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

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

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

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

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

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

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

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

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

3. *Id.* at 568–69.

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

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

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

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

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

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

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

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

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

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

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

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