate.”).

106. There are, of course, exceptions. See JUSTIN BOGIE, HERITAGE FOUND., CONGRESS MUST STOP THE ABUSE OF DISASTER AND EMERGENCY SPENDING (2019), <https://www.heritage.org/sites/default/files/2019-02/BG3380.pdf> [<https://perma.cc/V687-SP83>].

107. Anderson, *supra* note 104, at 323 n.82 (“[A]n egalitarian state can forbid people from inhabiting disaster-prone areas, or tax people who do to cover the excess costs of disaster relief.”).

108. See *supra* notes 81–90 and accompanying text.

109. Consider, by way of analogy, New York City's proposal to prevent recipients of food stamps from using them to buy sugared soda. Many regarded this action as patently demeaning and offensive. The fact that the government was providing aid was not seen as giving it license to paternalistically dictate how that aid should be used. See Patrick McGeehan, *U.S. Rejects Mayor's Plan to Ban Use of Food Stamps to Buy Soda*, N.Y. TIMES (Aug. 19, 2011), <https://www.nytimes.com/2011/08/20/nyregion/ban-on-using-food-stamps-to-buy-soda-rejected-by-usda.html> [<https://perma.cc/C8XB-V7JS>] (noting that “advocates for the poor and underfed . . . argued that the government should not stigmatize them by taking

would be a weird form of altruism that used its own generosity to justify actively forcing people out of their homes.

Mandatory insurance coverage is a trickier problem. Many theorists have treated insurance as a kind of escape hatch from the thorny problem of paternalism. For example, Feinberg and others take the view that even if the government cannot force motorcyclists to wear helmets, it may force them to bear the costs of not doing so through mandatory risk-rated insurance, a solution that has the appealing quality of seeming to preserve people's freedom to ride without helmets.¹¹⁰ Anderson, similarly, argues that the government is entitled to make smokers pay for the costs of their behavior *ex ante*, for instance, by taxing cigarettes and using the money to pay for their medical care.¹¹¹ Anderson sees this method as avoiding "intrusive moralizing judgments" and preserving smokers' "freedom and equality over the course of their whole lives."¹¹²

However, unless the state forces people to pay *ex ante* for all sorts of risky behavior, then it inevitably *is* making "intrusive moralizing judgments" by requiring smokers, but not other people, to pay for the expected costs of their self-harm.¹¹³ Indeed, charging higher insurance premiums based on individual characteristics—risk rating—makes an insurance system look less like a way to fulfill a social contract and more like something the government requires you to do for your own good and no one else's.¹¹⁴

away their right to shop like other consumers" and quoting executive director of the New York City Coalition Against Hunger, who "cheered the federal government for 'deciding not to micromanage' the lives of poor people"); *see also* CONLY, *supra* note 72, at 155–62 (discussing this proposal).

110. FEINBERG, *supra* note 67, at 139; Gerald Dworkin, *Paternalism: Some Second Thoughts*, in PATERNALISM 105, 109 (Rolf Sartorius ed., 1983); *see also* Anderson, *supra* note 104, at 323 & n.82.

111. Anderson, *supra* note 104, at 328.

112. *Id.* at 328–29.

113. SARAH MILOV, *THE CIGARETTE: A POLITICAL HISTORY* 223–24 (2019) ("The push for risk rating based on smoking status represented the apex in the nonsmoking movement's push to drive smokers out of the actuarial—and actual—commons."). Moreover, by taxing smokers in this way, the state would be absolving the rest of its citizens of their obligation—core to Anderson's account of democratic equality—to provide goods like health care universally, since the tax would require smokers to pay for their own health care when that care is causally connected to smoking.

114. *Id.* at 278 ("By relying upon cost-centered analyses of private behavior and unraveling decades-old collectivist programs, the nonsmokers' rights movement refashioned what Americans believed the government owed to its citizens, and what citizens owed to the government.").

Whether mandatory insurance coverage is paternalistic thus turns on the rate structure that is used. When insurance is priced to contain significant cross-subsidies, it looks less like a paternalistic effort to influence people's behavior for their own good and more like a social effort to make people share burdens whose costs are unequally distributed. The Affordable Care Act, for example, requires insurers to charge men and women the same premiums because of the belief that it is just for men to help pay for the costs associated with bearing society's children.¹¹⁵ The individual mandate instructs the young and healthy to purchase health insurance to help pay for the medical care for the old and sick because, in doing so, they help to support a system whose benefits accrue to society as a whole.¹¹⁶ These judgments concern not what is best for you but what you owe to others.¹¹⁷

When insurance premiums do not contain such cross-subsidies, on the other hand, mandating coverage is paternalistic. If coverage is priced according to the characteristics of each individual, insurance is more like a financial seatbelt than a social safety net. The distinction is roughly the same as that between mandatory retirement savings in the form of 401(k) contributions and social security taxes. The former, in my view, is paternalistic,¹¹⁸ while the latter is not.

115. See Jessica L. Roberts & Elizabeth Weeks Leonard, *What Is (and Isn't) Healthism?*, 50 GA. L. REV. 833 (2016).

116. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 548 (2017) ("[T]he mandate forces into the insurance risk pool more healthy individuals, whose premiums on average will be higher than their health care expenses. This allows insurers to subsidize the costs of covering the unhealthy individuals the reforms require them to accept."); *id.* at 592–94 (Ginsburg, J., concurring in part) (describing effects of large uninsured population on national market for health insurance). To be sure, the individual mandate has also been defended on the paternalistic ground that it is in the best interests of those subject to it. See, e.g., CONLY, *supra* note 72, at 172–73 ("The uninsured are the primary losers from not having health insurance, and the requirement that they get insurance is best seen as a paternalistic plan to benefit them."). This justification made the individual mandate enormously controversial, was relied on in lower court opinions that struck it down, and was largely abandoned by the ACA's defenders in the Supreme Court.

117. Anderson, *supra* note 104, at 327–30 (arguing that compulsory contributions to retirement and health insurance programs can be justified on non-paternalistic grounds as part of obligation to secure conditions of fellow citizens' freedom).

118. Dworkin, *supra* note 70, at 63 (noting the paternalistic quality of "[l]aws compelling people to spend a specified fraction of their income on the purchase of retirement annuities").

The NFIP is currently somewhere between these poles, although proposed reforms to the program's rate structure would make it more paternalistic. Premiums do bear a relationship to the risk faced by a property, but there are significant cross-subsidies built into the rate structure. Both FEMA's proposed changes to the risk-rating system ("Risk Rating 2.0") and the frequently proposed elimination of subsidized rates (which would require action by Congress) stand to make the NFIP less solidaristic and more paternalistic. Regardless of the rate structure the program uses, the NFIP's individual mandate is to some extent inescapably paternalistic since it applies only to homes within 100-year flood zones. In this sense, it is like the hypothetical health insurance program for smokers discussed above—it singles out those who face flood risk (but not other types of risk) as being required to make financial provision for the benefit of their own future selves.

A related argument, which is relevant to the paternalistic quality of measures aimed at reducing exposure to flood risk, is built on the idea that harming oneself creates a negative externality—a psychic harm—that justifies state intervention. Feinberg mentions this argument in connection with mandatory helmet laws for motorcyclists.¹¹⁹ To Feinberg and others, the helmetless motorcyclist who is killed in a crash hurts not just himself but anyone who is exposed to the gruesome aftermath of his death.¹²⁰ This might include the emergency personnel who respond to the scene and perhaps even anyone who learns of the crash on the evening news.¹²¹ All the insurance in the world will not solve this problem, since it still leaves people's brains smeared on the pavement. Feinberg says that this would be a non-paternalistic justification for a ban on helmetless motorcycling; you're not permitted to ride without a helmet, the law would say, because we don't like seeing you hurt.

