

The Opinion Pages | OP-ED CONTRIBUTOR

Can the Law Make Us Be Decent?

By JAY STERLING SILVER NOV. 6, 2012

Miami Gardens, Fla.

OF all the tragedies wrought by Hurricane Sandy, one has stood out as a horrifying exception to the tales of selflessness and bravery.

On Staten Island, according to several news accounts, a woman named Glenda Moore tried to flee the storm on Monday by driving herself and her sons to safety in their blue Ford Explorer. But the vehicle got trapped in the swirling waters, so Ms. Moore unbuckled the two boys — Connor, 4, and Brandon, 2 — to head for dry land. They got separated from her, and were swept away. Battling water and wind, Ms. Moore frantically knocked on neighbors' doors asking for help, but her pleas were ignored. On Thursday, the boys' lifeless bodies were found nearby.

Did discrimination play a role? Ms. Moore is black; her husband, Damien, is an Irish immigrant. In Ireland, Mr. Moore's family's priest condemned "the actions of these so-called neighbors who refused to give support to the poor woman," The Irish Times reported.

In many states, Good Samaritans are protected from liability if their well-intentioned efforts inadvertently result in harm. But the Bad Samaritan, if you will — the callous bystander who refuses to render even minimal help in a dire emergency — goes unpunished. No matter how grave the danger or how minor the effort needed to prevent harm, citizens are not required to provide help.

Perhaps the most famous example of hardhearted indifference to brutality also comes from New York City: the murder of Kitty Genovese, a 29-year-old

woman, in Queens in 1964.

Initial news accounts, including those in *The New York Times*, reported that some 38 neighbors looked down from their apartments but did nothing to call the police or intervene, even while the assailant stalked and stabbed Miss Genovese over the course of a half-hour before fleeing. Subsequent information has raised doubts about the initial accounts — many of the neighbors may not have seen or heard the attack, or realized its severity — but the case prompted hand-wringing about moral decline and discussions of legal reform. In 1967, Vermont adopted a law requiring people to render reasonable assistance to someone who is in grave danger, but the penalty for noncompliance is only a token civil fine.

The issue came to the fore again in 1983, when Cheryl Araujo, a 21-year-old woman, was gang-raped on a pool table in a New Bedford, Mass., tavern while patrons stood by. Minnesota and Wisconsin later adopted laws like Vermont's establishing a general rescue duty; some states have reporting requirements.

But with the exception of a few jurisdictions, the “no duty” rule remains largely the same as it was famously described by William L. Prosser, the dean of American tort law: “The expert swimmer, with a boat and a rope at hand, who sees another drowning before his eyes, is not required to do anything at all about it, but may sit on the dock, smoke his cigarette, and watch the man drown.”

Of course, some exceptions to the “no duty” rule exist in common law. Police officers, firefighters, doctors, emergency workers and others have legal or other requirements to help, often even when off duty. Motorists involved in accidents can't leave the scene. Parents, spouses, teachers and employers have duties to protect. If you injure someone through negligence and then don't help her, you could face higher civil damages. If you voluntarily try to rescue someone, you may be liable if you then stop and the victim is harmed.

The “no duty” rule can be traced to the spirit of rugged capitalist individualism, the Darwinist idea that the common good is advanced through the struggles of selfish individuals. But the law doesn't just allow moral monsters to act with impunity. Social science suggests it exacerbates the problem. Experiments have long revealed the symbiosis of law and morality: being told that a behavior is illegal makes it also seem more immoral.

One defense of the no-duty rule is that common law exists to prevent people from harming one another, not to compel people to help one another. But modestly impinging on the individual freedom to do nothing seems reasonable when a life hangs in the balance. Such a duty is common in Europe, where some countries have criminal penalties for violators.

A sensible statute might read like this: “Any person who knows that another is in imminent danger, or has sustained serious physical harm, and who fails to render reasonable assistance shall be fined up to \$5,000, imprisoned for up to three months, or both.” Civil liability could also be established, as in other countries.

A duty to help would not require bystanders to endanger themselves or provide help beyond their abilities; it could simply require warning someone of imminent danger or calling 911. It wouldn’t bring back the two boys, but it would require us to accept our fundamental moral duty to help those in grave peril.

Jay Sterling Silver is a law professor at St. Thomas University.

A version of this op-ed appears in print on November 7, 2012, on page A27 of the New York edition with the headline: Can the Law Make Us Be Decent?.