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Investigating Involuntary Manslaughter: An Empirical Study of 127 Cases

BARRY MITCHELL* AND R.D. MACKAY**

Abstract—In the past the law relating to involuntary manslaughter has been the subject of much criticism and controversy, though surprisingly it has received comparatively little attention during the recent review of the homicide law by the Law Commission and the Ministry of Justice. As far as the authors are aware, there has hitherto been no objective empirical research into cases of involuntary manslaughter in England and Wales. Based on data collected from case files maintained by HM Court Service and the Crown Prosecution Service, this article provides a brief analysis of a sample of 127 recent cases. As well as the usual criminological analysis (of offender and offence characteristics), the article focuses on the variations in offenders' moral culpability for causing death; the relationship between murder and manslaughter (especially those manslaughters at the 'upper end' of the seriousness scale); the categorization of different species of involuntary manslaughter, and the sentencing of convicted manslayers.

Keywords: criminal law, criminology, manslaughter

1. *Background*

The term 'involuntary manslaughter' refers to what are, arguably, three separate offences, namely: unlawful and dangerous act manslaughter (hereafter 'UDA manslaughter'), gross negligence manslaughter and reckless manslaughter, all of which have been controversial in some respect. In the last 25 years or so there has been a good deal of theoretical and empirical research into various aspects of English homicide law, and the Ministry of Justice has been conducting a review of the law of murder.[1] The majority of the discussion, and certainly the empirical research, has concentrated on murder or voluntary manslaughter (ie manslaughter by loss of self-control (formerly provocation), diminished responsibility or suicide pact). There has been no empirical study of involuntary manslaughter.

* Professor of Criminal Law and Criminal Justice, Coventry University Law School. Email: b.mitchell@coventry.ac.uk.
**Professor of Criminal Policy and Mental Health, Leicester De Montfort Law School, De Montfort University. Email: rdm@dmu.ac.uk.
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[1] See Written Ministerial Statement on Review of Homicide Law, 12 December 2007, Ministry of Justice.

In 1996 the Law Commission recommended the abolition of UDA manslaughter, essentially on the ground that the defendant might lack sufficient moral blame for causing the victim's death.[2] The law merely requires the defendant to have committed a crime which created a foreseeable risk of some, albeit minor, injury.[3] In 2000, the Home Office nonetheless thought that a redefined version of UDA manslaughter should be retained,[4] and the Law Commission's latest recommendations[5] are that the offence be retained, though redefined. The leading authority on gross negligence manslaughter, namely the House of Lords' decision in *Adomako*,[6] has been criticized for its unhelpful and unclear language. Gross negligence means that the standard of care shown by the defendant must have been far below that which could reasonably have been expected; it must have been bad enough to warrant criminal conviction (rather than mere civil compensation). But this is ambiguous and circular, and is likely to lead to inconsistencies in the verdicts. Reckless manslaughter relates to those who currently only just fall short of being convicted of murder. Instead of intending that their acts will kill or cause serious injury, they foresee such a consequence as (very) likely. Not all commentators or textbook-writers formally recognize reckless killing as a separate species of involuntary manslaughter in its own right, presumably on the basis that such cases will almost invariably fall within the definition of UDA or gross negligence manslaughter.[7] Under the Law Commission's 2006 proposals some reckless manslayers would be guilty of second-degree murder.[8]

Informal discussions with practitioners suggest there is a sense amongst criminal lawyers that cases of UDA manslaughter are more common than the other two species of involuntary manslaughter, but there is no objective information about the relative frequency of the individual varieties. The fact that such an august and influential body as the Law Commission has, within a decade, initially recommended the abolition of UDA manslaughter and then

[2] Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter*, (Law Com No 237, 1996) part IV.

[3] *R v Church* [1966] 1 QB 59 (CA); *DPP v Newbury; DPP v Jones* [1977] AC 500 (HL).

[4] Home Office, *Reforming the Law of Involuntary Manslaughter* (2000) London ch 2.

[5] Law Commission, 'Murder, Manslaughter and Infanticide' (Law Com No 304, 2006) paras 3.46–3.49.

[6] *R v Adomako* [1995] 1 AC 171 (HL).

[7] For examples of authors who do not identify reckless killing as a third distinct species, see M Allen, *Textbook on Criminal Law* (10th edn Oxford University Press, Oxford 2009) 338–50; and W Wilson, *Criminal Law: Doctrine and Theory*, (3rd edn Pearson Longman, Harlow 2008) 368–78. Nevertheless, Simester and Sullivan suggest that reckless manslaughter may not necessarily simultaneously fulfil the definitional requirements of unlawful and dangerous act manslaughter—for example, D, an archer, shoots an arrow at the target even though he knows that V is in the vicinity. By aiming at the target D is not necessarily committing any offence against V. Thus if D's arrow hit V, there may be no unlawful act. See AP Simester and GR Sullivan, *Criminal Law: Theory and Doctrine* (4th edn Hart Publishing, Oxford 2010) 383, 384.

[8] The Commission recommended that it should be murder in the second degree where D intends to cause injury or fear or risk of injury while aware of a serious risk of causing death; (n 5) para 9.6(2). This recommendation was intended to cover cases such as that of the bomber who, intending to cause fear and disruption, plants a bomb. He gives a warning which he thinks might be sufficient to permit the timely evacuation of the area but probably would not be. The bomb explodes and someone is killed as a result (para 1.27). More examples are given in para 2.89.

(albeit as a differently constituted Commission) argued in favour of its redefinition and retention, suggests that (i) it is the most controversial of the three offences and (ii) its future should not be determined without knowing how the courts apply the law in practice. It is often assumed that the crime in UDA manslaughter, which provides the context in which death occurs, is itself an offence against the person, but the law does not require this.[9] The Law Commission's (2006) proposed redefinition of UDA manslaughter would require the defendant to commit a form of personal assault,[10] but the absence of any empirical research means we have no real idea of the likely impact—ie how many cases would cease to result in manslaughter convictions—the Commission's proposal would have. In this study we hope to provide data on the operation of involuntary manslaughter which will fill a gap created by the absence of any previous empirical research. This absence has in turn resulted in a lack of any reliable information on how this important part of the substantive criminal law works in practice. Although this article does not seek to provide a detailed statistical breakdown of the offence and offender characteristics, our aim is to offer a brief summary of the empirical study followed by an analysis of some of the important legal issues surrounding involuntary manslaughter—viz the defendant's culpability for causing death; the contexts in which death was caused; distinguishing manslaughter from murder procedurally without testing the evidence; the impact of the fatality on the sentence, especially in cases where the moral blame for death was low; problems with categorizing involuntary manslaughter, and the relationship between categorization and sentencing.

2. *The Empirical Research*

A. *The sample*

One likely reason for the absence hitherto of any previous empirical research into involuntary manslaughter is the difficulty in identifying and obtaining access to an adequate sample of cases. In practice, the only realistic sources of case data are either Crown Court files or Crown Prosecution Service (CPS) files.[11] The problem with using Crown Court files is that the computerized filing system of HM Court Service (HMCS) is not able to identify cases by the nature of the offence for which the defendant was convicted. The CPS system does not suffer from that restriction, but neither does it readily distinguish

[9] See eg *DPP v Newbury; DPP v Jones* (n 3) where the UDA was an offence of criminal damage to property.

[10] See Law Commission (n 5) para 2.163. One of us recently argued that the criminal context in which death is caused ought not to be restricted to personal assaults: rather the emphasis should be on the danger of serious harm resulting from the defendant's acts or omissions; see B Mitchell, 'More Thoughts about Unlawful and Dangerous Act Manslaughter and the One-punch Killer' (2009) Crim LR 502–11.