Surely something very similar is going on in the flood context, where images of people trapped on roofs calling for help electrify the world and Congress opens its coffers to render whatever aid is necessary. There is clearly a psychic harm in seeing people rendered helpless by the awesome power of nature and in seeing one's fellow citizens cast into positions of extreme

119. FEINBERG, *supra* note 67, at 139.

120. *Id.* at 140–41.

121. *Id.* at 141.

deprivation.¹²² This is probably why we have never been content to abandon people to their fate in such circumstances.

Does this harm justify banning the risky activity? Feinberg thinks it might, and believes that coming up with a concrete answer requires weighing the interest of the motorcyclist in not wearing a helmet against “the interests and sensibilities of others.”¹²³ One problem with this view is the trouble in determining which types of psychic harms justify impositions on others’ freedom. Too loose a definition threatens the creation of a kind of “moral environmentalism,” in which a popular majority could use the psychic harm it experiences at having to witness disfavored lifestyles to justify invading realms of choice that most people today would view as sacrosanct, like the choice of whom to love.¹²⁴ A response to this is to fall back on the kind of weighing Feinberg envisions: marriage equality is a fundamental right while living in a society that perfectly conforms to one’s own religious beliefs is not. Moreover, seeing the results of a fatal motorcycle crash is presumably more traumatic than seeing people behaving in a way you think is immoral.

This move is not of much help in the flood context. Our dismay at seeing victims of natural disasters in distress might be weighty, but it would be hard to argue that it outweighs the importance of individuals’ freedom to decide where to live, which is surely more significant than the freedom to feel the wind in one’s hair while motorcycling. This sense is reinforced by the legal status of the rights at issue. Property rights are not absolute, but they play a central role in our legal system, and our Constitution forbids the taking of private property for anything but public use. The right to watch the evening news without being confronted by flood victims enjoys no such status.

There is thus reason to worry that various measures aimed at reducing exposure to flood risk are paternalistic. That flood-prone living imposes costs on others, both financial and psychic, does not itself justify paternalistic measures aimed at reducing its prevalence. On the other hand, the fact that paternalism is a problem in this context does not mean it is an insurmountable one; after all, there are many paternalistic laws on the books

122. Dworkin, *supra* note 110.

123. FEINBERG, *supra* note 67, at 141.

124. See Steven Wall, *Moral Environmentalism*, in PATERNALISM: THEORY AND PRACTICE 93 (Christian Coons & Michael Weber eds., 2013).

today. There are, however, other reasons to be wary of paternalistic interventions in this context.

III. VALUES ALL THE WAY DOWN

A major reason to be cautious about paternalistic interventions in the flood context is the elusiveness of a purely rational approach to risk. Paternalists like Conly often begin with the premise that they can improve people's lives according to some mutually-agreed-upon yardstick of progress. But this premise too often goes unexamined. On closer inspection, it turns out to be beset by intractable difficulties. First is the problem of *incommensurability*. Making decisions about where to live involves considering a host of factors that are not capable of being reduced to one standard unit of measurement and then weighed against each other. A second problem involves *subjectivity*. All of the costs and benefits involved have deeply subjective values, even when they implicate seemingly objective, quantifiable goods like the costs associated with flooding. Finally, flood risk involves more *uncertainty* than paternalists typically care to admit. The question of what constitutes a sensible place to live turns out to be much harder than it initially appears, even setting aside the other problems outlined above. All of these problems shade into each other, and together they illuminate facets of one core idea, long a feature of debates over paternalism: it is simply not possible to say with confidence that there is one objectively rational approach to this risk.

A. *Incommensurability*

Goods are said to be incommensurable if they cannot be reduced to one common unit—dollars usually—and placed on a single scale of value.¹²⁵ In her famous essay introducing the concept, Margaret Jane Radin asked whether a tort judgment of \$100,000 for the loss of an arm should be taken to mean that an arm is “worth” \$100,000.¹²⁶ Radin argued that there is a “non-commodified” conception of intangible, emotional goods, such as the use of a limb or the company of a spouse, under which efforts

125. Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56, 56 (1993).

126. *Id.*

to find amounts of money that would render us indifferent to the loss of such things are fundamentally misguided.¹²⁷

Many paternalistic interventions aimed at reducing our exposure to flood risk suffer from this problem. Moving away from a flood-prone house involves costs both financial (transaction costs, moving costs, etc.) and emotional. The emotional costs often range from relatively prosaic things like the loss of a well-tended garden or a favorite view to more significant losses like being separated from a tight-knit community,¹²⁸ being required to pursue a different line of work,¹²⁹ or abandoning an area that has been home to one's family for generations.¹³⁰

That these are costs often associated with moving is uncontroversial; nobody would deny that they may in many cases be significant. The problem is that they resist quantification and so are not commensurable with the various benefits that are often touted as reasons to move inland. The result is that in policy discussions about flood risk, such factors are often simply ignored. This makes it hard to determine whether moving inland makes sense for any given person or community.

For example, FEMA keeps track of a group of homes known as "repetitive loss properties." These are properties that have had two or more NFIP claims of \$1,000 or more in any ten-year period.¹³¹ Repetitive loss properties have historically accounted for a disproportionately large share of NFIP claims; while they represent only around 1 percent of policies, they have accounted for roughly a third of claims paid.¹³² Because of this, they have been the focus of reform efforts for years.¹³³ It is often pointed

127. *Id.* at 65–67.

128. McArdle, *supra* note 3, at 625–26 ("The fragmentation of existing community affiliations can be destabilizing, and the effects of relocation can be particularly disruptive of the cultural traditions and cohesiveness of long-established settlements . . .").

129. Nathaniel Rich, *Destroying a Way of Life to Save Louisiana*, N.Y. TIMES MAG. (July 21, 2020), <https://www.nytimes.com/interactive/2020/07/21/magazine/louisiana-coast-engineering.html> [<https://perma.cc/CK23-6RPD>] (describing opposition to Louisiana's costal restoration plan from isolated fishing communities, whose way of life such a plan would largely destroy).

130. *See infra* note 153.

131. RAWLE O. KING, CONG. RSCH. SERV., R40650, NATIONAL FLOOD INSURANCE PROGRAM: BACKGROUND, CHALLENGES, AND FINANCIAL STATUS 19 n.27 (2012).

132. *Id.* at 19.

133. OFF. OF INSPECTOR GEN., DEPT OF HOMELAND SEC., OIG-09-45, FEMA'S IMPLEMENTATION OF THE FLOOD INSURANCE REFORM ACT OF 2004 1 (2009), https://www.oig.dhs.gov/assets/Mgmt/OIG_09-45_Mar09.pdf

out that many repetitive loss properties—around 10 percent—have received more in NFIP claims than their market value.¹³⁴ The implication is that spending more to repair a home than it is worth is obviously nonsensical. But there is never any effort made to assess, either quantitatively or qualitatively, the aspects of a home's value that are not captured by its market price.

To be sure, floods are often deadly and the costs they impose are significant. The costs of rebuilding can sometimes be devastating for those whose losses are not insured. Even when losses are covered, floods destroy irreplaceable property, disrupt communities, cause long-term health problems, and require expensive and time-consuming rebuilding. Many of these costs are quantifiable, and they are often quantified for us into large numbers: the total number of covered losses under the NFIP and the amount of post-disaster aid allocated by Congress. Nobody wants to be flooded; reducing the frequency and intensity of destructive floods is a worthwhile goal. But living in a flood-prone area often creates benefits, and because those benefits are not as readily quantifiable, they are too often ignored. Weighing the costs and benefits of moving away from flood risk requires taking such intangibles into account, an inherently fraught exercise.

