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

INTRODUCTION

Criminal liability based on a failure to act, otherwise known as an omission, first requires a duty to act. Yet, when the criminal statute does not expressly provide for liability based on an omission, courts in this country have looked elsewhere in the law to construct a duty to act.[1] However, such novel statutory construction by the judiciary runs afoul of the Constitution and due process.[2] The Due Process Clause requires that before criminal liability may be imposed for violation of any penal law, due process requires "fair warning . . . of what the law intends."[3] "The fundamental requirement fixing criminal responsibility is knowledge, actual or imputed, that the act of the slayer tended to endanger life."[4] The principle concern is that at the time of the defendant's conduct that the statute made it clear that such conduct is criminal. When the statute fails to do so, fair notice and due process issues arise. A national epidemic has been created by courts around the country imposing criminal liability based on a failure to act when the statute with which he or she is charged does not expressly provide for a legal duty to act. Courts have imposed criminal liability upon defendants for failure to act in caring for their children, elderly parents, and in drug overdose deaths where the victim purchased drugs from the defendant.[5] Together, we must eliminate all consideration of mere moral obligation and discover whether one is under a legal duty towards another human.[6] Before criminal liability can be imposed, the criminal code, pursuant to due process, must state with particularity the conduct to be penalized.

1. *See, e.g.*, People v. Oliver, 210 Cal. App. 3d 138, 149 (1989) (implementing the Restatement Second of Torts to impose criminal liability based on a failure to act); *see also* State v. Gargus, 462 S.W.3d 417, 422–23 (Mo. Ct. App. 2013) (relying on *People v. Oliver*, civil common law negligence principles, and the legislature's comment to statutes).

2. *See* United States v. Lanier, 520 U.S. 259, 266 (1997).

3. McBoyle v. United States, 283 U.S. 25, 27 (1931).

4. State v. Beach, 329 S.W.2d 712, 717 (Mo. 1959).

5. *See* State v. Shrout, 415 S.W.3d 123 (Mo. Ct. App. 2013) (failing to care for child); *Gargus*, 462 S.W.3d at 421 (failing to care for elderly parent); Commonwealth v. Marcelli, 441 N.E.2d 270 (Mass. App. Ct. 1982) (failure to obtain aid for victim who had abused alcohol and dilaudid); State v. Voss, 2016 WL 145727 (Mo. Ct. App. 2016) (failure to obtain aid for victim who was overdosing after purchasing heroin from defendant).

6. People v. Beardsley, 113 N.W. 1128, 1131 (Mich. 1907).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

In 1979, the Missouri Legislature established the Missouri Criminal Code, a compilation of the criminal laws within the jurisdiction.[7] In deciding whether something is criminal within the State of Missouri, one must look to the Criminal Code. Section 556.026 provides that "no conduct constitutes an offense . . . unless made so by this code or by other applicable statute."[8] Thereafter, in Chapter 562 entitled "General Principles of Liability," the Missouri Legislature articulated the basis of criminal liability as based upon a "voluntary act."[9] Voluntary act is defined in subsection two as "(1) a bodily movement performed while conscious as a result of effort or determination; or (2) an omission to perform an act of which the actor is physically capable."[10] Lastly, subsection four established that "a person is not guilty of an offense based solely upon an omission to perform an act unless the law defining the offense expressly so provides, *or a duty to perform the omitted act is otherwise imposed by law*."[11]

This paper will examine a recent case decided by the Missouri Court of Appeals for the Eastern District of Missouri entitled *State v. Gargus*.[12] The Missouri Court of Appeals imposed a duty to aid another human upon the defendant, Linda Gargus, based upon an omission, or a failure to act.[13] The effect of the decision is the introduction of civil tort negligence liability upon criminal law. Part I will set forth the factual and procedural background, the court's analysis in *Gargus* that lead to the imposition of a duty, and examine how other jurisdictions approach this similar issue. In Part II, I will raise and examine the due process issues when criminal liability is imposed without sufficient notice. Lastly, in Part IV, I will look to how *Gargus* has been applied and propose the potential fallout from the opinion.

Generally, this paper seeks to examine the constitutional issues and implications of holding someone criminally liable for an act or an omission when the statute does not expressly enforce such a duty. This paper intends to establish that the Missouri Court of Appeals ultimately misapplied the law and misconstrued the applicable statutes. The main inquiry here is whether it is constitutional to impose a legal duty to perform an act when the failure to perform that act is not expressly provided by the statute.

7. *See* MO. REV. STAT. § 556.011 (2014). "This code shall be known and may be cited as "The Criminal Code.""

8. MO. REV. STAT. § 556.026 (2017).

9. § 562.011. Subsection 3 is excluded from this citation. Subsection 3 defines possession as a voluntary act and is not applicable to the analysis contained hereafter.

10. *Id*.

11. *Id*. (emphasis added).

12. State v. Gargus, 462 S.W.3d 417 (Mo. Ct. App. 2013).

13. *See id*.

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] Subsequently, Linda bought Lorraine an air mattress and would attempt to turn Lorraine every hour, however, Lorraine kept rolling to her back.[21] Fellow family members of the Gargus' were discouraged from visiting the residence.[22] In January of 2010, Lorraine's husband died.[23] Lorraine stopped eating and drinking.[24] After the funeral Linda discouraged family visits with Lorraine at the residence.[25] However, Cindy Hickman, a granddaughter, visited in early February and described the home as dirty and smelly.[26] Also, Sylvia Winger, a granddaughter, visited in early February, and recalled not seeing anything alarming about Lorraine's health.[27] In late February, Linda dispatched emergency personnel to the home after discovering a large sore on Lorraine's foot.[28] Linda told emergency personnel that she believed that Lorraine was giving up because her husband had just died.[29] The next month, Lorraine passed away.[30] The autopsy performed revealed that the

