Minding the gap in unlawful and dangerous act manslaughter: a moral defence for one-punch killers

Barry Mitchell

Table of Contents

Journal Article

Journal of Criminal Law

J. Crim. L. 2008, 72(6), 537-547

Subject
Criminal law

Keywords
Assault; Causation; Foreseeability; Ireland; Unlawful act manslaughter

J. Crim. L. 537 *Abstract* Whilst it is true that the one-punch killer has crossed a moral threshold and acted wrongfully by committing an assault, his victim's death may be both unforeseen and unforeseeable. The gap between what was foreseen/foreseeable and death may thus be considerable. This article suggests it is too great; convicting the killer of manslaughter places too much weight on the element of luck. The task then is to identify an appropriate principle for regulating the gap and in the course of tackling this task the article considers and rejects, *inter alia,* a recent recommendation by the Law Reform Commission of Ireland.

Keywords Unlawful act manslaughter; Moral threshold; Moral culpability

Much of the discussion generated by publication of the Law Commission's Consultation Paper and Final Report on the law of homicide [1] and, indeed, the Ministry of Justice's current review has concentrated on offences at the "upper end' of the scale, especially on the Commission's proposals for grading murder by degrees and what has hitherto been referred to as voluntary manslaughter, and the way this might be restructured. Comparatively little has been said about involuntary manslaughter, [2] particularly about offences at the lower end of the scale--the critical point at which deaths cease to be accidental, or perhaps merely negligent, and become criminal. The debate about the minimum moral culpability for manslaughter has been raised

particularly in relation to unlawful and dangerous act manslaughter (hereafter "UDA manslaughter')--with which this article is especially concerned--rather than manslaughter by gross negligence, and the Law Commission's latest proposals appear to rely heavily on the Home Office's recommendations made in 2000. [3]

Conviction for UDA manslaughter can result when, perhaps in the course of a drunken fight, D punches V who falls over, hits his head on *J. Crim. L. 538* a hard surface causing a fractured skull from which V subsequently dies. [4] D has committed a crime (the unlawful act), namely common assault, and his act is objectively dangerous because it created a foreseeable risk of causing harm. There are no reliable research data on the frequency or volume of such cases, though some broadly similar examples have been formally reported, such as *R* v *Mallett* [5] where D quarrelled with his neighbour and punched V in the face. Such a punch would normally have produced no real injury but unfortunately V fell awkwardly and hit his head on a paving-stone, and subsequently died. Likewise, in *R* v *Williams,* [6] D twice pushed V and slapped her once, causing her to fall backwards and hit her head against a wall-mounted heater, and she later died. Both defendants were convicted of UDA manslaughter.

The fact that the courts interpret the dangerousness of D's act objectively--that a sober and reasonable person would have foreseen an unjustifiable risk of some injury [7] --is in contrast with the view taken historically [8] and was described by one commentator as "staggeringly severe'. [9] Simester and Sullivan explain that in UDA manslaughter the danger inherent in D's unlawful act may not seem very great and yet D is convicted of a homicide: "the connection between the unlawfulness of D's act and its dangerousness may be extremely tenuous'. [10] They then contrast *Mallett* (above) with *Arobieke,* [11] even though neither case involved a risk of serious injury. Arobieke frightened V by following him to a railway station and searched for him on a train. In trying to escape V crossed a live railway track and was fatally electrocuted, but D could not be convicted of UDA manslaughter because he had committed no unlawful act. As Wilson points out, [12] the current law follows the objective approach taken by the House of Lords a few years earlier in *DPP* v *Smith* (on intent), but whereas that was subsequently corrected by s. 8 of the Criminal Justice Act 1967 no similar correction has been made to the meaning of "dangerous' in UDA manslaughter. Interestingly, if, on the other hand, having been punched, V incurs serious injury from hitting his head on the hard surface but (fortunately) does not die, D would presently be liable to conviction for unlawfully inflicting grievous bodily harm (Offences Against the Person Act 1861, s. 20), but would not be liable for the then Home Office's proposed replacement offence *J. Crim. L. 539* of recklessly causing serious injury because he does not knowingly risk causing such harm. [13] This in itself is, of course, not an argument for limiting the one-punch killer's liability to something less than manslaughter--amongst other things the Home Office's proposals may not be well founded. But this lack of consistency gives further cause for concern that undue significance is being attached to the fact that V dies in the original scenario.