[11] Theoretically, one could engage a small army of researchers to conduct observational research into a sample of current cases, but that would obviously exclude cases where a guilty plea is accepted. It would also be extraordinarily difficult to obtain the necessary human and financial resources for this.

between voluntary and involuntary manslaughter. However, the Ministry of Justice maintains what is known as the 'Homicide Index' which contains a list of details of murder and manslaughter convictions. One of the principal defences listed for each case in the Index is 'no intent', which means there was no 'malice aforethought', and that enabled us to identify involuntary as opposed to voluntary manslaughters.[12] Permission was sought from, and kindly granted by, HMCS[13] to access the files relating to 97 involuntary manslaughter cases that were decided between 1995 and 2004.[14] Fortunately, one of us (Barry Mitchell) also had corresponding data relating to a further 30 such cases from a previous largely unpublished study, the data from this additional batch of cases having been obtained from files held by the CPS.[15] Thus, in total, the sample upon which this article is based consists of 127 cases relating to convictions dating from 1995 to 2004.[16]

These 127 cases resulted in 152 defendants being convicted of involuntary manslaughter, 135 (88.8%) of whom were male.[17] This is slightly lower than the proportion of men (93.2–96.8%) convicted of murder during the same period.[18] Between them they killed 128 victims, 98 (76.6%) of whom were male, which is a little higher than for all recorded homicides.[19] Nine victims

[12] Unfortunately, (i) there were some cases in the Index where the principal defence was not indicated, and (ii) in other cases the entry in the principal defence column was 'multiple defences'. Although it is extremely likely that some of these cases might be involuntary manslaughters, they were not examined as part of this study.

[13] We wish to record our thanks, first, to the Nuffield Foundation for providing a grant to fund this research and, second, to staff in HMCS, both at their headquarters in London and in the Crown Courts, for their assistance.

[14] See (n 12) above for an explanation of why the sample was limited to 97 cases. Unfortunately, the government statistics for homicides do not distinguish between manslaughter by provocation and involuntary manslaughter, so that it is impossible to estimate the proportion of the sample to the total number of involuntary manslaughter convictions between 1995 and 2004 in England and Wales.

[15] The authors therefore also wish to record their thanks to the CPS for this access and for approving publication of the data. This earlier study using CPS files was conducted by Barry Mitchell and Dr Sally Cunningham (now of the University of Leicester, School of Law). It examined a sample of convictions for murder, manslaughter and vehicular homicides in England and Wales from 1995 onwards. Most of this research remains unpublished, though an analysis of the defences pleaded was published in Law Commission (n 5) Appendix C.

[16] Unfortunately, it is impossible confidently to assess the extent to which the cases in this study are representative of involuntary manslaughters generally.

[17] Their ages ranged from 12 to 63 years. Just over a quarter of them (42) had no previous convictions; about a third had convictions for offences excluding violence, and slightly fewer did have convictions for violent crime.

[18] See K Coleman and J Cotton, 'Homicide' in K Coleman, C Hurd and D Povey (eds), *Homicide Statistical Bulletin: Violent Crime Overview, Homicide and Gun Crime 2004/2005* (2nd edn Supplementary Volume to Crime in England and Wales 2004/2005 TSO, London) 02/06, 26 January 2006, Table 2.09; and K Coleman, 'Homicide', in D Povey, K Coleman, P Kaiza and S Roe (eds), *Home Office Statistical Bulletin: Homicides, Firearms and Intimate Violence 2007/08* (3rd edn Supplementary Volume to Crime in England and Wales 2007/2008 TSO, London) 02/09, 22 January 2009, Table 1.09. Those same tables indicate that the proportion of men convicted of 'other manslaughter', which includes both involuntary manslaughter and manslaughter by provocation, varied between 84.9% and 89.8%. Unfortunately, official government statistics do not provide comparative figures for the ages and previous criminal record of convicted murderers.

[19] Again, official government statistics do not provide directly comparative figures for other kinds of homicides, but during the same period the proportion of male victims of offences currently recorded as homicides—ie all homicides other than those resulting in lesser convictions, cases where the defendant was found unfit to plead or insane, acquittals or discontinued proceedings and cases where the defendant committed suicide or died—varied between 64.1% and 70.4%; see Coleman and Cotton (n 18) and Coleman (n 18), Tables 2.03 and 1.03, respectively.

were under 12 months old, the youngest being 4 weeks, and a further three victims were aged at least one but under 5 years. About two-thirds of all victims were aged between 16 and 49 years. The oldest victim was 98 years of age. This is broadly similar to the statistics for all recorded homicides during the same period.[20]

Whilst there did not appear to be any significant difference between the defendants and victims in the manslaughter sample, a striking feature of the study was that the most common relationship, between 65 of the 152 (42.8%) defendants and the victim, was one of acquaintance. An additional seven defendants killed a friend, one killed a work colleague and three others killed someone known (but not related) to them.[21] Thus, in total, just over half the victims (50.1%) in the sample were known to their killer in some way but were not related or domestically linked. It is impossible to make any direct comparison with other forms of homicide from official government statistics. But for much of the same period the proportion of recorded homicides where the parties were friends or acquaintances varied between 20.8% and 35.8%.[22] Conversely, there was a familial relationship in only just over a quarter of the cases in the sample, whereas the corresponding figure for all recorded homicides during most of that time ranged from 27.9% to 40.5%.[23] Some 40 defendants (26.3%) killed a stranger (the corresponding statistic for all recorded homicides at that time varied from about 27.5% to 51.3%).[24]

3. *Culpability for Causing Death*

Although there are minimum legal requirements as to offenders' culpability in involuntary manslaughter,[25] the precise degree of defendants' moral blame for causing the victim's death varies from case to case.[26] Where there is a full trial of the evidence the jury has to decide whether the legal requirements as to culpability have been made out. In doing so members of the jury are likely to consider the implications of various characteristics of the offence such as the means by which death was caused and the apparent motive or circumstances

[20] See Coleman and Cotton (n 18) Table 2.07.

[21] In case 78, a healthcare assistant in a care home killed an elderly lady who lived there; in case 80 the defendant was a customer in a pub where the defendant was the landlord; and in case 85 the defendant, a childminder, killed a child in her care.

[22] See Coleman (n 18) Table 1.05. The percentage figures have been calculated by ignoring the number of cases for which there is no suspect.

[23] Ibid.

[24] Ibid. The 51.3%, in 2002/03, is unusually large. In other years the largest proportion was 40.6%.

[25] Andrew Ashworth has recently called for a consistent minimum culpability requirement across all forms of involuntary manslaughter; see A Ashworth, 'Manslaughter: Generic or Nominate Offences?' in CMV Clarkson and S Cunningham (eds), *Criminal Liability for Non-Aggressive Death* (Ashgate Publishing Ltd, Aldershot 2008) 235–48.

[26] Though in reckless manslaughter the defendant must foresee that death or serious injury is very likely.

surrounding it. Similarly, prosecutors have to apply the same considerations when deciding whether to accept a plea of guilty to manslaughter.

A. *Method of Killing and Culpability*

A statistical analysis of the methods by which victims were killed in the sample is shown in Table 1.

B. *Method and Moral Culpability for Causing Death*

It is impossible to be sure what conclusions were drawn by the court as to the exact nature of the defendant's foresight or awareness, but where (for example) a firearm is used the risk of fatality is likely to be very evident, though it must not be assumed that the firearm was discharged deliberately. The apparent extent of the defendant's culpability for causing the victim's death should be a factor which influences the severity of the sentence, and of the ten firearm cases in the sample, two resulted in relatively lenient sentences.[27] In case 95, the defendant, a sheep farmer, shot a poacher at close range. It was after 10.00 pm when the defendant confronted the victim who (the defendant said) grabbed the gun which went off accidentally as the result of a faulty firing

Table 1. Method of Causing Death

Method	Frequency	Per cent
Sharp instrument[a]	27	21.3
Blunt instrument	11	8.7
Strangulation/asphyxiation	6	4.7
Punching/kicking/stamping[b]	46	36.2
Firearm	10	7.9
Fire/arson	4	3.1
Drowning	1	0.8
Struck/dragged by vehicle	9	7.1
Shaken baby syndrome	8	6.3
Electrocution	2	1.6
Unknown	3	2.4
Total	127	100.0

[a]Eight of the 17 female defendants used a sharp instrument.
[b]The largest single group of male defendants (43, or 31.9%) killed their victims with this method.

[27] The average sentence for firearms cases in the sample was 6.85 years' imprisonment.

mechanism. The defendant admitted hitting the victim and chasing him, and received a sentence of 18 months' imprisonment. In case 19, the only clear gross negligence manslaughter in the sample, a man went into his lounge carrying a shotgun, intending to commit suicide. His wife came towards him and tried to grab the gun from him, but it went off when they struggled. His sentence was 2 years in prison. The defendants in both cases 19 and 95 clearly ought not to have been handling the guns as they did, but (assuming their accounts of what happened are reliable) their culpability for their victims' deaths was not especially high: both victims played a part in their demise.