B. Subjectivity

Even if we could assign dollar values to intangible goods like the benefits of living in the neighborhood we call home, another vexing problem emerges: we would not agree on what those values would be. Weighing the costs and benefits of policy interventions involves assigning objective values to goods whose worth is inherently subjective. This is another reason to be cautious about supposedly objective solutions to the problem of flood risk.

The inherent subjectivity of most important goods has long been treated as a primary reason to oppose paternalistic interventions.¹³⁵ Even strong paternalists like Conly purport to be in favor of coercing individuals for their own good only when it “helps a person reach his own goals” and thus “reflects

[<https://perma.cc/D4KT-L8LQ>] (noting that it would cost \$1.8 billion to acquire all 8,040 severe repetitive-loss properties and noting, perhaps with a tinge of regret, that “FEMA can only promote the notion of mitigation and cannot directly compel property owners in flood hazard areas to mitigate”).

134. KING, *supra* note 131, at 19.

135. VANDEVEER, *supra* note 9, at 423–26.

individuals' actual values, not the values we might like them to have."¹³⁶ Feinberg, meanwhile, views the deep subjectivity of values as a primary reason to treat a certain sphere of autonomy as inviolable.¹³⁷ Feinberg respects the subjectivity of values by treating choices as sacrosanct unless the circumstances in which they are made lead us to believe that they aren't real choices (for example, because they were coerced). Others, like Conly¹³⁸ and Dworkin,¹³⁹ allow that values can be subjective while nevertheless insisting that in many cases objective weighing that favors paternalistic intervention remains possible.

The problem with this latter argument is that it pays only lip service to the idea of subjectivity. Conly, in particular, is largely content to assume people's values. Despite acknowledging that maximizing individual welfare involves the pursuit of ends whose value is subjective,¹⁴⁰ Conly argues that paternalistic legislators are generally better at acting in pursuit of people's own values than individual people are, chiefly because we individuals are so likely to be led astray by our cognitive biases.¹⁴¹ In other words, Conly argues that interventions that combat flaws in our thinking can safely be assumed to be welfare-maximizing, even for people with diverse conceptions of the good, because such interventions systematically favor our more rational and therefore "better" choices, thus forcing us towards better versions of ourselves.

For example, Conly argues that when we sit down to make our grocery lists, we usually don't write "whatever smells really good, no matter how fattening, cholesterol-laden and sugar-filled."¹⁴² Instead, we "plan to buy only the fruits and vegetables that we like just fine and that will be good for us" but end up

136. CONLY, *supra* note 72, at 150.

137. FEINBERG, *supra* note 67, at 94 ("There is no such thing as a 'trivial interference' with personal sovereignty; nor is it simply another value to be weighed in a cost-benefit comparison . . . [S]uch a value is respected in its entirety or not at all."). Feinberg uses the attitudes of motorcyclists towards helmets as an illuminating example. Rejecting Dworkin's willingness to treat motorcyclists' interest in not wearing helmets as trivial, he notes that some "view helmets as hated symbols of the nitpicking prudence they emphatically reject as they take to the open road, spirits soaring, their hair blowing in the wind. Can we justify permitting others their dangerous adventures in racing cars and on mountain slopes, yet deny the motorcyclist his romantic flair?" *Id.* at 93.

138. CONLY, *supra* note 72, at 149-52.

139. See *supra* notes 94-95 and accompanying text.

140. CONLY, *supra* note 72, at 102-12.

141. *Id.* at 116-25.

142. *Id.* at 117.

irresistibly tempted into buying sweets by their delicious smells.¹⁴³ Conly thus sees the choices we make as involving a battle between our dispassionate—and, therefore, better—selves and our impulsive, weak, manipulable selves. The government, on Conly's view, is free to take sides in favor of our more considered decisions because the ends we choose to pursue in moments of peaceful reflection are closer to our true desires than the choices we make under the hectic cognitive load of everyday life.¹⁴⁴

The problem is that this argument, while gesturing towards the deep subjectivity of our values, assumes that we all have rational selves who value things like fitness and health more highly than the taste of sweets. Conly defends New York City's effort to prevent people from using food stamps to buy soda, for instance, because doing so would help combat obesity, and "[o]besity clearly contributes to ill health and to the psychological burden of being unattractive by conventional standards."¹⁴⁵ The assumptions that everyone leaves sweets and sodas off their grocery lists or that everyone places a high value on being conventionally attractive are not safe ones.¹⁴⁶ Indeed, the same behavioral science on which Conly relies has led some to conclude that the search for our "true" preferences is a quixotic one, because our choices are inevitably the product of the environment in which they are made.¹⁴⁷

143. *Id.*

144. *Id.* at 124 ("I would argue that we (most of us) have a stable desire to be healthy and prosperous . . . even though in choosing means to that end we succumb to poor thinking.").

145. *Id.* at 156.

146. Barbara Ehrenreich, for example, tracks the emergence of the mania for "fitness" to the 1970s, seeing it as mainly a way to display class status: "Unfit behavior like smoking or reclining in front of the TV with a beer signified lower-class status, while a dedication to health . . . advertised a loftier rank." BARBARA EHRENRICH, *NATURAL CAUSES: AN EPIDEMIC OF WELLNESS, THE CERTAINTY OF DYING, AND KILLING OURSELVES TO LIVE LONGER* 58–60 (2018); cf. VANDEVEER, *supra* note 9, at 107–08 (arguing that the diversity of people's values makes it impossible to assume that a paternalistic intervention can make any large group of people better off by their own reckoning). There is now, many years into the obesity "epidemic," a growing movement against the "healthism" that pervades Conly's work. See, e.g., Roberts & Leonard, *supra* note 115. To her credit, Conly acknowledges that "[i]t is not always easy to avoid imposing values" and that she might be displaying "cultural prejudice" when she argues that "of course people should give up chips and junk food, but . . . wine appreciation is truly constitutive of welfare." CONLY, *supra* note 72, at 122.

147. See Robert Sugden, *Why Incoherent Preferences Do Not Justify Paternalism*, 19 CONST. POL. ECON. 226, 232 (2008). Indeed, Conly has urged paternalists

These concerns are likely to be particularly salient in the context of flood risk. Subjectivity may not present a significant hurdle to cost-benefit analyses of relatively straightforward adaptations like elevating a home,¹⁴⁸ but the ambitious, large-scale efforts most often cited as overdue solutions to flood risk all involve moving people out of their homes in one way or another. And because the problem is regional, the value of a home is not just the value of a particular house, but rather, in many cases, the value of an entire community and way of life.

As rising sea levels and soil subsidence combine to eat away at southeastern Louisiana, a whole constellation of rural communities is facing erasure.¹⁴⁹ Hurricane Ida brought national attention to this issue, as small communities outside the metropolitan New Orleans flood-control system sustained heavy damage, leading many residents to question their long-term viability.¹⁵⁰ Isle de Jean Charles is perhaps the most famous example of a community that has affirmatively chosen to relocate in the face of climate change.¹⁵¹ It is a Native American community that has already lost more than 90 percent of its land; today it is little more than a sliver, and the road that connects it to the rest

to embrace the goal of working to change people's values. Sarah Conly, *A Puzzle for Paternalism: Personal Values*, 14 GEO. J.L. & PUB. POL'Y 735 (2016).