14. *Id*. at 418.
15. *Id*.
16. *Id*.
17. *Gargus*, 462 S.W.3d at 418.
18. *Id*. at 119.
19. *Id*.
20. Appellant's Substitute Brief at 7, *Gargus*, 462 S.W.3d (No. SC93937), 2013 WL 3811369, at *3.
21. *Id*. at 7.
22. *Gargus*, 462 S.W.3d at 419.
23. *Id*.
24. *Id*.
25. *Id*.
26. *Id*.
27. *Gargus*, 462 S.W.3d at 419.
28. *Id*.
29. Appellant's Substitute Brief at 9, *Gargus*, 462 S.W.3d (No. SC93937), 2013 WL 3811369, at *9.
30. *Gargus*, 462 S.W.3d at 420.

cause of death was organ failure due to septicemia[31] from multiple bedsores and gangrene of the foot.[32] The bedsore on Lorraine's back was the size of a basketball.[33] The Department of Health investigated the Gargus home, discovering nearly forty animal cages and extreme filth.[34] Dr. Crenshaw testified at trial that the bedsore caused infection and turned septic.[35] He further testified that the foot's skin was removed down to the tendon and bone, and was consistent with having been eaten by a rodent.[36] Dr. Torres performed an autopsy on Lorraine and determined that the most significant contributor to her death was the bedsore on her back.[37] Also contributing to her death was gangrene in her left foot, severe coronary artery disease, fibrosis of the heart and lungs, chronic bronchitis, and diabetes.[38] Linda Gargus was charged with (1) involuntary manslaughter and (2) elder abuse in the first degree.[39] After a jury trial, Linda was found not guilty of the charge of involuntary manslaughter.[40] However, Linda was found guilty of elder abuse in the first degree and subsequently was sentenced to ten years, as recommended by the jury, in the Missouri Department of Corrections.[41]

B. Procedural History

The procedural history is relevant in this matter to establish a timeline for the plight of Linda Gargus and to exhibit the transfer, retransfer, and re-adoption of legal authority between the Missouri Court of Appeals Eastern District and the Missouri Supreme Court. Lorraine Gargus died in March of 2010.[42] The State of Missouri in Clark County, Missouri brought felony charges for involuntary manslaughter and elder abuse in the first degree in July

31. "Septicemia" is defined as a dangerous infection of the blood; "invasion of the bloodstream by virulent microorganisms and especially bacteria along with their toxins from a local seat of infection accompanied especially by chills, fever, and prostration –called also *blood poisoning*." *Septicemia*, MERRIAM-WEBSTER DICTIONARY ONLINE, https://www.merriam-webster.com/dictionary/septicemia [http://perma.cc/8B93-EJPJ].

32. *Gargus*, 462 S.W.3d at 420.

33. *Id*. at 419.

34. *Id*.

35. Appellant's Substitute Brief at 11–12, *Gargus*, 462 S.W.3d (No. SC93937), 2013 WL 3811369, at *11–12.

36. *Id*. at 12.

37. *Id*. at 13.

38. *Id*.

39. *Gargus*, 462 S.W.3d at 420–21.

40. *Id.*

41. *Id*. at 421.

42. *Id.* at 420.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

2011.[43] In September 2012, the jury returned its guilty verdict.[44] On November 26, 2013, the Honorable Gary M. Gaertner, Jr. handed down an opinion affirming the trial court's judgment.[45] A motion for rehearing and/or transfer to the Missouri Supreme Court was denied on January 13, 2014, yet later was sustained and ordered transferred on February 25, 2014.[46] The Missouri Supreme Court heard oral arguments in the matter on May 21, 2014.[47] Subsequently, the case was retransferred on May 27, 2014 to the Missouri Court of Appeals.[48] Ultimately, the Court of Appeals opinion of Judge Gaertner was readopted on June 2, 2014.[49]

C. Framing the Issue: How Gargus Established A Duty to Care?

Linda Gargus was convicted of Elder Abuse in the First Degree. Elder Abuse in the First Degree provides:

> 1. A person commits the crime of elder abuse in the first degree if he attempts to kill, knowingly causes or attempts to cause serious physical injury, as defined in section 565.002, to any person sixty years of age or older or an eligible adult as defined in section 192.2400.[50]

"A person acts knowingly or with knowledge . . . when he is aware his conduct is practically certain to cause a result."[51] On its face, the elder abuse in the first-degree statute does not expressly provide for criminal liability based upon a failure to provide care to another human being. Elder abuse in the first-degree is not defined with language regarding a failure to act. Whereas, had Linda Gargus been charged with elder abuse in the third-degree, she could have been found criminally liable based upon a failure to act. The relevant portion of the elder abuse in the third degree provides:

A person commits the crime of elder abuse in the third degree if he:

> (4) Intentionally fails to provide care, goods or services to a person sixty years of age or older or an eligible adult, as defined in section 192.2400. The result of the conduct shall be such as would cause a reasonable person age sixty or

43. Docket Entries, Missouri CaseNet, 11CK-CR00103-01, https://www.courts.mo.gov/casenet/base/welcome.do [http://perma.cc/E7MJ-GRB3] (click "Case Number Search" and search "11CK-CR00103-01").

44. *Id*.

45. *Gargus*, 462 S.W.3d at 417.

46. *Id*.

47. Docket Entries, Missouri CaseNet, ED99233, https://www.courts.mo.gov/casenet/base/welcome.do [http://perma.cc/E7MJ-GRB3] (click "Case Number Search" and search "ED99233").

48. *Id*.