At the other end of the scale, a 12-year sentence was imposed in case 104 where the family of the victim (a 19-year-old man) had blamed the defendant's girlfriend (B) for being a bad influence on the victim's sister. The victim slapped B across the head and spat at her, and when she told the defendant, a 25-year-old man, he became angry. It seems that some time later he collected a gun which he said was simply to scare the victim. He and B were driving in the area where the victim's family lived and he noticed they were being followed by a car containing the victim and others. The cars stopped: the defendant got out and went up to the other vehicle. He fired the gun twice into the rear of the other car, killing the victim and wounding another passenger. The jury convicted him of manslaughter and he was sentenced to 12 years' imprisonment. It was suggested by one of the lawyers in the case that there was some sympathy for him from the jury: he was deeply in love with B, he was of low-average intelligence and abnormally suggestible, and could not control his emotions. Nevertheless, regardless of any mitigation, the defendant's act of firing the gun into the back of the victims' car surely implied a high degree of moral blame for the resulting fatality and serious injuries.

Similarly, killing through fire is also likely to imply a high level of *mens rea*, though factors other than culpability for death may influence the sentence. In case 20 three men in their early 20s set fire to a house which resulted in the death of a 7-year-old girl and serious injuries to her younger brother. The act of arson was committed as part of an ongoing feud with the girl's family. The defendants pleaded guilty to reckless manslaughter and were given 12- and 10-year prison sentences, respectively. The case bore a general resemblance to *Hyam v DPP*[28] and it is difficult not to infer that the defendants must have foreseen death or serious injury as very likely. But in case 64 a 13-year-old boy set fire to the coat of a man whom he had previously harassed and persecuted and from whom he had stolen money, and then ran off. The man died and the boy pleaded guilty to manslaughter—almost certainly UDA (rather than reckless) manslaughter and was sentenced to 3½ years in a young offenders'

[28] [1975] AC 55 (HL). Hyam was convicted of murder but would now be guilty of reckless manslaughter because of adjustments made to the definition of intent by cases starting with *Moloney* [1985] AC 905 (HL) and culminating in *Woollin* [1999] 1 AC 82 (HL).

institution. Setting fire to clothing (while it is being worn!) and running off is clearly likely to lead to serious harm, but the boy seemed to think it was just a prank—the victim would get a nasty shock on discovering that his coat was on fire. It was apparently not proved beyond doubt that he had foreseen any greater harm than that. Thus, his moral culpability for the death was clearly less than that in case 20, though at the same time it easily exceeds the minimum legal requirement.

Likewise, it might be thought that a killer who strangles or asphyxiates the victim would be aware that at least serious injury would ensue and that would be reflected in the sentence. Again, it would be dangerous to make assumptions about this. An example of what might be expected in a case where death was caused in this manner was case 46 where the defendant manually strangled his cohabitee. They had had a stormy relationship and she had used violence against him. They were having a drunken row and she repeatedly punched him. He thought he couldn't stand it any longer, and he grabbed her round the throat for what he estimated was about 15 seconds. He was convicted of manslaughter by the jury and sentenced to 12 years in prison, the judge commenting that he was a known wife-beater. Clearly there was more than one aggravating feature to this case. But the defendant's admitted awareness that his hands were round his partner's throat for that length of time suggests that he may well have been guilty of reckless rather than simple UDA manslaughter. On the other hand, case 68 suggests that, whilst strangulation or asphyxiation might imply high levels of *mens rea*, there may be other factors which persuade the court to moderate the sentence. Three women killed a 74-year-old man whom the first defendant had known for some time in what was primarily a revenge killing. She was a beneficiary under his will and he had reported her for making a false benefit claim to the DSS. The defendants entered his flat; the first defendant punched the deceased and then she and the second defendant tied a belt around his neck and pulled it tightly. The third defendant admitted kicking the deceased in the face and ribs. The defendants took the deceased's pension book. Charged with murder, all three defendants had their pleas of guilty to manslaughter accepted. The first defendant was sentenced to 7 years' imprisonment; the second defendant, who claimed that she was intimidated by the first defendant and did not think they would kill the old man, received a 5-year sentence; and the third defendant was sentenced to 3½ years' imprisonment. Each defendant also received a concurrent 3½-year sentence for robbery. Pulling the belt around the deceased's neck clearly indicates an awareness of causing serious, if not fatal, injury. Yet the 7-year sentence is quite high but not especially so, and the other sentences are relatively modest—apparently because of the second defendant's claim that she felt intimidated by her co-accused, and the third defendant did not directly participate in the strangulation.

C. *Principal Motive, Circumstances and Culpability*

Defendants may have more than one reason for their actions, and in cases where there is more than one accused it may be that co-defendants have their own individual motivations for their participation. In analyzing this sample, attention has been focussed on what appeared to be the principal motive of the principal defendant, and the statistics in Table 2 below have been calculated on that basis.

A large proportion of offences in the sample were committed whilst the offenders, and often the victims, were angry for one reason or other, and an attempt has been made to identify some broad distinctions between the contexts in which these offences occurred. Thus, a distinction has been made between anger, domestic rows and fights, although there is clearly a potential overlap between these descriptions. For the purposes of understanding Table 2,

Table 2. Apparent Motive or Surrounding Circumstances

Motive	Frequency	Per cent
Anger: alcohol related	21	16.5
Anger: non-alcohol related	8	6.3
Domestic row: alcohol related	12	9.4
Domestic row: non-alcohol related	13	10.2
Fight: alcohol-related	11	8.7
Fight: non alcohol-related	10	7.9
Looking after baby	12	9.4
Revenge or jealousy[a]	17	13.4
Furtherance of crime	11	8.7
Ongoing feud	5	3.9
Bullying[b]	1	.8
Other[c]	2	1.6
Unclear	4	3.1
Total	127	100.0

[a]All but one of these cases was motivated by revenge.
[b]Case 64 referred to above was rather unusual.
[c]In case 36, two men killed D2's girlfriend. D2 had become dissatisfied with the church he belonged to and set up his own sect consisting of the two defendants, the victim and a third man. It seems the defendants thought the victim was possessed by demons and they were unable to rid her of them. So D2 commanded heavenly angels to execute her and resurrect her. Her body was so badly decomposed that the cause of death could not be determined. In case 78, a young man who worked as a healthcare assistant in a care home set fire to the night-clothes of an elderly woman whilst she was in her bed. He later admitted being fed up with her persistently soiling her clothes, though he was also suspected of seeking attention.

readers should note that 'domestic row' refers to cases where there was a domestic relationship between defendant and victim (frequently husband and wife, though their relationship was sometimes on a *de facto* rather than *de jure* basis), and they were having a row when the fatal act was committed. In 'anger' and 'fight' there was no domestic relationship between defendant and victim. These two groups could clearly overlap, but in 'anger' cases the defendant was angry when she or he killed and the victim did not assault the defendant: whereas 'fight' refers to those cases where both participants became angry and both inflicted violence on each other.

Clearly, other cases were characterized by angry defendants, but they have been categorized differently for the purposes of Table 2. Thus, there are separate categories for 'looking after baby', in which offenders were invariably angry and emotionally disturbed at the critical moment, for 'revenge or jealousy', in which the 16 revenge killers were inwardly angry even though their actions might have seemed quite calm and deliberate, and finally for 'ongoing feud'.

D. *Anger, Domestic Rows and Fights*

Table 2 shows that 44 of the 75 cases (58.7%) which occurred through anger, domestic row or a fight were alcohol-related—ie the defendant (and possibly also the victim) had been drinking when the fatal act was committed. It was not surprising to find so many cases of involuntary manslaughter characterized by anger and possibly also by the consumption of drugs or alcohol. The presence of either or both characteristics is likely to mean that the defendant was not thinking clearly about the consequences of his actions. Thus, to the calm, sober mind it may be quite foreseeable that death or serious harm would result from the defendant's acts—and that could point to a murder conviction—but in the cases in the sample the authors felt that it was often predictable that the courts and/or the CPS would infer that the defendant did not intend to kill or seriously injure. Comparison with murders and manslaughters generally during the same period is difficult because of the way in which the Ministry of Justice categorizes the different motives, but those motivated by a quarrel, revenge or loss of temper varied from roughly 34% to 54%, which is clearly much less than the 72.4%[29] in the involuntary manslaughter sample.

