Assumption of Flood Risk

ABSTRACT: 2017 was the costliest year for flood damage in American history. Somewhat fortuitously, the beleaguered National Flood Insurance Program came up for reauthorization just as the country was bearing the brunt of Hurricanes Harvey, Irma, and Maria. With the program at its borrowing limit and facing the prospect of being unable to pay claims, Congress punted on the question of long-term reform by forgiving its past debt and extending its reauthorization deadline. That deadline has since been extended seven more times, with little substantive discussion of the widely-felt need for reform.

Scientists expect a warmer climate to cause more intense rainfall, more powerful hurricanes, and higher sea levels, all of which will significantly worsen the flood risk we face. Meanwhile, many see federal policy as failing to encourage sustainable development. Indeed, the dominant view of experts is that programs like the NFIP have made the problem worse, by insulating property owners from the effects of storms and thus artificially inflating the value of flood-prone real estate. This viewpoint, however, assumes that the purpose of federal policy in this area should be to incentivize some objectively optimal level of exposure to the risk of floods. The behavior of policymakers, on the other hand, strongly suggests that this utilitarian approach to the problem is not the only—or even the default—way of thinking about our exposure to risk.

Drawing on tort doctrine, and particularly the defense of assumption of risk, I argue that there is instead a set of deeply moral instincts underlying our response to flood risk. The doctrine of assumption of risk assigns responsibility for the realization of risks not when our decisions to confront them are objectively rational, but rather when they are made freely, with meaningful knowledge of the risk and a choice of whether to accept it. These ideas, I argue, can already be detected in the rate structure of the NFIP, and yet they are largely ignored in the broader policy debate about how best to share the burden of flood risk. If tort law represents a distillation and application of our common moral intuitions about risk and responsibility, it can shed light on how this complex problem should be resolved.