49. *Id.*

50. MO. REV. STAT. § 565.180 (2017). "Elder abuse in the first degree is a class A felony."

51. *Gargus*, 462 S.W.3d at 424; *see also* § 562.016.3.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

> older or an eligible adult, as defined in section 192.2400, to suffer physical or emotional distress; or
>
> (5) Knowingly acts or knowingly fails to act in a manner which results in a grave risk to the life, body or health of a person sixty years of age or older or an eligible adult.[52]

The Missouri Legislature expressly provided that a failure to perform an act is criminalized in the elder abuse, third degree, but did not criminalize the failure to perform an act under elder abuse in the first degree. It follows that had the legislature intended to include liability based on an omission in the elder abuse in the first-degree statute, as it did so in the elder abuse in the third-degree statute, it would have done so. Therefore, the failure to include any language regarding an omission demonstrates a legislative intent that liability based on an omission was not intended to be included under Section 565.180. It does not follow that Linda Gargus's conviction could be based upon an omission to act. Thus, the relevant inquiry by the *Gargus* court was to determine whether a duty to perform the omitted act is otherwise imposed by law.[53]

The Court of Appeals in *Gargus* determined that the law otherwise imposed a duty upon Linda Gargus in finding that she had a duty to act in caring for Lorraine Gargus.[54] The court relied upon the commentary to Section 562.011, "Voluntary acts," as the basis for the its imposition of a duty to care.[55] The comment cites to *Jones v. United States*, which establishes a set of factors to consider in determining when "the failure to act may constitute a breach of a legal duty:"

> There are at least four situations in which the failure to act may constitute breach of a legal duty. One can be held criminally liable: first, where a statute imposes a duty to care for another; second, where one stands in a certain status relationship to another; third, where one has assumed a contractual duty to care for another; and fourth, where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid.[56]

In *Jones*, the defendant was indicted with involuntary manslaughter because of a failure to perform a legal duty to care for another human.[57] The defendant was a family friend of Shirley Green, who became pregnant out of wedlock with child Robert.[58] Defendant and Green agreed that the child would be taken into the defendant's home after birth.[59] The parties later agreed to a

52. § 565.184. Elder abuse in the third degree is a class A misdemeanor.
53. *See* § 562.011.
54. *Gargus*, 462 S.W.3d at 422.
55. *Id*.
56. Jones v. United States, 308 F.2d 307, 310 (1962).
57. *Id*. at 308.
58. *Id*.
59. *Id*.

payment of $72/month for Robert's care.[60] Green again became pregnant with another child, Anthony, who defendant cared for in her home as well.[61] There was no evidence of a monetary agreement between the defendant and Green for the care of Anthony.[62] Both Anthony and Robert were removed from the home and admitted to the hospital where Anthony later died from malnutrition and lesions caused by diaper rash.[63] The court in *Jones* recognized 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."[64] The court goes on to say that this neglected duty must be legal in nature, "and not a mere moral obligation."[65] Next, the court established the aforementioned four situations where a failure to act may create a breach of a legal duty to care.[66] *Jones* was ultimately reversed and remanded for a new trial because of an improper jury instruction, an instruction on the necessity for finding a legal duty of care.[67]

The *Gargus* court placed tremendous reliance on the Comment to Section 562.011 where the citation of *Jones* is contained.[68] Official comments in Missouri law are considered permissive and persuasive in determining legislative intent.[69] However, such approach is in conflict with the Comment to Section 556.026. Section 556.026 provides: "No conduct constitutes an offense or infraction unless made so by this code or by other applicable statute."[70] The Comment to the section explicitly raises both due process concerns and the use of the common law: "In view of the extensive declaration of offenses by statute there is no need for the unwritten common law offense. Moreover, the idea of the unwritten offense is repugnant to the concept of fair warning."[71]

In determining that *Gargus* secluded the victim, the Court of Appeals relied on the fourth factor of *Jones*: "where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid."[72] To find case law support, the court looked outside of Missouri to support the proposition finding a legal duty based upon seclusion

60. *Id*.
61. *Jones*, 308 F.2d at 308.
62. *Id*. at 308–09
63. *Id*. at 309.
64. *Id*. at 310.
65. *Id*.
66. *Jones*, 308 F.2d at 310.
67. *Id.* at 311.
68. *See* State v. Gargus, 462 S.W.3d 417, 422 (Mo. Ct. App. 2013).
69. *See, e.g.*, Groppel Co., Inc. v. U.S. Gypsum Co., 616 S.W.2d 49, 57 n.7 (Mo. Ct. App. 1981).
70. MO. REV. STAT. § 556.026 (2017).
71. *Id*., Comment to 1973 Proposed Code.
72. *Gargus*, 462 S.W.3d at 422.

of the victim.[73] The court referenced *Flippo v. State*.[74] In *Flippo*, a father and son (the "defendants") were convicted of involuntary manslaughter.[75] The defendants were hunting deer with rifles out of season.[76] After firing a round at what was thought to be a deer, the defendants discovered the victim who was wounded by a gunshot wound.[77] The men ran to a nearby residence and told the resident that they found a wounded man and were leaving to seek medical assistance.[78] The defendants drove twelve to fourteen miles away, passing several phones along the way.[79] At their home, the defendants discarded the rifle, called an ambulance, and then returned to escort the ambulance to the victim.[80] There was testimony at trial that approximately forty minutes to an hour and fifteen minutes transpired from the time of the accident to the arrival of the ambulance.[81] In upholding the defendants' conviction, the court considered the *Jones* factors in analyzing whether there was a duty to act.[82] In concluding that the defendants' had a duty to act, the court held that "[t]he jury could infer that Mr. Flippo's delay caused the helpless victim to be secluded in the field awaiting the promised aid and prevented or hindered others from rendering timely aid."[83]

"[W]hen a person takes a vulnerable victim into his home rather than leaving the victim in a public place where others could take care to prevent harm to the victim, the person can be held criminally liable."[84] The court in *Gargus* relied upon *People v. Oliver*[85] in part as the basis for finding Linda Gargus criminally liable for voluntarily assuming the care of Lorraine Gargus and so secluding Lorraine away from the public in her home.[86] In *Oliver*, the defendant ("Oliver"), a female, met the victim, a male at a local bar.[87] The victim accompanied Oliver back to her residence.[88] While at the residence, the victim asked Oliver for a spoon, Oliver provided one, and then the victim went into Oliver's bathroom and injected himself with heroin.[89] The victim came

73. *Id*.
74. *Id*.
75. Flippo v. State, 523 S.W.2d 390 (Ark. 1975).
76. *Id*. at 391.
77. *Id*. at 391–92.
78. *Id*. at 392.
79. *Id*.
80. *Flippo*, 523 S.W.2d at 392.
81. *Id*. at 392.
82. *Id*. at 393.
83. *Id*. at 394.
84. State v. Gargus, 462 S.W.3d 417, 422 (Mo. Ct. App. 2013).
85. People v. Oliver, 210 Cal. App. 3d 138, 149 (1989).
86. *Gargus*, 462 S.W.3d at 422–23.
87. *Oliver*, 210 Cal. App. 3d at 143.
88. *Id*.
89. *Id*.

