

1-27-2016

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## Recommended Citation

Rizzardi, Professor Keith, "The Injustice of Sea Level Rise: Ethics and Evidence, Lies and Liability--Text of Speech" (2016). *Lectures and Presentations*. Book 9.  
<http://commons.law.famu.edu/cilj-lectures-pres/9>

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**THE INJUSTICE OF SEA LEVEL RISE:  
Ethics & Evidence, Lies & Liability**

*Remarks by Professor Keith W. Rizzardi at the Florida A&M University School of Law  
Second Annual Climate and Energy Justice Lecture (February 2016)*

Let us take a journey together through the science, law, policy and ultimately, injustice of sea level rise. On our journey to justice, or injustice, let us think about four concepts: ethics, evidence, lies, and liability. It is an uncomfortable trip.

Before we go there, a word about me. I was born on Long Island, near New York, where my uncle often took me to his cabin in the Adirondacks. I went to the beach a lot, too, and became a nature lover. Now I live in South Florida, where I was an airboat driver in the Everglades. I still go to the beach a lot. And while I am a lawyer and law professor, my primary profession is Dad. I love to see my kids eyes open wide as we explore new places. But my kids have certainly shaped the way I think about climate change, and the intergenerational injustice it represents.

[ETHICS.] Parents, like many other professionals, have an ethical code. One of the principles is that Earth was loaned to us by our kids. So, living in Florida, I worry about the changes to our planet. I worry about what we are doing to our kids. For example, in a series of images provided by University of Miami Professor Dr. Harold Wanless, we can realize what sea level rise means for South Florida. The white areas are urbanized. The black line is Tamiami Trail. 2 feet of sea level rise is within the mid-range of predictions for the next 50 years, 4 to 5 feet is on the higher end (but far short of worst case scenarios.) In sum, South Florida faces the potential for massive changes.

I teach professional responsibility. So I think about legal ethics and professional ethics quite a bit. And I started thinking about how ethics applied to sea level rise. Consider a picture of Miami. Is all this construction ethical? Many of these construction cranes are Tower Condominiums. People make 30 year mortgage investments. Buildings have a 50 year design life, maybe even a 75 year useful life. Are we really thinking through our actions?

High tides are regularly flooding the streets of Miami. King Tides push ocean water inland, and the drainage systems work in reverse. Property values are at risk. And according to an FSU scientist, the high tides are getting higher, even during the period from 1998 to 2014.

Every day, people make decisions related to sea level rise that have ethical implications. Professionals, with ethical codes – architects, engineers, lawyers, planners and realtors – are all involved in planning & zoning; building & landscape architecture; water management & permitting; investment & financing

These professionals all have professional duties too. Lawyers may not make a false statement of material fact or law to a third person; or fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client. Certified planners shall not deliberately or with reckless indifference fail to provide adequate, timely, clear and accurate information. Architects shall not engage in conduct involving the wanton disregard of the rights of others. Realtors shall avoid exaggeration, misrepresentation, or concealment of pertinent facts relating to the property. Perhaps most significantly, civil engineers shall hold paramount the safety, health and welfare of the public and shall strive to comply with the principles of sustainable development in the performance of their professional duties. Are any of these professionals in South Florida living up to their professional duties when they sign off on that Miami Tower Condominium? Are they really understanding the evidence, and the risks?

[EVIDENCE.] Some people say that all this climate change is just too uncertain. Like the politicians saying "I'm not a scientist." I coach youth sports for my kids, so I'm calling timeout on that expression. Those same politicians rely on science and models in many other scenarios. They close parks for lightening, and close schools when weather models predict a snowstorm tomorrow. In Florida, we evacuate people from homes when a hurricane is a few days away. We do these things even though the event has not happened yet, and even though the models have uncertainty. The models might even be wrong! Yet still we act, because we use science to protect people.

Importantly, it is the job of the professionals to understand that science and translate it to policy. It is part of the duty of competence. Maybe the professionals need to think about earth as a client. What would she want?

We humans are changing the Earth. Burning of carbon fuels is the main reason, coupled with industrial scale agriculture, burning of crops and forests, transportation systems, and even thawing of permafrost. We are polluting our skies, which are just a thin layer of atmosphere above the Earth, like the skin on an apple. And the world is now changing.

Carbon continues to rise. Temperatures rise, decade by decade. Glaciers are melting. Just look at the images from the U.S. Geological Survey's Repeat Photography Project, showing changes over a century to the Boulder Glacier in Glacier National Park. Look at the Jackson Glacier, too. The hydrologic cycles of the Earth are changing. And the seas are warming, and rising, too. It is a very simple law of thermodynamics at work. Add heat to water and the molecules expand.

[LIES.] Still, some people will deny the change. According to the Miami Herald, Florida Department of Environmental Protection officials were ordered not to use the terms “climate change” or “global warming” in any official communications, emails, or reports. The whole story made me think of my son reading Harry Potter. Climate Change is the thing that shall not be named. There is such a thing as a lie of omission.