148. On the other hand, elevating homes in many flood-prone neighborhoods involves a hard-to-value cost to historic character. See, e.g., Cornelia Dean, *'We Cannot Save Everything': A Historic Neighborhood Confronts Rising Seas*, N.Y. TIMES (July 8, 2019), <https://www.nytimes.com/2019/07/08/science/historic-preservation-climate-newport.html> [<https://perma.cc/5WLW-7MEW>]; Cornelia Dean, *A Renowned Home, Prone to Flooding, Tests the Ingenuity of Engineers*, N.Y. TIMES (July 8, 2019), <https://www.nytimes.com/2019/07/08/science/farnsworth-house-flooding.html> [<https://perma.cc/7PLZ-7XWE>].

149. Amy Wold, *Washed Away: Locations in Plaquemines Parish Disappear from Latest NOAA Charts*, ADVOCATE (Apr. 29, 2013, 10:35 AM), https://www.theadvocate.com/baton_rouge/news/article_f60d4d55-e26b-52c0-b9bb-bed2ae0b348c.html [<https://perma.cc/YP3N-U4H5>]; RUSH, *supra* note 51, at 20 (noting that NOAA removed thirty-one places' names when it revised its maps of Plaquemines Parish in 2013).

150. See Sophie Kasakove, *Three Weeks After Hurricane Ida, Parts of Southeast Louisiana Are Still Dark*, N.Y. TIMES (Sept. 18, 2021), <https://www.nytimes.com/2021/09/18/us/ida-louisiana-power-outages.html> [<https://perma.cc/U38D-5XWF>]; Andy Horowitz, *Hurricane Ida Offers a Glimpse of the Dystopia That's Coming for All of Us*, N.Y. TIMES (Aug. 31, 2021), <https://www.nytimes.com/2021/08/31/opinion/hurricane-ida-climate-change.html> [<https://perma.cc/X5HJ-FF96>].

151. Coral Davenport & Campbell Robertson, *Resettling the First American 'Climate Refugees'*, N.Y. TIMES (May 2, 2016), <https://www.nytimes.com/2016/05/03/us/resettling-the-first-american-climate-refugees.html?searchResultPosition=1> [<https://perma.cc/VS8K-7QT6>].

of the state floods routinely.¹⁵² Residents attracted widespread media attention when they voted to relocate to drier land, but a significant minority have chosen to remain where they are. For them, moving inland would mean abandoning a connection to the land and a way of life that has been part of their identity for generations.¹⁵³

Even the city of New Orleans has had to grapple with this problem, as it made its case to the nation after Hurricane Katrina that an investment of an additional \$100 billion dollars to repair and upgrade the complex flood-control system that surrounds the metro area was warranted. Residents of the city assigned it a high subjective value and saw it as almost self-evident that it was worth saving.¹⁵⁴ Others were not convinced.¹⁵⁵

New Orleans may be an unusually—even uniquely—strong example, but there are many others. Oakwood Beach, Staten Island, is not an isolated Native American community with a unique way of life. Before it was inundated during Hurricane Sandy, it was a blue-collar neighborhood of modest homes next to the Atlantic Ocean.¹⁵⁶ After Hurricane Sandy, it hosted a notably successful buyout program; virtually the entire community elected to move inland, most to homes in nearby areas.¹⁵⁷ Even here, though, the calculus for many was not straightforward.¹⁵⁸

152. *Id.*

153. *Id.* (quoting Chief Albert Naquin's lament that "[w]e're going to lose all our heritage, all our culture"). Elizabeth Rush devotes several deeply affecting chapters of her book, *Rising*, to Isle de Jean Charles, quoting residents' deep grief at having lost their land and way of life while navigating deeply personal struggles over the decision whether to stay or move inland. RUSH, *supra* note 51, at 19–41, 162–80.

154. See Richard Campanella, *In Post-Katrina New Orleans: Abandon? Maintain? Concede?*, TIMES-PICAYUNE, https://www.nola.com/opinions/article_3ad9845b-85f2-574b-931c-a9521cc500d0.html [<https://perma.cc/JJ7C-KFDF>] (June 25, 2019, 11:15 AM).

155. Timothy M. Kusky, *Time to Move to Higher Ground*, BOS. GLOBE (Sept. 25, 2005), http://archive.boston.com/news/globe/editorial_opinion/oped/articles/2005/09/25/time_to_move_to_higher_ground [<https://perma.cc/GY59-8KLG>]; see also Zack Kopplin, *Should We Abandon Louisiana?*, SLATE (Aug. 19, 2016, 6:50 PM), <https://slate.com/technology/2016/08/deadly-flooding-in-louisiana-has-brought-up-old-feelings-for-locals.html> [<https://perma.cc/7PJS-GTVH>] (noting arguments that New Orleans should be abandoned after Hurricane Katrina).

156. RUSH, *supra* note 51, at 114.

157. Kia Gregory, *Deciding Whether It's Lights Out*, N.Y. TIMES (Oct. 25, 2013), <https://www.nytimes.com/2013/10/27/nyregion/deciding-whether-its-lights-out.html> [<https://perma.cc/9W4N-E36Y>].

158. RUSH, *supra* note 51, at 121–30; see also McArdle, *supra* note 3, at 625–26 (“[R]esidents’ attachment to place, and the documented psychological effects of

Canarsie, a lower-middle-class neighborhood in Brooklyn, was flooded badly during Hurricane Sandy and was at the center of New York City's fight with FEMA over its post-Sandy revisions to the City's flood-insurance rate maps. There is nothing *unique* about Canarsie, strictly speaking, but its residents are unwilling to leave, valuing it as a close-knit neighborhood in one of the few parts of New York where homeownership remains attainable to those of modest means.¹⁵⁹

To be sure, the problem of subjectivity is not universal, and some places have more subjective, incommensurable value than others. Not everyone, even in places like Isle de Jean Charles, places a high value on living in the same town as their grandparents. But that, in a way, is exactly the point. Forcing people out of their homes based on objective figures like the market value of the real estate they own sweeps aside these distinctions in a way that runs afoul of any meaningful commitment to respecting individual values.

C. *Uncertainty*

Problems of incommensurability and subjectivity are compounded by a troubling, persistent scientific uncertainty that threatens to undermine paternalistic interventions in the realm of flood risk. Here I do *not* mean uncertainty about whether climate change is occurring or what is causing it (it is; humans are). What I mean is uncertainty about exactly where and to what degree climate change will worsen flood risk over the next few decades. At a national scale, it is clear that some large number of people will have to relocate by the end of the century.¹⁶⁰ But managed retreat involves relocating individual people and neighborhoods, and in many cases, it is hard to say with a

mandated relocations, may fuel strong community reactions against managed retreat as a policy.”).

159. LLOYD DIXON ET AL., RAND CORP., THE COST AND AFFORDABILITY OF FLOOD INSURANCE IN NEW YORK CITY: ECONOMIC IMPACTS OF RISING PREMIUMS AND POLICY OPTIONS FOR ONE- TO FOUR-FAMILY HOMES 54–57 (2017), https://www.rand.org/pubs/research_reports/RR1776.html [<https://perma.cc/2F8F-TZF9>]; Jie Jenny Zou, *Insuring Catastrophe*, CTR. FOR PUB. INTEGRITY (Feb. 25, 2020), <https://publicintegrity.org/environment/flood-insurance-climate-change-risk-inequality> [<https://perma.cc/73RK-3YY4>] (describing Canarsie as “a bastion of black homeownership”).

160. UNION OF CONCERNED SCIENTISTS, *supra* note 2, at 4–5 (estimating that 2.4 million residential properties in the United States will be at risk of chronic inundation—defined as at least twenty-six floods per year—by 2100).

meaningful degree of precision how much worse flood risk is likely to get and how quickly.