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] The cause of death was morphine poisoning (heroin).[97] In *Oliver*, the defendant was charged with involuntary manslaughter.[98] The prosecution prosecuted the charge of involuntary manslaughter under two theories: (1) Oliver aided and abetted the victim in the commission of the use of a controlled substance, and (2) Oliver was criminally negligent when she failed to summon medical aid for the victim and, abandoned him, when she must have known he needed aid.[99] The jury was instructed under both theories of involuntary manslaughter, and the jury's guilty verdict did not specify the theory which the jury based the verdict.[100]

In upholding the conviction for involuntary manslaughter, the California Court of Appeals in *People v. Oliver* based their reasoning on principles derived from civil negligence theory.[101] First, the court had to establish that Oliver had a duty to aid the victim in order to find her criminally liable for her omission to render aid.[102] "Generally, one has no legal duty to rescue or render aid to another in peril, even if the other is in danger of losing his or her life, *absent a special relationship which gives rise to such duty*."[103] Based on reasoning from a string cite of civil cases, the court adopted the notion that a special relationship that gives rise to an affirmative duty to act is based upon the fact that "some act or omission on the part of the defendant either created or increased the risk of injury to the plaintiff, or created a dependency

90. *Id*.
91. *Id*.
92. *Oliver*, 210 Cal. App. 3d at 143.
93. *Id*.
94. *Id*.
95. *Id*. at 144.
96. *Id*.
97. *Oliver*, 210 Cal. App. 3d at 144.
98. *Id*. at 144–45
99. *Id*. at 145.
100. *Id.* at 145–46.
101. *See generally id.* at 146–51 (demonstrating criminal analysis follows civil negligence theory).
102. *Oliver*, 210 Cal. App. 3d at 146.
103. *Id*. at 147 (emphasis added) (citing 1 LAFAVE & SCOTT, SUBSTANTIVE CRIMINAL LAW, 282 (1986); RESTATEMENT (SECOND) OF TORTS, § 314 (1965)).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

relationship inducing reliance or preventing assistance from others."[104] Borrowing from the Restatement Second of Torts, the court adopted the specific guidelines as to what types of conduct require affirmative action to render aid:

> (1) If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.
>
> (2) The rule stated in Subsection (1) applies even though at the time of the act the actor has no reason to believe that it will involve such a risk.[105]

In so reasoning, the court in *Oliver* found that the aforementioned rules that impose a duty to render aid as an element of civil negligence are pertinent to the imposition of a duty for criminal negligence purposes.[106] The first of the combination of affirmative acts was Oliver leaving the bar with the extremely drunk victim and driving him home.[107] This act removed the victim from public where others could render aid or prevent harm.[108] The second affirmative act was allowing the victim to use the bathroom to inject narcotics.[109] Ultimately, the court concluded that Oliver's affirmative acts created an unreasonable risk for the victim; therefore, Oliver had a duty to render aid.[110] It follows that the omission to provide aid to the victim warranted a finding that Oliver breached her duty of care.[111] *Oliver* stands for the principle that in California courts are permitted to seek guidance from civil negligence standards derived from the Restatement of Torts in order to determine a criminal duty to act. It follows that the *Gargus* court has implemented civil negligence standards in the Missouri criminal law based on its reliance on *Oliver* for support of the proposition that taking a vulnerable person into a home away from the public where others can prevent harm can be the basis for criminal liability.

Based on *State v. Shrout*, Linda Gargus' duty to act arose singularly from assuming the role as caretaker of Lorraine.[112] In *Shrout*, the victim was the defendant's adult child.[113] The court in *Shrout* expressly did not provide a detailed recitation of the facts, only providing: "cold, sick, soaked in urine,

104. *Id*, at 147.

105. *Id*. at 147–48 (citing RESTATEMENT (SECOND) OF TORTS, § 321).

106. *Id*. at 149.

107. *Oliver*, 210 Cal. App. 3d at 149.

108. *Id*.

109. *Id*.

110. *Id*.

111. *Id*. The court again cites to the Restatement (Second) of Torts §§ 321, 324 for the creation of the duty to act.

112. *See* State v. Gargus, 462 S.W.3d 417, 423–24 (Mo. Ct. App. 2013).

113. State v. Shrout, 415 S.W.3d 123, 125 (Mo. Ct. App. 2013).

with a bucket of excrement as his toilet, Aaron Johnson died on a urine-drench mattress on the tarp-covered floor of a room . . . ."[114] On appeal, the defendant, the victim's mother, argued that Missouri lacks a statute or law, which imposes a duty upon a parent to protect or care for an adult child.[115] The court recognized that Missouri's manslaughter statute does not expressly provide for violation based solely on omission.[116] Ultimately, the court affirmed the trial court's finding on the basis that:

> [W]hen one voluntarily assumes the care of a mentally handicapped individual, being fully aware of the individual's physical and mental condition and the care challenges created by those conditions . . . that the defendants both owed a general duty of care to that young man and further a duty therefore to not act recklessly or with criminal negligence in carrying out that duty.[117]