The defendants' moral culpability for causing death in the anger, domestic rows and fight cases seemed to vary quite considerably. At one end of the spectrum the degree of violence used by the defendant may be very low. Indeed, reference was made in the introduction to concerns that, by requiring no more than a foreseeable risk of minor injury, the law effectively makes it too

[29] This is calculated by aggregating the anger, domestic row and fight cases together with the looking after baby killings (discussed below) and the ongoing feuds.

easy for people to be convicted of UDA manslaughter. One of the most glaring examples of this occurs in what are commonly called 'one punch' manslaughters where the only violence used by the defendant is literally a single punch which causes the victim to fall, bang his or her head against a hard surface and die.[30] Commentators have offered conflicting arguments about the justification of the current law, especially about the element of moral luck in bringing about the victim's death. These have been set out elsewhere,[31] but for present purposes suffice it to say that on the one hand it is argued that by committing an assault the defendant has crossed a moral threshold and therefore cannot say that the death was simply bad luck. The counter view is that crossing a moral threshold does not negate the fact that there is still a big gap between what was foreseen or foreseeable and the victim's death. The issue then becomes one of finding a way to narrow the gap to justify liability for homicide.

Two cases in the sample are worth briefly noting here. In case 34, a man hit a woman hard across the head with his hand causing her to fall and hit her head, and he ran off. His plea of guilty to UDA manslaughter was accepted and he was sentenced to 15 months' imprisonment. In case 83 the defendant punched the victim once, causing him to fall and hit his head on the concrete floor. The prosecution accepted a plea to manslaughter, and he was sentenced to 18 months' imprisonment.[32] In neither case 34 nor case 83 was anything more serious than fairly minor injury foreseeable.

Obviously, the presence of additional aggravating factors such as further violence is likely to imply greater moral blame for the harm to the victim. In the sample, there were cases where, although there was an element of misfortune in that the fatal blow was relatively trivial (such as a single punch) and the victim died having hit his head against a hard surface, other blows had nevertheless been struck in the course of the incident. In case 8 the defendant killed his flat-mate. Both had been out drinking, separately, and had consumed alcohol, though neither was particularly drunk. The defendant returned to the flat and in so doing woke the victim. They argued. The victim punched the defendant who responded in like manner. They punched each other, and one punch caused the victim to fall backwards and hit his head against the wall. A plea to manslaughter was accepted and the defendant was sentenced to 3½ years' imprisonment. In such cases there is clearly more violence than in the one-punch cases but it does not automatically follow that there is more culpability for causing death. Where it can be shown that a series of blows had a cumulative effect it is possible to argue that later blows, which by themselves would not normally cause more than modest injury, in fact aggravated injuries

[30] In such instances the starting point, where there is a guilty plea, is 12 months' imprisonment; see *Furby* [2005] EWCA Crim 3147.

[31] A convenient rehearsal of the arguments can be found in B Mitchell, 'Minding the Gap in Unlawful and Dangerous Act Manslaughter: a Moral Defence of One-Punch Killers' (2008) 72 JCL 537–47.

[32] If Professor Mitchell's arguments were accepted (see n 10) the defendants in cases 34 and 83 would be not guilty of involuntary manslaughter, but guilty instead of an unlawful and dangerous act causing death.

caused by earlier assaults so that serious (or possibly even fatal) harm was foreseeable. In case 8 it was not clear from the file whether the victim had been rendered unsteady and thus more likely to fall over (and possibly bang his head etc) by the earlier punches thrown by the defendant.

E. *Looking After Baby*

The ages of the 'Looking after baby' victims ranged from 4 weeks to 2¾ years. At least eight, and possibly nine, of the twelve cases involved the violent shaking of a young baby, and in three of those the defendant had also assaulted (smacked or punched) the baby or hit him or her against a hard surface. In all but one of the twelve cases[33] the defendant was either the victim's biological father or he was living with the victim's natural mother. The offences occurred while the defendant, who was usually in his early or mid 20s, was alone with the victim and the defendant had been unable to stop the victim from crying. In broad terms the prosecution argued that the defendants became frustrated and angry and struck out in the heat of the moment. All twelve defendants were indicted for murder: six were convicted of manslaughter by the jury and the prosecution accepted a guilty plea to the lesser offence of manslaughter in the other six cases. Seven of the 12 denied murder but admitted manslaughter on arraignment: the other five pleaded not guilty to both offences. Of the seven who admitted manslaughter, the plea was accepted in six cases and there was no trial.[34] Sentences for these twelve cases ranged from 3 to 7 years' imprisonment.

In eight of the 12 cases the medical evidence suggested that the babies had been shaken with sufficient force to explain the fatalities. In the other four cases, and in some of the 'shaking' cases, the evidence showed that the babies had been struck, usually by the hand. Since defendants in these cases were in a state of anger and frustration at the critical time it is difficult to be confident about the extent of their awareness and foresight of the consequences, but it is equally difficult to think that they had ceased to be aware that they were dealing with young babies whose physical frailty and vulnerability was all too apparent. It is worth remembering that the law envisages that provoked killers will be so angry that they lose self-control whilst simultaneously intending to cause at least serious harm. Thus, by analogy, it is quite conceivable that defendants in shaken baby syndrome (SBS) cases might have a similar intent.

[33] In case 85, the female defendant was the baby's registered child-minder.

[34] The one exception was case 14 in which a young man killed his 22-month old son. There was no allegation of violent shaking, but there was evidence of possible previous assaults by him on his son. Although he pleaded guilty to manslaughter, he told the police that he thought his son had fallen out of bed, but the medical evidence indicated non-accidental injuries to various parts of the son's body, including the face, head, legs and buttocks. Death actually resulted from inhalation of vomit. The defendant was sentenced to 7 years' imprisonment.

F. *Revenge or Jealousy*

Any crime motivated primarily by revenge is likely to be regarded as a fairly serious example of its type. Revenge implies the deliberate infliction of harm. There were 16 cases in the sample which appeared to be motivated in this way, all but one of which were committed by men,[35] but the sentences varied quite considerably, from 12 years at the 'top end' down to just 2½ years' imprisonment. Two concurrent 12-year sentences were imposed in case 100, a road-rage case in which the defendant deliberately pushed a vehicle across a central reservation into oncoming traffic killing the driver and passenger because the driver had 'cut him up'. We concluded that this was an example of reckless manslaughter on the basis that the defendant driver, albeit in a state of some anger and agitation, must have realized there was a very high risk of causing serious harm. In contrast, the 2½-year sentence was passed in case 105 where a young woman had a fight with her boyfriend. On hearing that the victim had hit his girlfriend the defendant became angry, left the pub, and went to the victim's home to confront him. They punched and kicked each other, and the victim died from a kick to the back of his head or neck. By comparison with case 100, the defendant here was arguably less culpable for the victim's death; he had been drinking and he punched and kicked the victim, probably without deliberately aiming the blows at vulnerable parts of the body. At the same time, however, he knew what he was doing and he meant to hurt the victim, and kicking in particular is likely to cause greater harm than mere punching.

G. *In Furtherance of Crime*

Killing someone in the furtherance of another crime is also likely to be viewed as relatively serious, and as with revenge cases only one female defendant fell into this category.[36] The offences which were being 'furthered' consisted of five dwelling-house burglaries, three robberies, one probable driving a conveyance which had been taken without authority, one car theft (or at least taking a conveyance without authority), and one assault.

Whilst the gravity of the crime being furthered will clearly contribute to the overall seriousness of the manslaughter, assessing the defendant's culpability for causing death is a separate issue. In the five burglary cases moral culpability in this respect seemed to vary. In case 30 the defendant, a 21-year-old man, pushed an 84-year-old widow who fell and hit her head. He pleaded guilty to manslaughter, but the sentence is unknown. Clearly, a push would not normally result in serious injury; but against an 84-year old, frail woman, it is much more likely to do so, and so the defendant's moral culpability is probably

[35] All victims were men.
[36] Ten of the 11 defendants in this group had previous convictions.

greater than might initially be assumed. The greatest violence in this subgroup of cases was in case 90 where D2 had stolen a charity box (containing 30 pence!) from a pub and was being chased out by customers and the landlady. Outside D1 drove the car directly at the landlady and killed her. He said he was just trying to escape. The jury convicted him of manslaughter and he was sentenced to 5 years' imprisonment. However much he was intent on escaping, it is difficult to see how a court could fail to conclude that he was unaware of the likelihood of causing the landlady at least very serious harm.