Here too, paternalists tend to assume the objective rationality of the behaviors they wish to induce. Conly, for example, justifies various paternalistic interventions into what people eat with casual references to the problem of obesity while assuming that foods high in fat are the cause and natural foods like fruits are better choices.¹⁶¹ These shibboleths are coming under increasing scrutiny.¹⁶² Saving for retirement is another popular target for would-be paternalists, since Americans are routinely reported to have shockingly little socked away. But do Americans fail to save for retirement because we lack the wisdom and self-discipline to do so, or because many of us have faced decades of stagnating wages and rationally choose to buy shelter and food instead of index funds?¹⁶³ In these and other realms, paternalists have tended to underestimate the degree of uncertainty that bedevils any search for an optimal approach.¹⁶⁴

Similar problems plague our thinking about flood risk. It is obvious that many places are flood-prone and that a warming climate will only exacerbate that risk. But spans of time relevant to human decision-making—a decade, a thirty-year mortgage, a lifetime—are but fleeting moments in the science of climatology. The probabilities of significant flooding events are estimated using a scale known as a “return interval”: Hurricane Harvey, for

161. CONLY, *supra* note 72, at 30–31 (discussing paternalistic interventions to discourage consumption of “BBQ-flavor pork rinds” in favor of “healthy fruit”).

162. Conly mentions barbecue pork rinds in passing as a quintessentially unhealthy food. But pork rinds have recently come into favor, thanks to the popularity of diets low in carbohydrates. Indeed, many now blame the USDA’s food pyramid, with its broad base of carbs like bread and pasta, for the rise in obesity. At the very least, the science of nutrition is deeply unsettled. Tara Parker-Pope, *Dried Fruit, Oats and Coffee: Answers to Your Sugar Questions*, N.Y. TIMES (Jan. 8, 2020), <https://www.nytimes.com/2020/01/08/well/eat/diet-sugar-nutrition-foods-health.html> [<https://perma.cc/YQC6-AHGM>] (quoting a leading nutritionist’s advice that grapes are “bags of sugar” and should be avoided).

163. Todd J. Zywicki, *Do Americans Really Save Too Little and Should We Nudge Them to Save More? The Ethics of Nudging Retirement Savings*, 14 GEO. J.L. & PUB. POL’Y 877, 889 (2016).

164. Empirical findings falling under the label “cultural cognition theory” have recently suggested that we all make choices about risk primarily based on our cultural values and sense of ourselves, as opposed to rational, dispassionate analysis. Elite decisionmakers are not immune from this phenomenon. See Dan M. Kahn, *Two Conceptions of Emotion in Risk Regulation*, 156 U. PA. L. REV. 741, 748–54 (2008); Robert R.M. Verchick, *Culture, Cognition, and Climate*, 2016 U. ILL. L. REV. 969, 985.

instance, was a “500-year flood.”¹⁶⁵ This concept misleadingly implies that an event like Harvey should occur only once in a 500-year period.¹⁶⁶ What it actually means is that the likelihood of a Harvey-scale flood occurring in any given year is 0.2 percent.¹⁶⁷ This is a hard figure to make sense of when deciding where to live.

The long return intervals of many recent floods point to a related problem with our understanding of the risk. Reliable historical records of flooding events go back roughly a century at most. This is a troublingly limited set of data from which to draw conclusions about the probability of rare but devastating events.¹⁶⁸ Indeed, a number of studies have suggested that FEMA’s estimates of flood risk are often very inaccurate.¹⁶⁹

The problem is compounded by the importance of small-scale local variables. Just as individual genes may play a significant role in determining what constitutes a healthy diet,¹⁷⁰ the

165. Memorandum from Jeff Lindner, Dir. of Hydrologic Operations/Meteorologist, & Steve Fitzgerald, Chief Eng’r, to Flood Watch/Partners, Harris Cnty. Flood Control Dist., Immediate Report – Final: Hurricane Harvey - Storm and Flood Information 3, 28 (June 4, 2018).

166. Adam F. Scales, *A Nation of Policyholders: Governmental and Market Failure in Flood Insurance*, 26 MISS. COLL. L. REV. 3, 9 (2006) (“What the average person actually understands . . . is that once there has already been such a flood in his area, he is safe for the next ninety-nine years.”); Nadja Popovich & Claire O’Neill, *A ‘500-Year Flood’ Could Happen Again Sooner than You Think. Here’s Why.*, N.Y. TIMES (Aug. 28, 2017), <https://www.nytimes.com/interactive/2017/08/28/climate/500-year-flood-hurricane-harvey-houston.html> [<https://perma.cc/4W7W-Z2VF>] (noting a tweet from Donald Trump referring to Harvey as “a once in 500 year flood”).

167. *Flood Zones*, FEMA (July 8, 2020), <https://www.fema.gov/glossary/flood-zones> [<https://perma.cc/TH84-GN7N>].

168. Maggie Koerth, FIVE THIRTYEIGHT, *It’s Time to Ditch the Concept of ‘100-Year Floods’*, PREVENTIONWEB (Aug. 30, 2017), <https://www.preventionweb.net/news/its-time-ditch-concept-100-year-floods> [<https://perma.cc/7EKH-F9MB>] (noting that much of the stream gauge data, on which estimates of Houston’s flood risk are based, go back only a few decades).

169. See, e.g., Wesley E. Highfield et al., *Examining the 100-Year Floodplain as a Metric of Risk, Loss, and Household Adjustment*, 33 RISK ANALYSIS 186, 189–90 (2012) (comparing 100-year floodplain in Houston with loss experience of repetitive-loss properties from 1978 to 2008 and finding that “the 100-year floodplain has not had the expected predictive power of property damage across the region” and, thus, is “neither accurate nor sufficient in guiding communities and household decisions”); Oliver E. J. Wing et al., *Estimates of Present and Future Flood Risk in the Conterminous United States*, 13 ENV’T RSCH. LETTERS 1, 3 (2018) (estimating that 40.8 million Americans live in a 100-year flood zone compared to FEMA’s estimate of only 13 million Americans).

170. Cynthia Graber & Nicola Twilley, *Diet for One? Scientists Stalk the Dream of Personalized Nutrition*, N.Y. TIMES (June 10, 2019), <https://www.nytimes.com/2019/06/10/health/nutrition-diet-genetics-food.html>

particular qualities of a given region, neighborhood, or home determine how factors like rising sea levels and intensifying rainfall will affect it in the future. Changes in one area, like the construction of a new subdivision or shopping mall, can affect flood risk miles away.¹⁷¹ And modeling how changes in average temperatures and sea levels will affect rainfall and high-tide levels in particular places requires cutting-edge and inherently uncertain science.¹⁷²

At the other end of the spectrum, there is a high degree of uncertainty surrounding the extent to which carbon dioxide will continue to accumulate in the atmosphere over the coming century. The Intergovernmental Panel on Climate Change operates on four different assumptions about humanity's ability to curb its carbon dioxide emissions. These range from a pessimistic scenario, in which carbon dioxide continues to be emitted at current rates and the planet warms by as much as 5.7 degrees Celsius, to an optimistic scenario, in which we find the will to reduce our carbon dioxide emissions and experience warming of only 0.6 degrees Celsius.¹⁷³ These scenarios lead to estimates of sea-level rise that range from as little as one to as many as eight feet, resulting in a "stark" difference in impacts to real estate.¹⁷⁴

[<https://perma.cc/XLF8-DN5G>] (noting studies suggesting that genetic differences help determine which diets help people lose weight).