Next, the Court of Appeals in *Gargus* sought support from civil law principles by stating: "despite the distinction between omissions sufficient for civil negligence liability and omissions sufficient to give rise to criminal liability, Missouri civil precedent is instructive in determining when the duty to act arises."[118] The court first relied on *State v. Studebaker*, a case where the defendant was convicted of manslaughter for driving his automobile in a safety zone and striking the victim who was waiting to board a streetcar.[119] The defendant in that case appealed regarding a jury instruction and whether its language required a finding of criminal liability based upon civil negligence standards.[120] The ultimate question for the court was to determine whether the defendant's actions constituted criminal negligence or common law-negligence.[121] The court reasoned "the extent to which the negligent act obviously imperils the life of another measures the state of mind of the doer in legal contemplation and therefore his criminality."[122] Further, "mere inattention or mistaken judgment resulting even in the death of another is not criminal unless the quality of the act makes it so. . .culpable negligence is manslaughter."[123] Next, the court in *Gargus* relied upon civil cases to stand for the principle that a duty to act arises when a defendant assumes responsibility to render services to another, even without an original duty to act, once the defendant assumes that responsibility, he or she can be held liable for criminal

114. *Id*. at 124.
115. *Id*. at 125.
116. *Id*. *See also* State v. Riggs, 2 S.W.3d 867, 870 (Mo. Ct. App. 1999).
117. *Shrout*, 415 S.W.3d at 125.
118. State v. Gargus, 462 S.W.3d 417, 423 (Mo. Ct. App. 2013).
119. State v. Studebaker, 66 S.W.2d 877, 878 (Mo. 1933).
120. *Id*.
121. *Id*. at 879.
122. *Id*. at 881.
123. *Id*.

negligence in failing to perform that act.[124] To support this proposition, the court relies on *Bowan v. Express Medical Transports, Inc.* and *Martin v. Missouri Highway & Transportation Department*.[125]

Then, the court relied upon a quote from a criminal law casebook to support the proposition that a civil duty based on an omission and a criminal duty based on an omission are the same. The quote states: "the measuring stick of duty is the same in a criminal case as in the law of torts."[126] The inclusion of this quotation leads the reader to believe that the court, with sufficient support from the law, has implemented civil negligence standards to the criminal law. However, when reading further, it appears that Perkins & Boyce did not intended for such an interpretation:

> It is the exercise of due care and caution as represented by the conduct of a reasonable person under like circumstances, and this in itself is intended to represent the same requirement whatever the case may be . . . But whereas the civil law requires conformity to this standard, a very substantial deviation is essential to criminal guilt.[127]

The court in *Gargus* by singularly including the "measuring stick" quotation for support is holding the prosecution of criminal defendants to a civil negligence standard: "There is a marked distinction between simple or ordinary negligence, giving one a right of action for damages, and culpable negligence, rendering one guilty of a criminal offense."[128] The importation of civil negligence standards into the criminal law runs afoul of the due process clause when fair notice, certainty, and clarity of criminal standards are lacking.

124. State v. Gargus, 462 S.W.3d 417, 423 (Mo. Ct. App. 2013).

125. Bowan v. Express Med. Transports, Inc., 135 S.W.3d 452, 458 (Mo. Ct. App. 2004) (A civil negligence case arising from an automobile accident where a non-emergency transportation company was held liable for damages to a Passenger; the court held that transportation company had no statutory duty, yet the company was found to have a common law duty evidenced by its voluntary assumption of a duty to make certain the passenger was seat belted.); Martin v. Mo. Highway & Transp. Dep't, 981 S.W.2d 577, 585 (Mo. Ct. App. 1998) (A civil wrongful death action arising out of a car accident finding that defendant had a duty to maintain 'clear areas' along roadway holding that the law in Missouri is clear where "liability may be imposed upon one who is under no duty to act but does so voluntarily or gratuitously.").

126. *Gargus*, 462 S.W.3d at 423 (citing ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW, 843 (1982)).

127. PERKINS & BOYCE, CRIMINAL LAW, 843 (1982).

128. *Id*. at 844.

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 question criminalizes acts of an abuser against an elder as well as any person who permits any elder to suffer abuse.[144] The court ultimately found that the statute failed to provide fair notice for criminal liability and failed to provide clear standards for enforcement.[145] However, the statute survived the void for vagueness analysis as the court found that the imposition of criminal liability under the elder abuse statute at issue applied to a person, who "under existing tort principles, has a duty to control the conduct of the individual who is directly causing or inflicting abuse on the elder or dependent adult."[146] The court cited to *People v. Oliver*[147] in part to save the statute from being void for vagueness on the grounds that civil negligence tort liability principles are applicable for the imposition of criminal liability under California law.[148] In so reasoning, the court looked to whether there was a special relationship between the defendant and victim, yet did not find the kind of special relationship that would give rise to a duty.[149]

In *Heitzman*, the defendant was the daughter of the victim, Robert.[150] The victim lived in the home of Richard Sr. and Jerry, the defendant's brothers.[151] The victim's cause of death was due to septic shock from bed sores caused by

141. *Id*. at 1131.

142. *Beardsley*, 113 N.W. at 1131.

143. *See* People v. Heitzman, 886 P.2d 1229 (Cal. 1994).

144. CAL. PENAL CODE § 368 (2000). "Crimes against elder or dependent adults. (b)(1) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any elder or dependent adult, with knowledge that he or she is an elder or a dependent adult, to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any elder or dependent adult, willfully causes or permits the person or health of the elder or dependent adult to be injured, or willfully causes or permits the elder or dependent adult to be placed in a situation in which his or her person or health is endangered."

145. *Heitzman*, 886 P.2d at 1231.

146. *Id*.

147. People v. Oliver, 210 Cal. App. 3d 138, 149 (1989).

148. *Heitzman*, 886 P.2d at 1249.

149. *Id*. at 1231.

150. *Id*.

151. *Id*.