Criminal lawyers, it seems, are divided in their opinions on the soundness of the view that the one-punch killer should be convicted of manslaughter. [14] This article begins by comparing the element of dangerousness in one-punch killing with that in other forms of what might loosely be called "lesser homicides'. After examining the arguments relating to the one-punch killer's moral culpability for causing death, the article briefly looks at the significance which should be attached to the consequences of our actions. Finally, a recent compromise solution offered by the Law Reform Commission of Ireland is discussed. The first two of these sections are closely related, in that, as a general proposition, the more inherently dangerous an activity is the more likely it is that serious (possibly fatal) harm is foreseeable and/or foreseen.

Comparing the dangerousness of one-punch homicides with other lesser fatal offences

Homicides arising out of minor assaults cover a category of cases which reveal a variety of facts and circumstances. Obviously, the unlawful act may not literally take the form of one punch; there may be a combination of physical assaults such as pushes, slaps, punches or kicks--and a further combination if D uses some form of weapon or instrument--each of which may be made against different parts of V's body. The precise nature of the assault will have an influence on the probable seriousness of the injuries, both what is foreseeable and foreseen by D. In the normal course of events the simple act of D punching V in the face creates a danger of causing only minimal harm, notwithstanding that it actually causes V to fall backwards, hit his head against a hard surface, and die. Only relatively minor injury, perhaps nothing more than a bruise or a broken small bone at most, may be foreseeable or (in the absence of any mental incapacity) foreseen. From both a subjective and objective perspective, more serious harm (including the possibility of death) is unforeseeable other than as a theoretical possibility, and only in the sense that it cannot be ruled out entirely. Although it may strictly be possible for an expert with special knowledge to punch someone on *J. Crim. L. 540* a particular part of the body so as to cause serious or fatal injury, the chances of it occurring in the vast

majority of cases are very remote. There is surely a broad analogy here with the *de minimis* rule, in the sense that the likelihood of serious harm, and certainly death, is extremely small.

At the same time, it is not difficult to imagine a situation in which the danger is much greater even though the assault *per se* is a minor one. Thus, if V was physically very frail, and especially if V was unsteady on his feet and had a brittle skull, a single punch might cause serious or even fatal injury. It will be argued that whether such situations should give rise to criminal liability for manslaughter should depend on the extent to which the injury is foreseen or foreseeable. Similarly, in attempting to support the importance attached to the actual harm caused Clarkson and Keating offered the example of "a workman high on a building who negligently tosses a brick to the street below where it strikes and kills a passer-by'. [15] Of course, this is not simply bad luck (an issue which is discussed more fully below), but it does not constitute argument in favour of convicting the one-punch killer of manslaughter, because throwing a brick to the street is inherently more dangerous than throwing a punch. It is not the fact that death is caused in the course of a dangerous criminal act *per se* that is crucial; rather it is the degree of dangerousness arising from the act.

Clearly, it is highly desirable--some might say imperative--that in the absence of good reasons to the contrary there should be a common minimum level of moral culpability for all forms of criminal homicide. [16] Compare, therefore, causing death by dangerous or careless driving with one-punch homicide. Although lawful *per se,* driving is, by its very nature, a significantly more dangerous activity than punching someone in the face. Again, the likelihood of serious (or fatal) injury will vary from one motoring situation to another, but in almost all instances even a moment's inattention or lapse of concentration (of which surely virtually all motorists are guilty at some time) can result in serious, possibly fatal injury. Whether harm is or is not caused and, if it is, the seriousness of that harm, may well be determined to a large degree by sheer chance, but the likelihood of death or serious injury is comparatively greater than in cases where one person punches another. Even where the level of moral culpability is relatively low, as in the offence in s. 2B of the Road Traffic Act 1988 of causing death by careless, or inconsiderate, driving, the argument in support of holding drivers liable for death is stronger (though not necessarily convincing) because the risk is inherently greater in driving. Yet there has been no shortage of criticism of causing death by careless, or inconsiderate, driving precisely ***J. Crim. L. 541*** because of the significant discrepancy between D's moral culpability and causing death. [17]

Other than through committing an unlawful and dangerous act liability for manslaughter can arise through either gross negligence or recklessness. The latter requires D to have foreseen a serious or significant risk of death or serious harm, [18] so the moral culpability for causing death is much greater than that of the one-punch killer. Indeed, those guilty of this species of involuntary manslaughter are very close to being guilty of murder: Mrs Hyam, [19] whose offending is often used to illustrate the current crime of reckless manslaughter, was of course convicted of murder. The former (i.e. gross negligence manslaughter) requires D to have displayed a standard of care which fell far below that which could reasonably have been expected in the circumstances, and the negligence must have created a risk of killing. [20] Again, the degree of moral culpability for causing death here is markedly greater than in many cases of UDA manslaughter, and certainly than in one-punch homicides. The gap between D's moral culpability and V's death is much less in gross negligence manslaughter. Although there is a conspicuous absence of any reliable empirical research on this offence, it is probably committed by persons acting in the course of their profession or vocation (such as a medical practitioner or heating engineer), or perhaps by a really bad driver. In these situations the nature of D's activity is likely to be inherently much more dangerous than that of the one-punch killer.