171. See Tony Bartelme, *Rising Waters: Charleston Area Lost More Than 10,000 Acres of Tree Cover Since 1992, Making Floods Worse*, POST & COURIER, https://www.postandcourier.com/rising-waters/charleston-area-lost-more-than-10-000-acres-of-tree-cover-since-1992-making-floods/article_a202a744-f83a-11ea-a446-935c0f524f47.html [<https://perma.cc/7NJ5-RGYX>] (Sept. 29, 2021); Neena Satija et al., *Boomtown, Flood Town*, TEX. TRIB. (Dec. 7, 2016), <https://projects.propublica.org/houston-cypress> [<https://perma.cc/KH4G-NKNN>]; Luke Broadwater et al., *After Deadly Flash Flood, Concern About Development's Impact on Ellicott City*, BALT. SUN (Aug. 13, 2016, 9:15 PM), <https://www.baltimoresun.com/maryland/howard/bs-md-ho-ellcott-city-development-20160813-story.html> [<https://perma.cc/4WVE-9SYS>].

172. U.S. GLOB. CLIMATE CHANGE RSCH. PROGRAM, *supra* note 1, at 210–16 (noting regional variation in changing rainfall patterns and the difficulty in projecting future trends); *id.* at 333–35. (noting the mean global sea level rise prediction ranges from one to eight feet by 2100 with significant local variation based on factors like land subsidence and ocean currents).

173. U.S. GLOB. CLIMATE CHANGE RSCH. PROGRAM, *supra* note 1; see also J.B. Ruhl & Robin Kundis Craig, *4° Celsius*, 106 MINN. L. REV. 101, 125 (2021) (noting breadth of scientific projections of warming by 2100, which results from "uncertainty regarding how fast and how much our climate responds to changes in atmospheric greenhouse gas concentrations . . .").

174. UNION OF CONCERNED SCIENTISTS, *supra* note 2, at 11.

There are, to be sure, areas that will be literally underwater by the end of the century if nothing is done to save them. But there are many more areas, particularly inland ones, where the best we can say is that the flood problem will probably get worse—how much worse, and exactly when and where, is impossible to say. Of course, saying that our understanding of flood risk is bedeviled by significant uncertainty does not mean that we have no understanding of flood risk at all. What it does mean is that we should resist the temptation to write off vast swaths of the country as obviously irrational places to live.

IV. DISTRIBUTIVE CONCERNS

Anti-paternalists have long been criticized, often with good reason, for their blindness to the distributive effects of their insistence that people be free to make bad choices. The world of the anti-paternalists, many have argued, privileges good choosers over bad choosers.¹⁷⁵ Anti-paternalism thus appears to prioritize freedom of contract, say, over the government's ability to regulate the working conditions of common laborers.¹⁷⁶ Feinberg's "soft" anti-paternalism was meant to help address this problem by allowing the government to override choices that were not made under conditions of freedom, like the choice of a penniless immigrant to take a job in a dangerous factory. But this move does not entirely eliminate the problem, since protecting any significant realm of autonomy against government intervention gives people the freedom to make bad choices and have worse outcomes, creating troubling distributive effects.

This problem is significant in the flood-risk context. The popular image of the fancy beachfront mansion is hard to dislodge, but it is important to keep in mind that, in the vast majority of states (Florida being the leading exception), it is the poor who are more likely to live in flood zones.¹⁷⁷ In many places,

175. Arneson, *Joel Feinberg and the Justification of Hard Paternalism*, *supra* note 11; Arneson, *Paternalism, Utility, and Fairness*, *supra* note 11.

176. *See, e.g.*, *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) ("[A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez-faire.").

177. *See generally* FED. EMERGENCY MGMT. AGENCY., DEP'T OF HOMELAND SEC., AN AFFORDABILITY FRAMEWORK FOR THE NATIONAL FLOOD INSURANCE PROGRAM (2018); NAT'L ACADS. OF SCIS., ENG'G, & MED., FRAMING THE CHALLENGE OF URBAN FLOODING IN THE UNITED STATES 52–58 (2019) (describing "decades of

this is the product of a historical legacy that is, on reflection, unsurprising: flood-prone areas often consists of poor-quality land settled by impoverished people who had nowhere else to go.¹⁷⁸ Riverfront neighborhoods in urban areas, for example, were more likely to be industrial and, therefore, smelly, noisy, and populated with people who found work in nearby docks, factories, and shipyards.¹⁷⁹

The importance of these factors has certainly faded over time, but their effects remain in current data. Within flood zones, over a quarter of NFIP policyholders are low income, as are more than half of those who do not have flood insurance.¹⁸⁰ Unsurprisingly, those in riverine flood zones tend to have lower incomes than those in coastal flood zones.¹⁸¹ Even in places where coastal living is desirable and therefore expensive, such as southern Florida, people are willing to pay to avoid flood risk, and low-income and minority residents are more likely to move into areas with high flood risk.¹⁸²

Not only are wealthier people less likely to live in flood-prone homes, they are far more likely to have the resources to

research, which demonstrates that impacts from flooding tend to fall disproportionately on the most vulnerable and resource-constrained members of society"). The question of whether the NFIP is progressive or regressive has generated a small body of empirical literature. See, e.g., Lemann, *supra* note 12, at 186 n.107 (collecting sources).

178. See, e.g., PEIRCE F. LEWIS, *NEW ORLEANS: THE MAKING OF AN URBAN LANDSCAPE* (2d ed. 2003); RICHARD CAMPANELLA, *TIME AND PLACE IN NEW ORLEANS: PAST GEOGRAPHIES IN THE PRESENT DAY* (2002). New Orleans is somewhat unique, since its peculiar geography means that the land closest to the Mississippi River is also highest in elevation. Throughout the nineteenth century, low-lying land away from the river was referred to as the "back swamps," which consisted of predominantly Black neighborhoods. Many of these neighborhoods remain mostly Black today. But the invention of new technologies for draining those same swamps in the early twentieth century led to a wave of suburbanization, and the largely middle-class neighborhoods that resulted—both Black and White—are even lower in elevation, meaning they flooded even worse during Hurricane Katrina. ANDY HOROWITZ, *KATRINA: A HISTORY, 1915–2015*, at 48–51, 69–73 (2020).

179. Richard Campanella, *An Ethnic Geography of New Orleans*, 94 J. AM. HIST. 704, 706–07 (2007). See generally Jeff Ueland & Barney Warf, *Racialized Topographies: Altitude and Race in Southern Cities*, 96 GEOGRAPHICAL REV. 50 (2006).

180. FED. EMERGENCY MGMT. AGENCY., *supra* note 177, at 6.

181. *Id.* at 14–15; Eric Tate et al., *Flood Exposure and Social Vulnerability in the United States*, 106 NAT. HAZARDS 435, 438 (2021).

182. Laura A. Bakkensen & Lala Ma, *Sorting Over Flood Risk and Implications for Policy Reform*, 104 J. ENV'T ECON. & MGMT. 1, 2 (2020). Bakkensen and Ma also note that homes located just inside a flood zone sell at a 6.3 percent discount to those just outside. *Id.*

mitigate the effects of any flooding they experience.¹⁸³ For example, New Orleans was placed under a mandatory evacuation order before Hurricane Katrina, but an estimated one hundred thousand residents of the city did not have access to a car and no other means of evacuating was provided.¹⁸⁴ Those lacking access to a car were, in a bitter irony, far more likely to live in a flooded area.¹⁸⁵ The various short-term costs associated with evacuating from a storm can be crippling for those of modest means.¹⁸⁶ Rebuilding, too, can be crushingly expensive, even when damage is not severe.¹⁸⁷

There is real danger, then, in a laissez-faire system that allows rich and poor alike the freedom to live in a flood zone while ignoring the reality that the poor are more likely to do so and more likely to be killed or financially ruined when floods arrive. But moving too far in the other direction creates distributive risks of its own. Paternalism also privileges good choosers over bad choosers, not by exacerbating preexisting inequalities but by privileging one set of values and choices over another.