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] The defendant was charged under the aforementioned elder abuse statute for "willfully permitting an elder to suffer unjustifiable physical pain and mental suffering."[154] The principle issue for the *Heitzman* court was "whether the statute adequately denotes the class of persons who owe such a duty."[155] The defendant made the argument that the statute is unconstitutional because it seems to impose a legal duty on people to prevent physical or mental abuse on an elder, when they may not reasonably know they have a duty.[156] The court rejected the notion that the statute imposes a blanket duty on every person because such a reading of the statute would create an anomaly.[157] However, the court concluded that the statute's language does not convey adequate notice as to who may be under a duty to prevent the infliction of physical or mental abuse on an elder.[158]

The *Heitzman* court's analysis of the fair notice and certainty constitutionality issues is informative to the issues presented by the *Gargus* court. As an example, compare the "*any person*"[159] language of the California statute to the Missouri language of "*a person*."[160] Both the *Heitzman* defendant and the *Gargus* defendant's liability were based on an omission. Like *Heitzman*, where the court noted that the statutory language leads to the interpretation that *any* person could be found criminally liable, here, the elder abuse in the first-degree statute lends the same interpretation.[161] The California statute was held to fail to provide notice or clear standards as to who is under a duty to prevent the infliction of mental or physical pain on an elder.[162] In *Gargus*, criminal liability under elder abuse in the first degree based on an omission also fails to provide notice. The statute does not expressly provide for liability based on an omission. Enforcement based on the precedent established by *Gargus* would lead to uneven application of the law and runs afoul of the Fourteenth Amendment's Due Process Clause.

152. *Id*. at 1232.

153. *Heitzman*, 886 P.2d at 1232.

154. *Id*.

155. *Id*. at 1234. The duty in question here is that in order for a person to be held criminally liable under section 368, the defendant must first be under a legal duty to act.

156. *Id.* at 1235.

157. *Id.* at 1236.

158. *Heitzman*, 886 P.2d at 1236. The court focused on the language at the start of the statute: "*any person*." *Id.* (emphasis added).

159. CAL. PENAL CODE § 368 (2000) (emphasis added).

160. MO. REV. STAT. § 565.180 (2017) (emphasis added).

161. State v. Gargus, 462 S.W.3d 417, 424 (Mo. Ct. App. 2013).

162. *Id.*

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 victim's granddaughter from visiting the house, which ultimately prompted a hotline phone call to the department of social services.[166] The victim's heel as well as her hip and back were eaten away by large bedsores. After transport to the hospital, maggots were found festering on the bedsores.[167] As a matter of first impression, the Texas Appellate Court was presented with the question of whether criminal liability could be imposed for omissions against the elderly.[168]

The defendant in *Billingslea* was charged under Penal Code § 22.04.[169] The indictment predicated liability on grounds that the defendant failed to obtain medical care for the victim.[170] The State argued that the duty to act on the part of the defendant on behalf of an elderly person might be derived from legal or common law duties.[171] Furthermore, the State argued that the defendant owed a duty because he voluntarily assumed care; by voluntarily assuming care he prevented others from rendering aid.[172] The court rejected the State's arguments.[173] In so reasoning, the court first established that for liability to be based on an omission, (1) a statute must provide that an omission is an offense, or (2) a statute establishes a duty, and a failure to perform that duty equals an offense.[174] The court then examined the constitutional issues that arise when predicating criminal liability based on a failure to perform a duty that is not imposed by law.[175] At this point in the analysis Texas deviates from the Missouri approach set forth in *Gargus*: "While other States may imply duties or derive them from the common law, under the laws of this State

163. Billingslea v. State, 780 S.W.2d 271 (Tex. Crim. App. 1989).

164. *Id*. at 271.

165. *Id*. at 272.

166. *Id*.

167. *Id*.

168. *Billingslea*, 780 S.W.2d at 273.

169. *Id*. *See also* TEX. CRIM. CODE § 22.04 (1989). The text of the statute in effect at the time the defendant was charged is different than a recent modification by the Texas legislature in 2015 to include "omission."

170. *Billingslea*, 780 S.W.2d at 273.

171. *Id*.

172. *Id*.

173. *Id*. at 274.

174. *Id*. at 274.

175. *Billingslea*, 780 S.W.2d at 276.

(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 § 1.03(a) provides: "conduct does not constitute an offense unless it is defined as offense by statute, municipal ordinance, order of a county commissioners court, or rule authorized by and lawfully adopted under a statute."[179]

Compare to Missouri's statute: Section 556.026 provides that "no conduct constitutes an offense unless made so by this code or by other applicable statute."[180] Yet, Texas reasons that penal provisions that "criminalize a failure to act without informing those subject to prosecution that they must perform a duty to avoid punishment are unconstitutionally vague."[181] The court concluded that although the indictment alleged sufficient facts to support a duty to act based on an omission under the common law, the indictment was defective because there was no associated statutory duty to care for an elderly person.[182]

The Texas Legislature, since the *Billingslea* indictment dismissal and subsequent opinion, amended the § 22.04 statute.[183] The court recognized the amendment of the statute to include liability based on an omission meant that the legislature "perceived the paradoxical futility of applying the former law: there could never be a failure to perform that which no one had a statutory duty to perform in the first place."[184]

II. DUE PROCESS & FAIR NOTICE

The Court of Appeals in *Gargus* imposed civil common law liability principles in establishing that Linda Gargus had a duty to aid the victim.[185] Because the elder abuse in the first degree does not expressly provide for liability based on an omission nor expressly impose a duty to prevent harm to another, an issue of fair notice is raised. "The Government violates the Due Process Clause when it takes away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standard-less that it invites arbitrary

176. *Id*.
177. *Id*.
178. *Id*.
179. TEX. CRIM. CODE §1.03(a) (1994).
180. MO. REV. STAT. § 556.026 (2017).
181. *Billingslea*, 780 S.W.2d at 275–76.
182. *Id.* at 276.
183. TEX. CRIM. CODE § 22.04 (2015).
184. *Billingslea*, 780 S.W.2d at 277.
185. State v. Gargus, 462 S.W.3d 417, 421–22 (Mo. Ct. App. 2013).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

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] "A statute is unconstitutionally vague if it fails to give a person of ordinary intelligence *fair notice* that his contemplated conduct is forbidden."[194] A criminal defendant, as a matter of due process, is entitled to notice of the charges against him and may not be convicted of any offense of which the information or indictment does not give him fair notice."[195] Furthermore, recall Missouri's statute for when conduct constitutes an offense, Section 556.026's commentary: "[i]n view of the extensive declaration of offenses by statute there is no need for the unwritten common law offense.[196] Moreover, the idea of the unwritten offense is repugnant to the concept of fair warning."[197]

186. Johnson v. United States, 135 S. Ct. 2551, 2554 (2015).

187. MO. CONST. art. I, § 10.

188. *See* U.S. CONST. amend. V & U.S. CONST. amend. XIV, § 1.

189. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

190. Kolender v. Lawson, 461 U.S. 352, 357 (1983).

191. United States v. Lanier, 520 U.S. 259, 266 (1997). Novel construction occurs when a court constructs a criminal statute to conduct that the statute or any other judicial decision has disclosed to be within its scope. *Id.*

192. State v. Crawford, 478 S.W.2d 314, 316 (Mo. 1972).

193. State v. Allen, 905 S.W.2d 874, 876 (Mo. 1995).

194. GREGORY S. PARKS ET AL., ALPHA PHI ALPHA 295–96 (2012) (emphasis added).

195. State v. Miller, 372 S.W.3d 455, 466 (Mo. 2012).

196. Cmt. to MO. REV. STAT. § 556.026 (2017).

197. § 556.026; § 556.026., Comment to Proposed Code.

A. New Jersey's Approach

A case not mentioned by the Court of Appeals in *Gargus*, but particularly instructive of the fair notice and due process considerations, is *State v. Lisa*.[198] The principal holding of the *Lisa* case provided that a New Jersey statute that regarded an omission as a basis for criminal liability did not provide sufficient notice to satisfy a person's due process rights to the degree that the statute incorporated civil common law principles.[199] The defendant was charged with a five-count indictment that included reckless manslaughter because the victim purchased methadone from the defendant.[200] Victim ingested the methadone and attended several parties during the evening where she consumed alcohol and smoked marijuana.[201] Defendant and victim had sex on defendant's bed, and shortly thereafter she passed out.[202] Victim was unresponsive.[203] Defendant's friend suggested calling 9-1-1 three times, to which Defendant did not comply.[204] Emergency aid was summoned at 5:00 p.m. the following day.[205] The victim died approximately ten days later in the hospital.[206] Multi-organ system failure caused by ethanol and drugs was pronounced as the cause of death.[207] The defendant's motion to dismiss the manslaughter count was granted.[208]

The text of the New Jersey manslaughter statute and the statutory definition of "conduct" are relevant for its analogous language to that of Missouri's voluntary act statute. In New Jersey, to determine whether a defendant should be charged with reckless manslaughter, evidence must first be presented showing the defendant engaged in conduct that caused the victim's death. . . ."[209] Conduct in New Jersey is defined as:

> an action or omission or a series of actions or omissions. Action means a bodily movement, whether voluntary or involuntary. Omission means the failure to act. The law provides that criminal liability for an offense may not be based on an omission or a failure to act unaccompanied by action unless a duty to perform the omitted act is other wise imposed by the law.[210]

198. State v. Lisa, 919 A.2d 145 (N.J. Super A.D. 2007).
199. *Id*. at 160.
200. *Id*. at 147.
201. *Id*.
202. *Id*. at 148.
203. *Lisa*, 919 A.2d at 148.
204. *Id*.
205. *Id*. at 149.
206. *Id*. at 150.
207. *Id*.
208. *Lisa*, 919 A.2d at 150.
209. *Id*.
210. *Id*.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

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.
>
> 2. A "voluntary act" is
>
> (1) a bodily movement performed while conscious as a result of effort or determination; or
>
> (2) An omission to perform an act of which the actor is physically capable.
>
> 4. A person is not guilty of an offense based solely upon an omission to perform an act unless the law defining the offense expressly so provides, or a duty to perform the omitted act is otherwise imposed by law.[211]

The court in *Lisa* included the State's grand jury instructions. The State instructed the grand jury as follows: "a person has a duty to act where he has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid."[212] "A person has the duty to act when the person is responsible for placing the victim in the position of danger or peril."[213] The court recognized that the State based this instruction from several provisions of the Restatement (Second) of Torts.[214] The court reasoned by examining several other jurisdictions imposition of a duty to aid based on omission.[215] However, the *Lisa* court concluded that New Jersey "has never definitively adopted the common-law principles embodied in the several Restatement provisions that formed the basis" of the aforementioned grand jury charge.[216]

The instruction given in *Gargus* stated in part:

> Linda Gargus, by having voluntarily assumed the care of her mother, Lorraine Gargus, a person unable to meet her physical and medical needs, by moving into Lorraine Gargus' house, performing basic caregiving functions such as providing food and water, and representing to others that she was the primary caregiver for Lorraine Gargus . . . .[217]

The principle issue with the jury instruction given in *Gargus* is that the instruction did not require the jury to find that Linda Gargus had a legal duty to

211. MO. REV. STAT. § 556.011 (2014). Subsection 3 is omitted, as the act of "possession" is not at issue here.

212. *Lisa*, 919 A.2d at 150–51.

213. *Id*. at 151.

214. *Id*. The Court included the provisions from the Restatement (Second) of Torts §§ 314, 314A, 321, 322, 324, 326. Id. at 156–57.

215. *Id*. at 157–59.

216. *Id*. at 159.

217. Brief for Appellant at 16, State v. Gargus, 462 S.W.3d 417 (Mo. Ct. App. 2013) (No. ED 99233), 2013 WL 3811369, at *16.

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 in *Lisa* concluded, 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] duty of care, upon which a duty to act is premised, must be so firmly established as to be beyond controversy or dispute if it is to provide presumed notice."[223]

IV. THE APPLICATION OF *GARGUS*

A recent surge in heroin deaths in Missouri has led to indictments of the supplier or the 'drug dealer.'[224] *Gargus* has already been applied to support the finding of criminal liability based on an omission.[225] Earlier this year, the Missouri Court of Appeals handed down *State v. Voss*, a case of first-impression.[226] Motion for rehearing or transfer to the Missouri Supreme Court

218. State v. Gargus, 462 S.W.3d 417, 421–22 (Mo. Ct. App. 2013).

219. *Lisa*, 919 A.2d at 160.

