IF I HAVE A DUTY, I NEED NOTICE TO SATISFY DUE PROCESS

INTRODUCTION

I. THE CASE: STATE OF MISSOURI V LINDA GARGUS

A. Factual Background

Lorraine Gargus, a diabetic eighty-one-year-old woman fell and became bedbound in 2005.[14] Linda Gargus, the adult daughter of Lorraine started to care for her ailing mother.[15] By 2009, Linda moved back into her parent's home and shortly thereafter quit her job as a certified nurse assistant at a nursing home to care for her parents full time.[16] Linda was responsible for every need of Lorraine, bathing her, changing her clothes, and giving her medication.[17] Lorraine often rejected the care from her daughter.[18] Lorraine developed bedsores and was reluctant to follow Linda's treatment recommendations.[19] "Linda told Lorraine that she should go to the hospital, but Lorraine refused to go."[20]

cause of death was organ failure due to septicemia[31]

out of the bathroom and into the living room where he fell to the floor unconscious.[90] Oliver called her friend at the local bar.[91] He told her to leave the victim and come back to the bar, Oliver obliged.[92] Oliver's daughter and her friends later returned home to find the victim passed out on the floor and immediately phoned Oliver.[93] Oliver had her daughter drag the victim outside of the house and placed him near the shed, the victim was still breathing at that time.[94] Later that evening, Oliver's daughter checked on the victim again finding that the victim had a pulse and was still snoring.[95] The victim was found dead in the yard the next morning.[96]

relationship inducing reliance or preventing assistance from others."[104]

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D. How Other Jurisdictions Approach the Issue of Duty

1. Michigan

Jones v. United States cites to a Michigan Supreme Court case from 1907 entitled *People v. Beardsley*.[129] *Jones* cites to *Beardsley* for the proposition of when a duty is established one must take action to preserve the life of another.[130] *Beardsley* states:

> The law recognizes that under some circumstances the omission of a duty owed by one individual to another, where such omission results in the death of the one to whom the duty is owing, will make the other chargeable with manslaughter. This rule of law is always based upon the proposition that the duty neglected must be a legal duty, and not a mere moral obligation. It must be a duty imposed by law or by contract, and the omission to perform the duty must be the immediate and direct cause of death.[131]

In *Beardsley* the defendant was convicted of manslaughter.[132] The defendant made arrangements with another woman, the victim, while his wife was out of town.[133] The defendant lived in two rooms on the ground floor of a house with other tenants occupying other rooms.[134] On one evening the defendant and victim drank liquor together.[135] Defendant ordered liquor by telephone, a young man responded, and was asked by the victim, without the defendant's knowledge, to purchase camphor and morphine tablets.[136] Later in the day, the victim became unresponsive.[137] The defendant, who was intoxicated himself, summoned help, and moved the victim to another room occupied by Mr. Skoba so his wife would not see the woman.[138] By the late evening, Mr. Skoba was alarmed at her condition and called a doctor who pronounced the victim dead.[139] The court in *Beardsley* reasoned that in order to create a criminal liability for neglect by nonfeasance, the "neglect must also be of a personal legal duty, the natural and ordinary consequences of neglect of which would be dangerous to life."[140] The court considered that the victim was an adult past thirty years of age, was accustomed to the use of intoxicants, that

129. *Jones v. United States*, 308 F.2d 307, 310 (1962); *see also People v. Beardsley*, 113 N.W. 1128 (Mich. 1907).
130. *Jones*, 308 F.2d at 310.
131. Id. (citing *Beardsley*, 113 N.W. at 1129).
132. *Beardsley*, 113 N.W. at 1128.
133. Id.
134. Id.
135. Id. at 1129.
136. Id.
137. *Beardsley*, 113 N.W. at 1129.
138. Id.
139. Id.
140. Id. at 1130.

there was no evidence of duress or fraud upon her, and that she went on the carouse with the defendant voluntarily.[141] In so reasoning, the court held that the defendant had no legal duty, either by fact or by implication to the victim.[142]

2. California

In 1994, the California Supreme Court reviewed California's elder abuse statute for a challenge to the statute's constitutionality.[143] The statute in

malnutrition, dehydration, and neglect.[152] A year before the death of the victim, the defendant moved away from the home leaving the primary care to Richard Sr. and Jerry.[153]

