The Legal Consequences of Ignoring Climate Risk

Local decision-makers who fail to prepare their communities for climate change could find themselves in court.

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Last month, in a case that sent shivers through corporate America, a former peanut-company executive was sentenced to 28 years in prison for his role in a deadly salmonella outbreak. The executive, Stewart Parnell, knowingly shipped contaminated peanut butter to stores across the country. Nine people died and hundreds more were sickened.

Parnell's punishment was unprecedented for a foodborne-illness case. But it signals an important shift in the prevailing legal winds: More courts are holding people to account for failure to prevent harm. Increasingly, corporate and civic leaders face stiff civil - and potentially, in the most egregious situations, criminal -- penalties when they endanger others.

It's a shift that has important implications for local decision-makers -- the public officials, developers and property owners who shape the places where we live and work. As our largely ill-prepared cities and towns confront an uncertain and changing climate, those decision-makers may be called to account for development that puts people in harm's way.

Here's why. The law, in theory if not always in practice, encourages responsible behavior based on a "standard of care" as exercised by an individual, agency or corporation. People with special capabilities, such as engineers or architects, are held to an even higher standard of care.

Typically, when someone breaches a duty of care and others suffer harm, civil litigation is the legal remedy of choice, and the harm is most often offset with monetary damages. Today, we are seeing more litigation over actions that result in foreseeable harm.

For example, Des Moines Water Works recently sued the leaders of three upstream farming counties for failing to keep nitrates out of the water supply. The lawsuit alleges that the counties' voluntary measures to reduce nitrate pollution have failed, forcing the utility to filter water at considerable public expense.

In the Des Moines case, county officials knew they were missing the mark on nitrate pollution. But other cases have found civil liability when responsible parties unknowingly made a mistake. For example, lenders and corporations that read FEMA flood-insurance maps incorrectly have historically escaped liability, even when their mistakes result in uninsured losses for homeowners. But that changed in 2008 with a federal appeals court ruling that allowed a Mississippi couple to sue a company that determined that their property was not in a federal flood zone and therefore didn't need flood insurance. Their home was inundated by Hurricane Katrina.

Could local officials be held to account if they fail to protect their citizens from climate disaster? Recent federal rulings suggest that they could. Notably, in May of this year, the Court of Federal Claims found the U.S. Army Corps of Engineers liable for damage caused by flooding from Katrina and other storms. Judge Susan Braden ruled that the corps' failure to properly maintain the Mississippi River-Gulf Outlet exacerbated flood damage, depriving landowners of the use of their homes. Federal flood-control projects usually enjoy immunity from liability, but in this case the government's negligence was found to be an unconstitutional "taking" of citizens' property.

Failure to prevent climate disaster could even, in the rarest and most egregious circumstances, result in criminal charges. Even if someone does not deliberately intend to cause harm, they may be accused of a crime if they act in a manner that leads to serious harm or loss of life. Such was the case last year when James Pflueger, the owner of a dam in Hawaii, was indicted for common law murder. Pflueger's failure to safely maintain the dam resulted in a catastrophic 2006 breach that killed seven people. (The case was eventually dropped due to Pflueger's advanced age and his willingness to pay considerable restitution to the victims' families.)

Decision-makers who fail to ensure climate-safe design and construction could find themselves in similar straits. Most American cities and towns are sorely unprepared for the current climate, and even less prepared for future climate-change impacts. Some municipal governments have made significant contributions to adaptation planning and implementation, but generally there remains a troubling and ever-increasing gap between climate-related vulnerabilities and local preparedness. According to a 2011 survey, only 13 percent of U.S. cities had even
completed an assessment of their vulnerabilities and risks.

Failure to prepare is not a victimless crime. In unprepared communities, people will suffer vast, preventable misery. Families will lose their homes. Lives will be lost. Public treasuries will be drained, leaving fewer resources available for education, infrastructure and other public needs. And those who suffer will seek justice.

At its core, government exists to prevent us from harming each other. When government fails in that duty, the victims may well seek to share their misery with all who have contributed to their misfortune. Decision-makers who ignore the threat of climate change, take note: Whether at the gates of St. Peter's or before a judge, you may be called upon to answer for your actions.