220. *Id.* at 159.

221. *Id*. at 159–60.

222. *Id.* at 160.

223. *Id.*

224. *See, e.g.*, Robert Patrick, *Man Accused of Dealing Fatal Heroin Dose to St. Louis County Official's Nephew*, SAINT LOUIS POST-DISPATCH (Jan. 28, 2016), http://www.stltoday.com/news/local/crime-and-courts/man-accused-of-dealing-fatal-heroin-dose-to-st-louis/article_8bf86642-a297-5245-ad9a-ef150a8d7898.html [http://perma.cc/HU2H-GWZE]; Valerie Schremp Hahn, *Siblings Charged with Murder in Heroin Overdose*, SAINT LOUIS POST-DISPATCH (May 19, 2012), http://www.stltoday.com/news/local/metro/siblings-charged-with-murder-in-heroin-overdose/article_89726f28-b7fd-5440-a81c-258a5a48d480.html [http://perma.cc/V2B4-9KPD].

225. *See* State v. Gargus, 462 S.W.3d 417 (Mo. Ct. App. 2013).

226. State v. Voss, 488 S.W.3d 97, 113 (Mo. Ct. App. 2016). In this case, there was a first impression as to finding criminal liability for the drug dealer who sold the drugs to an individual,

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

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, the defendant interjected stating that he should prepare it because he was more experienced.[231] The victim consulted the defendant on how much heroin to use.[232] The victim injected himself with the heroin and immediately began "nodding off."[233] Defendant left the room to get the victim some ice because he feared that the victim might be suffering a heroin overdose.[234] Shortly thereafter, the victim, who was sweating profusely, walked the defendant and Curtis to the door.[235] The victim shook the defendant's hand and paid him one hundred dollars for the heroin.[236] The next morning the housekeeper found the victim deceased in the hotel room.[237] The verdict director for involuntary manslaughter stated: "Defendant caused the death of Victim *by not summoning medical help* when [Victim] showed signs of a drug overdose after he injected heroin he purchased from [D]efendant."[238]

More recently, the Missouri Court of Appeals again was faced with an appeal of an involuntary manslaughter conviction of the heroin supplier in *State v. Shell*.[239] In *Shell* the defendant and victim pooled their money together to purchase heroin.[240] The defendant picked the victim up from the victim's house, drove to defendant's house and injected themselves with heroin, then the defendant took the victim back home.[241] The victim went inside his residence and told his mother he was going to bed where the victim was found

who later died. *Id.* at 110. The court held that criminal liability is based on the omission to seek aid. *Id.* at 113.

227. *Id*. at 97.
228. *Id*. at 107–08.
229. *Id*. at 104.
230. *Id*. at 105.
231. *Voss*, 488 S.W.3d at 105.
232. *Id*.
233. *Id*.
234. *Id*.
235. *Id*.
236. *Voss*, 488 S.W.3d at 105.
237. *Id*. at 106.
238. *Id*. at 109 (emphasis in original).
239. State v. Shell, 501 S.W.3d 22, 24 (Mo. Ct. App. 2016).
240. *Id*. at 25.
241. *Id*.

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 *Gargus* 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 *Gargus* principle that where evidence is present to support a conviction for involuntary manslaughter consists of affirmative acts and omissions, the defendant can still be found guilty "even if a duty to perform the omitted act is *not* otherwise imposed by law."[247] The court reasoned that the affirmative acts consisted of selling the defendant heroin, suggesting how much heroin to use, and preparing the heroin.[248] A duty then existed for the defendant to go back and check on the victim because based on *Gargus*, a duty to perform the omitted act is otherwise imposed by law. Thus, because *Gargus* established that although a statute does not expressly provide for liability based on an omission, a duty otherwise imposed by law and an affirmative act coupled with an omission create criminal liability.

In contrast, the court in *Shell* factually distinguishes *Voss* by comparing the amount of involvement in the victim's use of heroin.[249] The court in *Shell* again relied on the precedent of *Gargus*, to determine whether the defendant in *Shell* had a duty to act based upon a voluntary assumption of care of a vulnerable person, the victim.[250] By comparing the "egregious" facts of *Gargus*, where criminal liability was found based on the voluntary assumption of care and seclusion, the *Shell* court noted that the victim was not entirely dependent on the defendant throughout the evening.[251] The court held: "the law did not impose a duty to act because the defendant did not seclude the victim, and the victim was not dependent on the defendant medical care."[252]

242. *Id*.
243. *Id*. at 26.
244. *Shell*, 501 S.W.3d at 29.
245. MO. REV. STAT. § 565.024 (2016).
246. State v. Voss, 488 S.W.3d 97, 110 (Mo. Ct. App. 2016).
247. *Id*. (emphasis added).
248. *Id*. at 112.
249. State v. Shell, 501 S.W.3d 22, 31 (Mo. Ct. App. 2016).
250. *Id*. at 30–32.
251. *Id*. at 32. The victim held a conversation with his mother, completed laundry, and went to bed. *Id.*
252. *Id*.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

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 *Shell* opinion.[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 imperatives are not the functional equivalent of legal duties."[254] Absent an express legal duty in the criminal law, any finding of a criminal defendant's liability for a failure to act is a distinct violation of the due process clause. The *Gargus* court's express reliance on the Commentary to Section 562.011 to find a legal duty otherwise imposed by law and seeming ignorance to the Commentary to Section 556.026 is extremely troublesome.[255] The Missouri Supreme Court has had the opportunity to provide guidance, yet has not done so. The legislature must act to uphold constitutional due process rights before more criminal defendants are held criminally responsible for a legal duty he or she was not expressly made aware by statute.

ALEXANDER L. LEDBETTER*

253. *See id.* at 31.

254. Billingslea v. State, 780 S.W.2d 271, 276 (Tex. Ct. App. 1989).

255. *See* State v. Gargus, 462 S.W.3d 417, 422 (Mo. Ct. App. 2013).

* J.D. Candidate, 2017, Saint Louis University School of Law.