3. Texas

Another instructive jurisdiction on the issue of fair notice when coupled with an omission for criminal liability is Texas. In *Billingslea v. State*,[163] the defendant was convicted of injury to an elderly individual.[164] There, the victim lived with the defendant, his wife, and son.[165] The defendant forbade the

(Texas) notice of an offense must invariably rest on a specific statute."[176] Texas precedent has forbidden the use of common law duties as the foundation of criminal sanctions.[177] Texas, like Missouri, has an all-encompassing statute that characterizes when conduct constitutes an offense.[178] Texas Penal Code § 6.01(a)

enforcement.[186] The Missouri Constitution provides in Article I, Section 10 "that no person shall be deprived of life, liberty, or property without due process of law."[187] Furthermore, the United States Constitution guarantees due process of law in both the Fifth and Fourteenth Amendments.[188] The United States Supreme Court has interpreted the Due Process Clause in the context of the criminal code to mean, "no one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes."[189] Furthermore, a penal statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[190] The Due Process Clause also forbids courts from applying a novel construction of a statute.[191]

When applied to the criminal context, Missouri courts presume a statute to be constitutional and will only hold otherwise if the statute plainly contravenes a constitutional provision.[192] Whereas, a statute that fails to clearly define proscribed conduct violates the Due Process Clause and is considered to be void for vagueness.[193]

For comparison purposes, recall Missouri's voluntary act statute, Section 562.011:

> A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act.
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> 2. A "voluntary act" is
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> (1) a bodily movement performed while conscious as a result of effort or determination; or

perform some act, but failed to perform that act. The Court of Appeals in *Gargus* then interpreted and imposed a legal duty to aid on Linda Gargus in order to support the affirmance of her conviction.[218] Even if the trial court included a legal duty for criminal liability of elder abuse in the first degree, such instruction would likely have been akin to the instruction given in *Lisa* and subsequently considered, as the court included, a violation of due process.[219] Therefore, it follows that any imposition of a criminal liability based on a failure to act when the law does not otherwise provide a duty to act is a violation of due process.

The *Lisa* court ultimately was concerned about violation of the fundamental procedural due process notice requirements. In so concluding, the court reasoned, "notice is the first requirement of procedural due process."[220] When applied to the criminal law, the principle requires that "criminal statutes should be clear and understandable in order to achieve two goals: notice of illegality and clear standards for enforcement."[221] The court mentioned that it failed to see how civil common law principles could satisfy procedural due process notice requirements to justify criminal liability.[222] Ultimately, "[a]

was denied on February 29, 2016 and application for transfer was subsequently denied on May 24, 2016.[227] In Voss, the defendant was charged with second-degree murder, but was convicted of the lesser included offense of involuntary manslaughter.[228] The victim called the defendant and requested to purchase heroin from him.[229] En route to a hotel with another friend, Curtis, the defendant gave the victim nine capsules of heroin and syringes.[230] While at the hotel, the victim began to prepare to inject himself with the heroin, however,

dead the next afternoon.[242] Per experts who testified at trial, the victim died within two to six hours after injection of the heroin.[243] On appeal, the defendant argued that the charge of involuntary manslaughter did not impose a duty to seek medical care for the victim.[244]

Like elder abuse in the first degree, Missouri's manslaughter statute does not provide for liability based on an omission, nor is it defined in terms of a failure to act.[245] In affirming his conviction, the Voss court first relied on the precedent from Garguss to establish that criminal liability can be based on omission to perform an act, "if a duty to perform the omitted act is otherwise imposed by law."[246] Further, the court in Voss adopted the Garguss principle that where evidence is present to support a conviction for involuntary manslaughter consists of affirmative acts and omissions, the jury must be instructed

CONCLUSION

A plausible explanation for the Gargus court's reasoning is the moral consideration of the horrific factual background set forth in section I. The Missouri Court of Appeals confirmed this notion in the Shephion.[253] The Texas Billingslea court stated the root of the issue: "while children may have a moral duty to care for their elderly parents, moral imperati1 Tc 0.0c 0.2(i)[ae 7 Tw 0udren ma