The issue is whether there is good reason for attaching legal significance to the variations in the degree of dangerousness inherent in different activities which would then call for amendment to the current definition of UDA manslaughter. Since the latter is a very serious offence the question can only be addressed by looking at the extent of the moral culpability of the unlawful act and of the part played by luck in the outcome of death.

Moral luck and the focus of attention for assessing the scope of moral culpability

The current law on UDA manslaughter is an example of constructive liability, and the case of the one-punch killer graphically illustrates the common objection that D lacks sufficient moral culpability for causing V's death; the gap between moral blame and death is simply too great. Defenders of the current law usually argue that death was not merely unfortunate or accidental: by punching V (i.e. deliberately wronging V) D "changes [his] normative position vis-à-vis the risk of adverse consequences of that wrongdoing to V, whether or not foreseen or reasonably foreseeable'. [21] Put simply, by punching V, D has made his own luck.

J. Crim. L. 542 Andrew Ashworth has recently exposed serious limitations to the significance of the change of normative position and has demonstrated that the fact that D crossed a moral threshold does not address the extent of his liability, i.e. the gap between what was foreseen or foreseeable and the actual outcome. [22] John Gardner, who is a leading advocate of a redefined version of UDA manslaughter and advocate of what he calls "moderate constructivism', has accepted that undue significance has been attached to the change of normative position, though he continues to favour constructive criminal liability. [23]

Ashworth suggests that the law ought to be influenced by the scope of the risk, as judged by "common experience or (if available) statistics'. [24] Statisticians--perhaps actuaries--may be able to calculate the likelihood of V dying if punched once by D in any given set of circumstances, and the law could determine (albeit somewhat arbitrarily) the statistical/numerical point at which the risk would be regarded as foreseeable. Quite what the procedural implications of this would be is not absolutely clear; presumably the assessment would have to be made at an early stage so that the defendant knows the nature and gravity of the charge against him. The precise meaning of the phrase "scope of the risk' is also not absolutely clear, though Ashworth subsequently refers to the scope of the "foreseeable risk'. One of the implications of this is that it reminds us that the element in UDA manslaughter which has real bearing on the extent of D's moral culpability is the dangerousness of the act. Support for this is already available in some of the case law. In *R* v *Watson,* [25] D's act of burglary was dangerous because V's frailty and old age were apparent so that there was a risk of causing harm. In *R* v *Dawson,* [26] on the other hand, no such risk was apparent, and D's robbery was thus not dangerous (or not dangerous enough). Thus, whereas in the majority of one-punch homicides D's act is insufficiently dangerous because it creates a risk of only minor harm, the argument for holding D liable for manslaughter would be significantly stronger if it was apparent that V was frail, and especially if it was clear that V was unsteady on his feet and had a brittle skull, because there would be an obvious risk of serious, possibly fatal, injury. Similarly, looking at the facts in *R* v *Mitchell* [27] it is arguable that pushing one elderly individual so that he bumps into another who is thereby knocked to the floor creates a sufficiently dangerous risk for the purposes of UDA manslaughter.

The concept of "foreseeable risk' seems to correspond nicely to the criminal and civil laws' principles on causation, but one obvious issue is ***J. Crim. L. 543*** how subjective or objective to make it. Given the difference in the nature and functions of these two realms of the law, especially in personal fault, it is arguable that criminal liability should only arise where D was at least capable of foreseeing the risk even if he or she did not actually advert to it at the material time. [28] This would obviously be appropriate if the law wishes to highlight the significance of D's moral culpability for the consequence. [29]

Jeremy Horder has argued that the courts have applied a principle that the harm for which D is criminally liable must not be disproportionate to that which he intended or foresaw, [30] otherwise the part played by luck is given undue prominence, and insofar as there is a ladder of offences against the person it would not be disproportionate to hold D liable for the harm on the next rung above that which was intended or foreseen. At first blush the argument that a manslaughter conviction is justified if serious harm was foreseen (or foreseeable) might appear attractive, and it would create some symmetry with the legal definition of murder. However, the concept of "serious harm' is very ambiguous; it may include life-threatening or non-life-threatening harm. If non-life-threatening harm was foreseen or foreseeable, but V died--perhaps as a consequence of a highly unusual medical condition--making D liable for a criminal homicide would place considerable weight on the improbability of death. If a person foreseeably risks breaking another's arm, there is still a considerable gap between that and death. The broken arm might require surgery and something unforeseen might happen during surgery resulting in the patient's death, but that merely illustrates the unlikelihood of death. In the case of the one-punch killer it is highly unlikely that even non-life-threatening serious injury would be foreseen or foreseeable, and the gap between minor injury and death is that much greater again.