Even amongst just the three robbery cases there were significant variations in the apparent culpability for killing. On the one hand, in case 42 the defendant had set out to commit a robbery armed with a loaded shotgun. Five police officers arrived at the scene. They attempted to arrest the defendant who was holding the gun. One of the officers grabbed the defendant's hand and the gun went off, killing one of them. The jury convicted the defendant and he was sentenced to 10 years' imprisonment. Even if the defendant's claim that his finger happened to be on the trigger and the officer had pressed his (D's) finger causing the gun to go off is believed, his willingness to arm himself in that manner implies considerable blameworthiness for the death. In contrast, the defendant in case 113 grabbed a plastic bag from his male victim and pushed him in the chest. Unfortunately, the victim was drunk and thus unsteady on his feet, and he fell backwards striking his head on the pavement. The defendant pleaded guilty to manslaughter and he was sentenced to 15 months' imprisonment. The robbery element was clearly relatively minor, but the victim's unsteadiness ought to have made it apparent that even a push might make him fall over.

4. *Distinguishing Manslaughter from Murder Procedurally without Testing the Evidence*

The difference between murder and involuntary manslaughter is essentially determined by whether the defendant had an intent to kill or cause serious injury (for murder) or some lesser *mens rea*, and that is a question of fact which is *prima facie* for the jury to determine. Defendants charged with a single count of murder may be acquitted of that offence and convicted of manslaughter instead.[37] In most cases in the sample defendants were formally indicted for murder,[38] but 13 of the 152 defendants were indicted for manslaughter only—so they were automatically cast into the 'lower division'—though six of those had earlier been charged with murder. The two main criteria which should

[37] Criminal Law Act 1967, s 6(2).

[38] The CPS Charging Standards are conspicuously silent on charging practice for involuntary manslaughter. On the acceptance of pleas, there is guidance in cases of voluntary manslaughter, but the only comment on involuntary manslaughters is that gross negligence cases should be referred to the area Complex Casework Unit. See *Homicide; Murder and Manslaughter: Legal Guidance: The Crown Prosecution Service*, para 152.

influence the charges preferred by the CPS are (i) whether the evidence is such that there is a 'realistic prospect of conviction', and (ii) what is in the public interest.[39] Examination of the evidence in the 13 cases in the sample reveals that, whilst it is possible to identify reasons for regarding some cases as not indicative of the most serious homicides, (a) similar arguments (relating to the evidence and/or public interest criteria) could be identified in other cases where the defendant was charged with murder, and (b) it was difficult to find any basis for the absence of a count of murder in those cases where only manslaughter was formally charged.

One of the clear examples of this latter group was case 16 where three young men killed a fourth in apparent revenge. The victim and friends had ransacked D1's home when they called to buy some drugs. When they returned later they were attacked by the defendants with crockery and a heavy metal torch. D1 was subsequently convicted by the jury and sentenced to 6 years' imprisonment.[40] Without having a detailed knowledge of the evidence available to the prosecution, it is impossible to confidently evaluate the decision to charge D1 with manslaughter only. But there was nothing in the file to suggest that the victim's death had been particularly unlikely, and the degree of force which appears to have been used against the victim, together with the motivation for the attack, make it difficult to appreciate why there was no murder charge against D1. Similarly, in case 121 the defendant, a doorman, refused to allow the victim to enter a pub and they argued about it. When the victim became aggressive the defendant kick-boxed the victim who fell over and banged his head on the ground, and subsequently died. In numerous other cases (such as case 8, discussed earlier in the Section 3D) where the defendant's assault on the victim did not *prima facie* appear particularly violent—the victim was punched—but the victim banged his head against a hard surface, a murder charge was preferred, presumably on the basis that the jury might infer an intent to cause serious harm. It is difficult to see why the same approach was not taken in case 121—the defendant deliberately kick-boxed the victim, and there was surely a 'realistic prospect' that the jury would infer an intent to cause serious injury.

Some vehicular homicides were also puzzling. In case 101 the defendant and two friends went to a kebab shop when the victim, who was clearly drunk, was abusive and behaved in a 'loutish' manner towards one of the friends. The defendant left without buying a kebab, but drove back to the kebab shop shortly afterwards. He saw the victim standing in the middle of the road and

[39] Since the cases in the sample were heard the CPS has published a new Code; see Crown Prosecution Service, *Code for Crown Prosecutors* (2010) www.cps.gov.uk/publications/docs/co. Para 4.1 of the new Code re-affirms the importance of the evidential and the public interest tests. Paras 4.18 and 4.19 state that in homicide cases prosecutors should take into account any views expressed by the victim's family.

[40] Interestingly, unlike D1, D2 and D3 were charged with murder but were convicted of the lesser offences of causing grievous bodily harm with intent and conspiracy to supply controlled drugs.

drove straight at him. This was not simply bad driving;[41] the car was driven directly at the victim in an attempt to exact revenge, and the likelihood of causing serious injury was extraordinarily obvious—far more than in many other cases in the sample where murder was charged—but the prosecution only charged the defendant with manslaughter.

Sometimes, however, the facts of the case make it difficult to assess the defendant's probable *mens rea* and thus whether murder or only manslaughter should be charged. In case 86 a man, his wife and another woman were charged with burglary and manslaughter. They had planned to burgle the house of a 98-year-old woman. The defendants entered the premises and D3, who had been drinking, was confronted by the victim. D3 pushed the victim who fell and subsequently died from her injuries. The man was acquitted of manslaughter but the two women were convicted and each received 8-year prison sentences. Although little force seems to have been used the file indicated that the court had adopted the ruling in *Watson*[42] that the act was dangerous because the defendants were aware of the victim's age and frailty, so there was an obvious risk of (serious) injury.

There are undoubtedly cases where charging manslaughter rather than murder is appropriate. The two one-punch homicides—cases 34 and 83, discussed earlier—are obvious examples. So too is case 113 (see above) where the victim was simply pushed, even though the death occurred in the course of a robbery, because the moral blame for causing death was so low. But this study suggests that more care is needed so as to ensure that, unless the evidence clearly indicates a low level of *mens rea vis-à-vis* injury to the victim, the prosecution should charge murder and thereby at least provide the opportunity for the court to decide just how serious the homicide was.

A further procedural means by which manslaughter and murder may be distinguished can be seen by looking at the defendants' pleas and the prosecution or court's response thereto. Four of the 13 defendants indicted for manslaughter (but not murder) pleaded guilty. In addition, 60 defendants who were indicted for murder denied liability for that offence but pleaded guilty to manslaughter and their pleas were accepted.[43] No distinction in the degree of moral culpability for causing death could be detected between those cases where only manslaughter was formally charged and those where murder was charged but a manslaughter plea was accepted. The argument for charging manslaughter only was strongest in the two one-punch cases (cases 34 and 83) but they were both indicted for murder and had their pleas to manslaughter accepted. Whilst it is true that in each of the four cases where manslaughter

[41] Cases of bad driving would normally be expected to result in charges being brought under the Road Traffic Acts, such as causing death by dangerous driving etc.

[42] [1989] 1 WLR 684 (CA).

[43] Effectively, therefore, 73 cases (57.5% of the sample) were categorized as manslaughter rather than murder without the evidence being tested.

was charged and the defendants pleaded guilty the amount of force used was similarly modest—so that the charge was thus understandable—there was no apparent reason for treating cases such as the one-punch homicides as potentially more culpable.

Arguably, the need to allow the court to consider the evidence as to the defendant's moral culpability for causing death is greatest in cases of reckless killing, where the *mens rea* is closest to that required for murder. Yet in five of the 15 cases in the sample which we treated as reckless manslaughters there was no trial, although in case 88 there was a partial explanation for this. There had been a history of antagonism between the victim and the two defendants (father and son), both of whom were sober at the time. The three participants argued in the street and the defendants then attacked the victim with a table leg and a knife. He was found dead in his bath the next morning. It is surely very difficult to resist the implication that whoever was responsible for the fatal attack must have known that serious injury was very likely, but the CPS could not prove precisely which of the defendants was responsible for which blows and only the father was charged with murder.[44] He pleaded guilty to manslaughter and was sentenced to 5 years' imprisonment.[45]

However, there was no such explanation in the other four cases. These were: case 20 where, as part of an ongoing feud, the defendants set fire to a house killing a 7-year-old girl and badly injuring her younger brother; case 53 where a man burgled the flat of a 68-year-old man and suffocated him with a pillow, apparently to stop him from screaming; case 68 where, in an act of revenge, three women burgled the flat of a 74-year-old man and punched and kicked him and tied a belt around his neck, pulling it tightly; and case 97 where two factions met at a nightclub and shot at one another in the course of which the victim was killed.