Consider a paragon of health: an abstemious person who exercises daily, indulges rarely, and lives to a ripe old age. Anti-paternalism might seem to privilege such a person over the indulgent and slothful by leaving the latter with a lower life expectancy, but if we remember that life expectancy is not the only value people might wish to maximize, we can begin to see that

183. Alice Kaswan, *Domestic Climate Change Adaptation and Equity*, 42 ENV'T L. REP. 11125, 11127 (2012) ("Numerous case studies reveal disparities in harm and recovery for low-income and marginalized communities."); MILETI, *supra* note 64, at 6–7, 122–24 ("[L]ow income groups . . . have the highest disaster mortality and morbidity rates."); R. W. Kates et al., *Reconstruction of New Orleans After Hurricane Katrina: A Research Perspective*, 103 PROC. NAT'L ACAD. SCI. U.S. 5, 14 (2006) (noting, in connection with Hurricane Katrina, "racial and class differences in the ability to cope with the flood, to return, and to rebuild"); FREUDENBERG ET AL., *supra* note 3, at 13–15.

184. TOM DAVIS ET AL., A FAILURE OF INITIATIVE: FINAL REPORT, H.R. REP. NO. 109-377, at 113 (2006).

185. BROOKINGS INST., NEW ORLEANS AFTER THE STORM: LESSONS FROM THE PAST, A PLAN FOR THE FUTURE 13 (2005), https://www.brookings.edu/wp-content/uploads/2016/06/20051012_NewOrleans.pdf [<https://perma.cc/ZK2E-BDH7>].

186. MILETI, *supra* note 64, at 124 ("[P]eople of lower socioeconomic status have the most trouble reconstructing their lives and reestablishing permanent housing after disasters in the United States. They have less insurance, more financial stress, more trouble negotiating bureaucracies, less access to resources, and more difficulty obtaining loans.").

187. Kaswan, *supra* note 183, at 11131–33 ("The capacity to recover and reconstruct after a disaster is strongly influenced by underlying socioeconomic status.").

paternalism too privileges the abstemious by singling out only the indulgent and slothful for coercion.

The problem becomes even clearer when background inequalities are added back into the picture. The poor are more likely to smoke, leaving them with lower life expectancy and worse health.¹⁸⁸ But the paternalistic policy designed to help them avoid this fate, a cigarette tax, is notoriously regressive,¹⁸⁹ adding an additional financial burden to already overburdened lives while having no impact on elites who would never touch a cigarette.¹⁹⁰ Soda taxes raise similar concerns.¹⁹¹

Consider how this problem plays out in the context of flood risk. Mandatory relocation enjoys widespread support among policy experts who long for a more “rational” approach to flood risk. Recently, the Corps of Engineers has even forced municipalities to agree to use eminent domain to purchase properties before federal matching funds are made available for buyout programs.¹⁹² The test for which properties will be bought out is a familiar one: properties that have incurred flood losses greater than their market value are targeted for removal.¹⁹³ This kind of cost-benefit analysis has been a staple of reporting about flood risk in the popular press for many years.¹⁹⁴ Focusing on the

188. MILOV, *supra* note 113, at 235.

189. Dahlia K. Remler, *Poor Smokers, Poor Quitters, and Cigarette Tax Regressivity*, 94 AM. J. PUB. HEALTH 225, 228 (2004).

190. EHRENREICH, *supra* note 146, at 101–04 (“As more affluent people gave up the habit, the war on smoking . . . began to look like a war against the working class.”).

191. CONLY, *supra* note 72, at 159–60. Conly recognizes this problem but waves it away, noting that “in the US we are used to richer people being able to get things poorer ones can’t.” *Id.* at 160–61.

192. Flavelle, *supra* note 50.

193. *Id.*

194. See, e.g., Michael Grunwald, *How Washington Made Harvey Worse*, POLITICO MAG. (Aug. 29, 2017), <https://www.politico.com/magazine/story/2017/08/29/a-storm-made-in-washington-215549> [<https://perma.cc/9Z4B-R52C>] (citing a home valued at less than \$115,000 that has flooded sixteen times in eighteen years, resulting in \$800,000 in claims); Noel King, *National Flood Insurance Program Will Pay Out Billions for a Few Properties*, NPR (Sept. 21, 2017, 4:45 PM), <https://www.npr.org/2017/09/21/552708255/national-flood-insurance-program-will-pay-out-billions-for-a-few-properties> [<https://perma.cc/S59P-M9UU>] (reporting on a home that cost \$83,000 in 1992 yet has received \$700,000 in claims payments since 2009); Eric Lipton et al., *Flood Insurance, Already Fragile, Faces New Stress*, N.Y. TIMES (Nov. 12, 2012), <https://www.nytimes.com/2012/11/13/nyregion/federal-flood-insurance-program-faces-new-stress.html> [<https://perma.cc/GV7Q-45DC>] (citing homes in Biloxi, Mississippi, and Humble, Texas, that—despite being worth \$183,000 and \$116,000, respectively—have received \$1.47 million and \$2 million in claims payments from the NFIP).

market value of a property, though, obscures other values and systematically devalues the properties of less well-off people. Buyout policies based on cost-benefit analysis thus risk disproportionately singling out the poor and communities of color for relocation.¹⁹⁵

The most politically feasible policy intervention to discourage people from living with flood risk, meanwhile, is increasing their flood insurance premiums, a kind of cigarette tax for flood-prone houses. Many well-off people can easily afford such increases.¹⁹⁶ Many less well-off people cannot, as FEMA's studies on the affordability of NFIP premiums have made increasingly clear.¹⁹⁷ Increasing mandatory flood insurance premiums could create a world in which the rich are free to remain in their homes while the poor must upend their lives and disrupt their communities in search of somewhere they can afford to live.¹⁹⁸ It may be that this leaves them better off in the long run if they avoid a disastrous flood.¹⁹⁹ Or it may lead to the destruction of communities, cultures, and ways of life that were more valuable than the consequences of whatever floods they avoided. An objective, clear answer is elusive.

Consider afresh, then, the image of mandatory retreat: poor neighborhoods, home to generations of people who have never had the full menu of American life presented to them, evacuated and abandoned by order of the government. As for where to go, the only clear answer seems to be . . . somewhere else.

195. A. R. Siders, *Social Justice Implications of US Managed Retreat Buyout Programs*, 152 CLIMATIC CHANGE 239, 239 (2019).

196. FREUDENBERG ET AL., *supra* note 3, at 40 (noting that rising flood insurance premiums risk creating a "paradox" in which "only the more affluent can enjoy the benefits of coastal living").

197. Bakkensen & Ma, *supra* note 182, at 3 ("[T]he costs of insurance price reform fall more heavily on low income residents as a fraction of income."); FED. EMERGENCY MGMT. AGENCY, *supra* note 177.

198. Bakkensen & Ma, *supra* note 182, at 16–17 (finding that eliminating various forms of subsidized NFIP premiums would be regressive, creating higher proportional burdens on low-income, Black, and Hispanic households); Kaswan, *supra* note 183, at 11139–40 ("Adaptation policies that attempt to treat everyone the same . . . will result in substantial inequality given underlying differences. . . . [L]ow income residents do not have the resources to start fresh elsewhere and face significant risks of homelessness or deepening poverty if relocation assistance is not provided.").