Fortunately, some of the counties in South Florida are trying to confront the facts. The Southeast Florida Regional Climate Change Compact convened a technical work group and created a unified sea level rise projections to assist the policy makers. The Compact Counties are now planning for an estimated 14 to 26 inches of sea level rise by 2060.

But should they be using the best case scenarios, or the worst? People and property in the lowest lying lands are at risk. And as my friend John Englander, author of High Tide on Main Street has taught me, the data for the actual rate of sea level rise consistently proves to be higher than our earlier projections.

Meanwhile, the North Carolina legislature said that its official policy on sea level rise is not to have a policy. It prohibited state officials from defining rates of sea-level change for regulatory purposes. We must obey the legislators in Carolina, by rejecting the scientists at NASA?

Please do not mistake my message. There is room for debate over climate change and sea level rise in particular. Science comes with scientific disagreement over data adequacy, assumptions, and modelling methodologies. Policy makers will need to consider whether we need more research on a specific point, when we should take action, and whether we should be conservative and precautionary, or not. Our society should have hard conversations about these things before making decisions like coastal armoring, disaster management, and the decision to rebuild or retreat. And it all costs money. But to flatly deny the science is to lie. And when a licensed professional lies – the person whom society pays to be the knowledgeable expert – it should come with consequences.

[LIABILITY.] We need to start thinking about the relationship between sea level rise and malpractice. Because if your home got flooded, like the people in New Orleans, you might ask this question: “Who can I sue?” And the possibility of another mass flooding is not fiction, it is a non-fiction cover story. National Geographic pondered the drowning of the Statue of Liberty. The ABA Journal considered the flooding of Pacific Island nations. The American Prospect worried about the effects on the U.S. Navy in Coastal Virginia. And the Rolling Stone declared “Goodbye, Miami.” If these magazines seem too popular, and you want something more technical, then try reading the American Society of Civil Engineers book on prediction, risks and solutions related to Sea Level Rise and Coastal Infrastructure. Or sit through a presentation at the South Florida Water Management District.

Overwhelmingly, the evidence tells us that the changing climate, and altered ocean, will harm people. Fisheries will be transformed. There may be fewer tuna fish in the Gulf of Mexico, and our coral reefs are likely to suffer more bleaching and decline. Our coastal roads, infrastructure and even our homes will be subjected to more flooding and erosion.

It is an open question whether our system of justice can adapt to the realities of sea level rise, and the degree to which lawyers will confront and solve these problems. Indeed, I think that, in the foreseeable future, we will see lawyers suing professionals for fraud. The elements of fraud are simple and straightforward: a knowing misrepresentation of material fact causing detrimental reliance. If your home was falling into the sea, wouldn't you want to sue the developer, the engineer, the realtor?

The litigation might take decades to be shaped, and creative lawyers will battle over many questions. Who are the plaintiffs, how many were injured and how, and could it become a class action? When did the damages occur, and did the statute of limitations expire? Who are the defendants, government or private sector, and to what extent will sovereign immunity or Acts of God protect them from liability? How effective will defensive doctrines and strategies be? Lawyers will argue over caveat emptor, and try to apportion the responsibility among others. Will money be the remedy, can alternative lands be provided, and will there be enough of it? And with clients who lost everything to the seas, who will pay the lawyers?

As even Pope Francis has noted, the gravest effects of climate change may be felt by the poor, especially the poor homeowners who have nowhere else to go. As Professor Anthony Oliver-Smith noted in a paper for the United Nations University Institute for Environment, forced displacement is already happening, and the risks of sea level rise, migration and resettlement might be the biggest challenge for humanity in the 21st century.

In 2008, the Republic of the Marshall Islands submitted a communication to the United Nations suggesting a relationship between human rights and climate change. Citing the provisions of the Universal Declaration of Human Rights, they noted how rising seas could destroy human coastal habitat, thus undermining the right to live, liberty, and security, forcing interference with, deprivation of, and even exile from residences, homes and property. Sadly, the political realities of international justice are such that smaller states unlikely to succeed in interpreting treaties in ways opposed by the powerful, and scholars have noted that a nation can declare a state of emergency to suspend human rights obligations immediately. The United States has already taken the position that a human rights approach to addressing climate change is unlikely to be effective. But will we one day be dealing with a crisis of climate refugees fleeing the floods? Immigration law will be tested in entirely new ways.

[WHAT CAN I DO?] Perhaps, instead of asking who can I sue, we should all ask ourselves a different question: what can we do? My generation seems to be having a hard time accepting the new truths, and climate change doesn't fit with their worldview. The climate deniers must eventually adapt to the changed world.

Fortunately, the next generation is different. Your minds are more accepting of rapid and radical change. And you can be the change we need in the world. You can speak up, like the young lady who wore a life preserver to a Miami-Dade budget committee meeting. Her efforts convinced the county commission to fund a new position for sea level rise adaptation. You can help us adapt, by creating solutions. Some of them may be hard, and expensive too. Just ask the Dutch who are spending one billion Euros each year to protect themselves from climate change, with plans to build many more structures that protect them from rising seas. In some places, you might even suggest that we retreat, moving homes and people to higher ground.

But whatever you do, you need to lead. It is your Earth, too. What will you do?