5. *Sentencing and Culpability*

Sentencing in cases of involuntary manslaughter is notoriously difficult, primarily because there may be no certainty about the factual basis on which the defendant was convicted.[46] This is true whether a plea to manslaughter was accepted by the court or whether the defendant was convicted by a jury. In the former the lack of a trial means there has been no opportunity for the relevant facts to be revealed, and even if the charge was manslaughter (rather than the more usual murder), the indictment simply refers to 'unlawful killing', and not a specific form of manslaughter. In the latter cases, the jury merely returns a

[44] His son was charged with, and convicted of, inflicting grievous bodily harm and sentenced to 2¼ years' imprisonment.

[45] The judge indicated the sentence would have been 6 years' imprisonment but for the guilty plea.

[46] For interesting discussions of the implications of this see R Taylor, 'Jury Unanimity in Homicide' (2001) Crim LR 283–300; and HH Judge D Clarke, 'Jury Unanimity – A Practitioner's Problem' (2001) Crim LR 301–04.

verdict of guilty of manslaughter; the sentencing court is not told the basis on which the jury reached its verdict, making it impossible to be sure of the precise extent of the defendant's culpability.[47] Furthermore, there is a general difficulty facing the courts which is to balance the gravity of the harm caused, the loss of life, against the defendant's moral culpability which may not be that great.

A. *The Most Lenient Sentences*

There were two non-custodial sentences in the sample which were imposed on female defendants who killed in the course of a domestic row. Case 69 concerned a 21-year-old woman who killed her 29-year-old male cohabitee during a domestic argument: he was questioning her about her movements during the day, he threw his plate of food on the floor and put his hand in her face. She was holding her knife and fork and instinctively pushed him away, stabbing him through the heart in the process. Only minimal force was used. The defendant was put on probation for 2 years with a condition that she should attend a treatment course determined by a psychiatrist. Obviously, stabbing a person through the heart *prima facie* suggests an intent to cause at least serious injury, but the defendant's case was that the stabbing was not intended. Although she was angry at being questioned by her cohabitee, she surely ought to have been aware that she was holding her knife and fork when she pushed him away.

In case 82 a 63-year-old woman killed her twin sister during a quarrel. Although known as a rather rude, aggressive and occasionally violent individual, the defendant had had a tragic life—her parents had divorced, her husband had abused her, one son had committed suicide and the second had been murdered. Both she and her sister had a drink problem and had been drinking on the day of the offence. The defendant said she was making an omelette in the kitchen when her sister walked in and they quarrelled. As her sister was walking out she picked up a knife and stabbed her. When the police arrived the victim was still conscious, and she died the following day. The court imposed a community rehabilitation order for 3 years with a condition to reside as directed by the probation service. A psychiatric report stated that the defendant was not dangerous; what had happened was confined to her relationship with her sister, and she would be harmless if kept away from alcohol. It nevertheless appeared that, although she had been drinking, the defendant deliberately stabbed her sister and must therefore have foreseen the likelihood of serious injury.

[47] See M Wasik, 'Form and Function in the Law of Involuntary Manslaughter' (1994) Crim LR 883–893, 885, 886 for illustrations.

B. *The Most Severe Sentences*

Conviction for involuntary manslaughter can attract a discretionary sentence of life imprisonment, though such a sentence is extremely unlikely since cases in this offence category will almost invariably fail to meet the necessary legal criteria.[48] The Court of Appeal has indicated that only in 'outstandingly serious' cases of involuntary manslaughter should the sentence exceed 10 years.[49] Eleven cases in the sample attracted such a sentence, all of which were committed by male defendants,[50] nine of which have already been outlined.[51] The two other cases which resulted in particularly lengthy sentences were also characterized by high levels of moral blame for the victim's death accompanied by other aggravating features such as premeditation.[52]

6. *Impact of the Fatality on the Sentence*

Precisely because the victim's death in many involuntary manslaughter cases may be quite unlikely or unforeseeable, and the defendant's moral culpability for causing the death may be very low, it was interesting to try to assess the influence of the death on the sentence imposed by the courts. It is important to acknowledge that one can never be certain what the sentence might have been, absent the death.[53] Although it would be inappropriate to look at all 127 cases in the sample it is interesting to consider a few examples.

The most suitable cases for this purpose are those where the defendant committed an offence other than the homicide at issue. The robbery in case 113 was undoubtedly at the lower end of the gravity spectrum: whatever property may have been taken seemed to have been recovered and the amount of force used against the victim was minimal. Even allowing for a guilty plea, a

[48] The principal criteria originally set down in *Hodgson* [1967] 52 Cr App Rep 113 were: (i) the offence must be sufficiently serious; (ii) the defendant must be mentally unstable so that he would probably re-offend and present a serious danger to the public; and (iii) the defendant is thought to be likely to remain a danger to the public for a long or uncertain time. The *Hodgson* criteria were re-affirmed by the Court of Appeal in *AG's Reference No.32 of 1996 (Whittaker)* [1997] 1 Cr App R (S) 261.

[49] See *Barrell* [1992] 13 Cr App R (S) 646.

[50] Five of the 11 defendants had previous convictions for crimes of violence and another three had non-violent convictions.

[51] In case 13 the defendant was driving a stolen car and killed a police officer who was trying to arrest him. In case 20 three men killed a 7-year-old girl and badly injured her younger brother then they set fire to her house. The defendant in case 42 also killed a police officer who was attempting to arrest him, for a suspected robbery. A woman was manually strangled by her cohabitee in case 46. In case 49 two alcoholic men killed a third because he had fouled D1's carpet. A 68-year-old man was killed in case 53 when the defendant burgled his flat and he was suffocated with a pillow. Case 87 was another killing in the course of burgling the flat of an elderly person, this time an 87-year-old woman. The defendant in case 100 was so enraged at being 'cut up' by another motorist that he rammed him from behind and propelled him through the central reservation and into the path of an oncoming vehicle, causing two deaths. Finally, in case 104 a young man fired two shots into the back of a car killing one victim and injuring another.

[52] In case 40 two young men deliberately approached a man from behind and stabbed him in the back of the neck. In case 74, motivated by jealousy, the defendant deliberately stabbed two young men in the street, one of whom died.

[53] We have tried to take account of the fact that the cases in the sample were heard between 1995 and 2004.

15-month sentence nevertheless appears quite lenient,[54] and that in turn suggests that relatively little more was added to reflect the fact that a life had been lost. The same seems to be true of other cases. In case 86 a man and two women burgled the house of a 98-year-old woman, whom they knew, at night. The third defendant (a woman) went into the victim's bedroom to steal some money but was confronted by her. She grabbed the victim by the shoulders and 'guided' her to the door, but evidence of a telephone conversation showed she had pushed the victim causing her to fall. She subsequently died from her injuries. All three defendants were charged with manslaughter and burglary, on the basis that they burgled the house with full knowledge of the victim's age and frailty. The man was acquitted of manslaughter but convicted of burglary (for which he received a 3-year prison sentence). The two women were convicted of both offences, each receiving 8-year sentences for manslaughter—one also a 3-year concurrent sentence for burglary; the other got a 4-year concurrent sentence. Apart from the burglary there was also an assault. On a younger victim it would have been only very minor but on a 98-year-old woman it was clearly much more serious. In those circumstances, it is unlikely that the victim's death made a significant difference to the length of the sentences.

This is not automatically to imply any criticism of the sentence; but how much more punishment is added on to reflect the fatality should depend on the defendant's moral culpability for causing it. Minimal force seems to have been used in case 113, though the victim was unsteady on his feet (through drunkenness), which might suggest he would have had limited (if any) control of his body when pushed, and the defendant ought to have realized this. Although the third defendant who actually assaulted the victim in case 86 had been drinking, it seems she still knew what she was doing and the court adopted the principle in *Watson*[55] implying that she ought to have been aware of the danger of causing serious injury.

On the other hand, whether the fatality arose in the course of a domestic row, there were instances where the victim's death seemed to have a greater impact on the sentence. In case 8 (discussed earlier in Section 3D) the defendant's assault on his victim would surely have amounted to no more than an aggravated assault under section 47 of the Offences Against the Person Act 1861 at most. In such cases sentences of more than 3 months' imprisonment were regarded as inappropriate unless there were aggravating factors or the UDA was close to a section 18 offence of causing grievous bodily harm with intent.[56] In case 8 the violence consisted only of punches and there was an

[54] Street robberies usually attract sentences of 2–5 years. In *Brennan* (1980) 2 Cr App R (S) 250, for example, two defendants (each with long criminal records) who jostled and punched a man in a public toilet and stole his wallet containing £63 were sentenced to 3 years' imprisonment.