199. Bakkensen & Ma, *supra* note 182, at 2 ("[W]e find that higher insurance prices would lead to fewer individuals living in high risk zones, highlighting that migration will likely be an important [albeit costly] challenge to mitigate climate risks.").

CONCLUSION

If the right approach to flood risk is irreducibly subjective and paternalistic policies run the risk of creating distributive problems, what is to be done? Being skeptical of paternalism in this context does not mean that we must throw up our hands and abandon any attempt to improve the dire situation we face. A focus on paternalism suggests that we should emphasize choice rather than coercion, improving people's capabilities rather than telling them where to live.

To help move people away from flood zones, we should focus less energy on increasing the insurance premiums people must pay to remain in their homes and more on empowering them to move when they choose, primarily through buyouts.²⁰⁰ Buyout initiatives have in most cases been created as one-off programs in the wake of large disasters and have involved complex funding and administration partnerships between various levels of government. Buyouts have thus only been sporadically available and difficult to navigate procedurally.²⁰¹ Experts have for years suggested various ways this system can be improved, most obviously through a standing federal program with uniform requirements and a straightforward application procedure.²⁰²

200. Cf. McGeehan, *supra* note 109 (noting that "advocates for the poor and underfed" argued, in response to New York's proposal to ban the use of food stamps to buy soda, that "[i]nstead of restricting the dietary choices of low-income residents . . . city officials should reconsider how to increase the purchasing power of low-income residents so that they can buy food that is more nutritious").

201. In the wake of Hurricane Sandy, for example, New York selected only ten communities for buyouts, excluding several communities that had actively sought to be included. Some residents just outside buyout zones petitioned the state government, without success. Sherri Brokopp Binder & Alex Greer, *The Devil Is in the Details: Linking Home Buyout Policy, Practice, and Experience After Hurricane Sandy*, 4 POL. & GOVERNANCE 97, 99–100 (2016); see also *id.* at 100–01 (presenting survey data showing residents' struggles to understand the complex buyout process). FEMA has purchased and demolished 43,633 properties since 1989, a miniscule number considered in light of the 13.1 million people projected to be at risk of regular flooding by 2100. Elizabeth Rush, *Buy High, Sell Low* (2020), <https://www.anthropocenemagazine.org/2020/08/buy-high-sell-low> [<https://perma.cc/JE2E-U76C>].

202. ANNA WEBER & ROB MOORE, NAT. RES. DEF. COUNCIL, GOING UNDER: LONG WAIT TIMES FOR POST-FLOOD BUYOUTS LEAVE HOMEOWNERS UNDERWATER 4, 15–16 (2019) (finding a five-year median for the completion of FEMA-funded buyouts and proposing reforms to streamline the process); Pappas & Platt, *supra* note 44, at 401–04 (proposing changes to federal buyout policies); FREUDENBERG ET AL., *supra* note 3, at 57–59; Sherri Brokopp Binder et al., *Rebuild or Relocate? Resilience and Postdisaster Decision-Making After Hurricane Sandy*, 56 AM. J. CMTY. PSYCH. 180, 191–94 (2015); Anamaria Bukvic & Graham Owen, *Attitudes Towards*

This work will only become more pressing as rising sea levels begin to impact property values along America's coasts, creating the risk that low-income neighborhoods will become increasingly concentrated in increasingly risky locations.²⁰³ Again, the best approach to this problem is not to single out the poor for forced relocation but to ensure that everyone has the means to relocate when they choose to do so.

Disclosure of information about flood risk is also an unqualified good. To be sure, mandatory disclosure laws do attract opposition because of their ability to negatively impact real estate values in flood-prone areas. Disclosure as a regulatory tool has also proved disappointing in other contexts; people continue making the "wrong" decisions despite being confronted with information about the risks they are taking.²⁰⁴ There is thus no guarantee that disclosing flood risk would significantly impact people's willingness to buy flood-prone homes.²⁰⁵ But it would, at the very least, provide people with information they need to make informed decisions about how much risk they're willing to take. Far too often, people have no meaningful sense that their homes are flood-prone at all,²⁰⁶ in part because FEMA's flood maps are often dated and always based on historical data, and therefore do not include predictions of how flood risk will change

Relocation Following Hurricane Sandy: Should We Stay or Should We Go?, 41 DISASTERS 101, 116–18 (2017).

203. Bakkensen & Ma, *supra* note 182, at 2 (expressing concern that "insurance price reform" would result in "a greater concentration of low income and minority residents in harm's way"); Kaswan, *supra* note 183, at 11139 (noting the danger of "relying on market forces to depopulate at-risk areas[, which] would exacerbate, not reduce, risks to low-income and of-color citizens who could be powerfully attracted to newly affordable housing—housing that has become affordable and available because it is at risk").

204. Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 651 (2011).

205. At least one study has found that improved mapping would negatively impact demand for coastal real estate. The study's authors also found that improved mapping would be cost effective and would also be progressive in the sense that it would deliver proportionally greater welfare gains for households in the bottom income quintile than for those in the top income quintile. Bakkensen & Ma, *supra* note 182, at 18–20 ("[F]lood risk map updates are valuable sources of information and are appealing from both a distributional and efficiency perspective.").

206. See, e.g., Neena Satija et al., Tex. Trib., *Everyone Knew Houston's Reservoirs Would Flood — Except for the People Who Bought Homes Inside Them*, PROPUBLICA (Oct. 12, 2017), <https://projects.propublica.org/graphics/harvey-reservoirs> [<https://perma.cc/MMP3-4QZK>]; James Drew, *Canyon Gate Homeowners Were Not Warned About Potential Flooding*, HOUS. CHRON., <https://www.houstonchronicle.com/news/houston-texas/houston/article/Canyon-Gate-bond-prospectuses-did-not-warn-12259584.php> [<https://perma.cc/86CM-8UL4>] (Nov. 27, 2017, 11:48 AM).

in the future. This situation could easily be addressed without paternalistically overriding people's choices.²⁰⁷

There is, after all, no reason to expect that governments will suddenly find the will to force people out of their homes or make them pay fully risk-rated flood insurance premiums.²⁰⁸ People's choices about where to live are entitled to more respect than they are usually afforded in the national conversation about flood risk. While it seems obvious that, with rising seas, worsening rains, and stronger storms, a significant number of people will have to move, deciding exactly who and when and where involves subjective, value-laden judgments that seriously risk creating disparate impacts on low-income and minority communities and, thus, should be treated with caution.

207. Louisiana, for example, recently released a series of maps under its "LA SAFE" program that are designed to show in simple, legible ways how rising seas and land subsidence will affect flood risk over the next fifty years. See Collection of Maps for Louisiana's Strategic Adaptations for Future Environments, LA. SAFE: VIEW MAPS, <https://lasafe.la.gov/engagement/maps> [<https://perma.cc/UKZ8-Y45X>]. Nicolas Cornell has expressed concern that interventions as seemingly mild as public information campaigns run the risk of exacting an "aesthetic toll," thereby ruining the fun of activities like road trips and indulgent meals. Cornell, *supra* note 36, at 856–57. A reminder that one's beach house could be wiped out by a hurricane would certainly implicate this concern.

208. Politicians from across the political spectrum have recently voiced misgivings about FEMA's "Risk Rating 2.0," which is set to make flood insurance premiums more actuarial. See Flavell & Cochrane, *supra* note 8.