[55] [1989] 1 WLR 684.

[56] See eg *Leather* (1993) 14 Cr App R (S) 736 (assaulting a police officer to prevent an arrest—8 months).

element of misfortune in that a punch caused the victim to fall and bang his head against a hard surface, but the sentence was 3½ years even though the defendant pleaded guilty to manslaughter. Similarly, in one of the fight cases, case 37, both defendant and victim had been drinking heavily, and the victim accused the defendant of stealing his money. The victim became aggressive and shook the defendant by the shoulders, and they fought. The defendant twice kicked the victim in the head, killing him. His plea to manslaughter was accepted and he was sentenced to 4 years in a young offenders' institution. Had the victim not died, he could perhaps have expected a sentence of up to 3 years' detention.[57]

Cases such as these seem to echo the comments of Lord Taylor CJ in *Pettipher*[58] that, notwithstanding the relatively low level of an offender's *mens rea*, the public would want the courts to increase the sentence so as to reflect the loss of a life. It should be acknowledged that some lawyers have argued that by committing a UDA the defendant has crossed a moral threshold and cannot argue that the victim's death was simply an accident. Detailed analyses of the arguments and counter-arguments on this issue can be found elsewhere;[59] suffice it to say that there has been no response by supporters of the present law to the challenge made by Andrew Ashworth that the mere fact that a moral threshold has been crossed does not justify the significant gap that exists in many cases between the defendant's (low) moral culpability and the victim's death (for which she or he is held liable).[60]

7. *Categorizing Involuntary Manslaughter*

A. *Problems with Categorization*

Allocating a specific category of involuntary manslaughter to any particular case in the sample can be difficult for a number of reasons. First, the individual species of the generic crime are not mutually exclusive. A single case may fall within the definition of both UDA and gross negligence manslaughter. A significant proportion of reckless killings fulfil the requirements of UDA manslaughter, although they are separately categorized because they are extremely serious examples of the offence and only just fall short of murder. Second, in the vast majority of cases there was no indication in the file (in either the Crown Court or CPS files) as to the basis of the conviction.

[57] In *Moore* (1991) 13 Cr App R (S) 464 in the course of a disagreement the defendant struck the victim and kicked him in the head and body whilst he was on the ground, and a 3-year prison sentence was upheld.
[58] [1989] 11 Cr App R (S) 321.
[59] A full account of these can be found in A Ashworth, 'A Change of Normative Position: Determining the Contours of Culpability in Criminal Law' (2008) New Crim LR 232–56.
[60] Ibid.

B. *Categorization of the Sample and the Relationship with Sentence*

Nevertheless, an attempt has been made to offer some analysis of the 127 cases in the sample, and Table 3 shows the relationship between the category of involuntary manslaughter and the sentence. Reference was made in the introduction to anecdotal evidence which suggests that the majority of involuntary manslaughter convictions are returned on the basis of an *unlawful and dangerous act* and this study clearly supported this. There were 110 UDA cases in the sample and in the overwhelming majority of these (100, or 90.9%) death was caused as the result of some sort of assault against the person. Five were committed during a dwelling-house burglary, three during a robbery and two occurred through an offence of arson. In each of the burglaries and robberies, and in one of the arson cases the defendant committed some sort of assault against the victim, but in case 64 (where a teenager set fire to a man's coat[61]) there was no assault. Thus, if the Home Office's (2000) and the Law Commission's (2006) proposed reforms confining UDA manslaughter to cases where the defendant was committing an offence against the person were to be implemented, only one of the 110 cases from this sample would not have resulted in a manslaughter conviction.

The gravity of UDA manslaughters will probably be influenced—though not conclusively so—by the seriousness of the unlawful and dangerous act, and by the risk of causing serious or fatal injury. Only three of the UDA manslaughters in the sample were regarded as 'outstandingly serious' in that the sentence passed was one of at least 10 years' imprisonment. In case 42 (see Section 3G)

Table 3. Category of Manslaughter by Sentence

	Non-custodial sentence	Less than 2 years prison	2 but less than 4 years prison	4 but less than 6 years prison	6 but less than 8 years prison	8 but less than 10 years prison	10 years or more prison	unknown	Total
UDA	2	4	22	40	28	8	3	3	110
GN	0	0	1[a]	0	0	0	0	0	1
UDA/GN	0	1[b]	0	0	0	0	0	0	1
UDA/Reckless	0	0	0	2	2	3	8	0	15
Total	2	5	23	42	30	11	11	3	127

[a]This was case 19, discussed earlier in Section 3B.
[b]This was case 95, also discussed earlier in Section 3B.

[61] See text following (n 28). Although setting fire to a coat which is being worn is clearly dangerous, it seemed that in this case the 13-year-old defendant had not appreciated the true extent of the risk he had created; he thought it was just a prank! Thus, this case is treated as a UDA manslaughter rather than a reckless killing.

the defendant shot a police officer who was trying to arrest him for suspected robbery. The two defendants in case 49 exacted revenge against a close acquaintance who had fouled D1's carpet by punching and kicking him in the head and chest. The young male defendant in case 87 (see Section 6) killed an 86-year-old woman whilst burgling her flat. Each case contained aggravating features, including not insignificant moral blame for their victims' deaths.

In gross negligence cases it is the degree of negligence and the probability of death which will surely have a major bearing on the gravity of the manslaughter.[62] Both relevant cases in the sample (cases 19 and 95, see Section 3B) involved firearms which are potentially fatal weapons, but (if the defendants' accounts are taken as accurate) the actions of the victims played significant roles in the discharging of the guns and that reduces the degree of the defendants' negligence and their causal responsibility for the fatalities. Thus, the sentences were relatively modest.

The fact that, by its definition, reckless manslaughter is so close to murder suggests that the sentence is likely to be relatively severe. There were 15 such cases in the sample, the average sentence for which was 9.3 years' imprisonment. Not surprisingly eight of these cases were 'outstandingly serious'. Examples of these included case 13, where the defendant killed a police officer whilst trying to resist arrest; and case 20 where three men killed a 7-year-old girl by setting fire to her home. At the same time it was interesting to find that in case 84 the court imposed the relatively modest sentence of 4 years' imprisonment. The defendant, a man with no previous convictions, was driving home at about midnight and it was snowing heavily. As he did so he saw people on the side of the road. In the meantime the victim, who was walking home with his girlfriend, had stumbled into the road and had been struck by a vehicle. He was being attended to, but the defendant was anxious to drive past and he seemed impatient and indifferent to the victim's injuries. He drove off but then returned, apparently angry, to where the victim was lying in the side of the road. He ignored everyone and drove on, trapping the victim under his car and killing him. The victim's girlfriend was thrown clear. The defendant denied murder but pleaded guilty to manslaughter. This case could be construed as a reckless manslaughter on the basis that when he drove over the victim the defendant knew there was a high probability that serious harm would be caused.

Even if case 84 is treated as no more than a UDA manslaughter, case 88—which is arguably a clearer example of reckless killing—shows that such manslaughters may attract a relatively modest sentence. There had been a

[62] Sentences for *gross negligence* manslaughter similarly vary. The Court of Appeal upheld a 5-year sentence in *Rodgers* [2004] EWCA Crim 3115, [2005] 2 Cr App R (S) 105 where the defendant landlord (who pleaded guilty) installed a gas fire in a flat without adequate ventilation and two tenants died from carbon monoxide poisoning. *Kite* [1996] 2 Cr App R (S) 295 was the manager and personification of a company which organized outdoor leisure activities for young people. Four were drowned when on a canoeing trip organized by the company after the defendant failed to ensure adequate safety precautions. The Court upheld a 2-year sentence.

history of antagonism between the victim and the two defendants (father and son), both of whom were sober at the time. The three participants argued in the street and the defendants then attacked the victim with a table leg and a knife. He was found dead in his bath the next morning. The CPS could not prove precisely which of the defendants was responsible for which blows and only the father was charged with murder.[63] He pleaded guilty to manslaughter and was sentenced to 5 years' imprisonment.[64] It is surely very difficult to resist the implication that the defendant must have known that serious injury was very likely. Thus, these latter two cases seem to suggest that relatively high moral blame for the victim's death will not automatically result in a severe sentence. Moreover, the strongest mitigation in both cases was probably the guilty pleas, for which they both seem to have been given considerable discount.

C. *Categorization and Proposed Changes in the Substantive Law*

Andrew Ashworth has recently suggested that the common minimum culpability requirement for all involuntary manslaughter should be awareness of the risk of serious harm.[65] One can, of course, only make a very rough and ready estimate of what effect that would have had on the cases in the sample. The method of killing is far from conclusive—one can intend serious harm simply by punching and one may not intend such harm even though the victim was shot. The precise part of the victim's body that was assaulted may be more helpful, but one cannot assume that the defendant deliberately aimed at it, especially when the incident happened very quickly and/or the defendant was not thinking clearly or calmly. The defendant might be extremely angry and act in the heat of the moment but she or he may still intend to cause serious injury. Drunken defendants may also have such an intent. All that said, we estimate that 88 cases in the sample (ie just over two-thirds) would be very likely to result in involuntary manslaughter convictions, and a further 23 (another 18.1%) might also result in a similar outcome. But we think that 16 cases from the sample (12.6%) would probably not have been treated as manslaughter on the Ashworth model. Thus, the only criminal liability that would arise in these cases would be for the unlawful and dangerous act, and that might result in a lesser sentence being imposed. Reforms based on the Ashworth model would bring symmetry to the law and would simultaneously address concerns that the element of luck (whether the victim lives or dies) currently plays too great a part in offenders' liability.

[63] His son was charged with, and convicted of, inflicting grievous bodily harm and sentenced to 2¼ years' imprisonment.
[64] The judge indicated the sentence would have been 6 years' imprisonment but for the guilty plea.
[65] Ashworth (n 25) 236–39.

It is also interesting to consider the possible implications of the Law Commission's recommendation that it should be second degree murder where the defendant killed intending 'to cause injury or fear or risk of injury' whilst simultaneously 'aware that his or her conduct involved a serious risk of causing death . . . '.[66] Again, it is impossible to make any confident predictions about what would have happened in the cases in the sample had this recommendation been in force, but we believe that at least 14 of the 15 cases which we have treated as reckless manslaughters—ie about 11% of the sample—would probably have resulted in second degree murder convictions.[67] The only doubtful case is case 13 where the defendant drove a suspected stolen vehicle erratically so as to shake off the police officer who was trying to arrest him. One of the principal reasons why the Commission recommended an alternative form of murder was to create an additional mainstream homicide offence, because the two existing offences are being used to cover too great a variety of cases. We agree that murder and manslaughter should be defined more narrowly and that would underline the need for at least one new offence. However, this in turn raises significant and complex issues concerning the restructuring of the homicide law that are beyond the scope of this article.

8. *Conclusions*

One of the more striking statistical features was the high number of killings of an acquaintance, which seemed to reflect a contrast between involuntary manslaughter cases and murder and manslaughter generally—a significant number of all murders and manslaughters concern people who know each other, but murder and manslaughter generally involve more cases where the parties are familially or domestically related.

The lower moral culpability requirements for involuntary manslaughter tentatively indicated that punching, kicking and stamping would be one of the more common methods of causing death. Similarly, it was unsurprising to find that many defendants were angry when they killed. At the same time, though, as with homicides generally, there was a broad range of contexts and circumstances in which these manslaughters were committed—young parents (almost invariably men) who could not cope with looking after crying babies; defendants bent on exacting revenge; offenders who killed trying to commit some other crime such as robbery or burglary; and people arguing or fighting, often in the street.

[66] Law Commission (n 5) para 9.6(2).

[67] Some of the cases in our sample broadly resembled scenarios suggested by the Law Commission as meriting the label murder in the second degree. For example, compare the Commission's 'D sets fire to V's house at night, knowing that V is asleep inside. His intention is to give the occupants a severe fright. V is killed trying to escape' (n 5, para 2.98(1)), with case 20 where the defendants set fire to the victims' house killing a 7-year-old girl and severely injuring her younger brother.

In line with anecdotal evidence, the sample was dominated by UDA cases where death resulted through the commission of some other crime; gross negligence killing, especially where the defendant was *prima facie* acting lawfully, was rare, though there was a not insignificant number of comparatively serious reckless killings. Most of this latter group would be regarded as murder in the second degree if the Law Commission's recommendation was implemented.

Categorizing involuntary manslaughter cases is not always easy, especially identifying clear examples of reckless manslaughter. This study supports the view that most involuntary manslaughters fall within the unlawful and dangerous act category, though very occasionally such cases may also be seen as examples of gross negligence killing. Deaths that occur in the course of other offences often appear at first sight to be largely 'accidental' or little more than by-products of the unlawful and dangerous act. The study also offers very tentative evidence that in manslaughters committed in the furtherance of other crimes the sentence may not be significantly increased because of the fatality; though where death occurred in the course of a domestic row, the sentence did appear to have been more influenced by the loss of a life.[68]

There has long been a concern that the crime of (involuntary) manslaughter encompasses too broad a range of cases, and that one of the ways in which this is demonstrated is through the possible variations in defendants' moral culpability for causing death.[69] This empirical study lends considerable weight to this concern containing as it does, at one extreme, cases where as a result of literally one punch or slap the victim falls and hits his or her head against a hard surface and dies, and at the other extreme, cases where a gun has been fired into the back of a car where people are seated, and driving a car directly at a person. Cases which reveal such low levels of moral blame for causing death vary in their circumstances.

There is nowhere else in English criminal law where one crime stretches to encompass such a vast range of moral blame for the resulting harm. Mitchell recently argued that defendants with very low moral culpability—such as the one-punch killers—ought not to be convicted of manslaughter, but since there

[68] This conclusion may now need to be read in the light of the Court of Appeal's recent decision in *R v Appleby* [2009] EWCA Crim 2693 [22] where Lord Judge CJ gives detailed consideration to sentencing in cases of unlawful act manslaughter and concludes

> the increased focus on the fact that a victim has died in consequence of an unlawful act of violence, even where the conviction is for manslaughter, should, in accordance with the legislative intention, be given greater weight. It is with these considerations in mind that we have approached these individual cases, and they will, we anticipate, provide sentencing courts with some assistance about the way in which these difficult sentencing decisions should be approached in future.

[69] See eg the concern expressed by the Law Commission in the early stages of its recent review of the homicide law—'[w]e have provisionally concluded that this is too broad a range of cases to be covered by a single crime, manslaughter, that is already far too broad'; Law Commission, 'A New Homicide Act for England and Wales? A Consultation Paper' (Law Com No 177; TSO, London 2005) para 2.63.

seems to be such enormous insistence that they be convicted of some sort of homicide, he suggested they might instead be convicted of a UDA causing death.[70] Ashworth, though, urged us to stand firm—'if we are not to be governed by the law of deodand or by a raging constructivism, we should have the courage to refuse to label such cases as homicide offences. It is wrong to be influenced by the fact that D was committing an offence by doing the act that caused death, as to turn the offence into homicide even when the final result lies outside the scope of the foreseeable risk created by the offence D was committing . . . '.[71] It is understandable that the next-of-kin should want the person who was causally responsible for their loved one's death to be held accountable for it, but a sound rationale based on moral culpability is imperative for criminal liability. There can surely be little doubt that the law's current treatment of 'one-punch' cases as manslaughter is unjustifiable; the more difficult question is whether to ignore wider political considerations and the desire to appease the populist call for a homicide conviction as argued by Ashworth, or whether to adopt a compromise as suggested by Mitchell.

Given that the boundary between involuntary manslaughter and murder is *prima facie* a question of fact—whether the defendant had the intent necessary for murder—it was surprising to find no clear rationale for procedural decisions (formally charging manslaughter rather than murder, and accepting a plea to manslaughter) which negated the possibility of a murder conviction. This puzzling aspect of the study is particularly acute in an admittedly small number of cases of what appeared to be reckless manslaughter where there was no trial. It is surely very desirable in these instances that the court is given the opportunity to consider the evidence; otherwise, the criminal justice system is paying no more than lip service to the need to distinguish the most serious from the lesser criminal homicides. Furthermore, there is the danger of a loss of public confidence in the criminal justice system through what are perceived to be unduly lenient convictions.

[70] Mitchell (n 10).
[71] Ashworth (n 25) 242.