The importance of consequences

There are of course good reasons why we should not overlook the consequences of our actions. First, D will feel morally burdened with V's death whereas he clearly would not had V suffered only minor injury. ***J. Crim. L. 544*** Secondly, D cannot undo his act because V has died, whereas he could promise not to behave the same way towards V (or anyone else) in the future if the outcome had been a relatively minor injury. Thirdly, D deserves censuring for causing V's death because merely convicting him of a (non-fatal) criminal battery would suggest that V's death is unimportant. [31] In addition, Honoré argued that we should be judged by the outcomes of our behaviour because (a) there is an inevitable element of risk in our everyday lives, since we cannot exert complete control over the outcomes of our actions--this is sometimes referred to as the "betting argument'; and (b) the outcomes of our actions "make us what we are', they are a necessary part of our agency; we are judged by the consequences of our actions in everyday life. [32]

John Gardner resolutely endorses Honoré's view of the need for the law formally to take account of the outcomes of our actions, whether or not they were foreseen or foreseeable. [33] Indeed, he seeks to develop Honoré's claim of the importance of outcomes to our moral agency by arguing that reasons (and even obligations or duties) to succeed in bringing about an outcome are inevitably "primary' to reasons to merely try, for the very notion of trying cannot but be understood in the transitive sense--we always try *to do something:* we never just try *simpliciter.* However, whilst it is correct to say that society regards outcomes as "not unimportant', it would be quite misleading to suggest that they are treated as overwhelmingly significant. Indeed, there is clear evidence that in assessing wrongdoing the public adopt a balanced, analytical approach and do attach weight to the dangerousness of the activity and to the actor's moral blameworthiness. [34] The public may want the sentence imposed on offenders to take account of the actual consequence of D's act, [35] but when encouraged to think about specific circumstances they recognise some vital factual distinctions which lead them to different conclusions about liability. In a survey conducted in September and October 1995, respondents were invited to consider a scenario in which a man gently pushed a woman during the course of an argument in the supermarket queue, with the result that she unexpectedly tripped and bumped her head against a wall. The woman had an unusually thin skull and died from her injuries. The majority thought the man should not be convicted of a criminal homicide because death was really only accidental. [36] Only when the gap between what D intended or foresaw and V's death is narrowed down did they favour convicting D of criminal **J. Crim. L. 545* homicide. (Understandably, they found it difficult to identify the precise point at which the defendant should become guilty of manslaughter.) Naturally, it does not necessarily follow that the law should invariably reflect what is perceived as public opinion; the latter may, for example, be based on a misconception or misunderstanding. [37] At the same time though, there was no indication during the public survey of any such misunderstanding, and law reformers should be very careful before going against the popular instinct.

An Irish compromise solution?

The Law Reform Commission of Ireland (hereafter the "LRC') has recently recommended that the existing offence of UDA manslaughter be retained, but also expressed concern that "it punishes very harshly people who deliberately perpetrate minor assaults and thereby unforeseeably cause death, due perhaps to an unexpected physical weakness in the victim'. [38] Such minor acts of deliberate violence which unforeseeably result in death should instead be prosecuted as "assault causing death', [39] an offence which would be located below involuntary manslaughter on the homicide ladder. Whilst the assault *per se* is intended, a reasonable person would have foreseen neither death nor serious injury. [40]

In making such a recommendation the LRC seems to agree with commentators such as Anthony Duff who, mindful of the communicative function of the criminal law, are worried that a failure to recognise formally the consequences of our actions would give the impression (to the world at large) that causing harm did not matter. [41] Removing these deaths by minor assaults from the scope of UDA manslaughter may (without more), in the LRC's view, have traumatic consequences for the secondary victims--the deceased's family. Thus, they felt there is a need for a new homicide offence where the fact that a life had been lost should be reflected not only in the offence label but also in the sentence. [42]

The danger when trying to take account of the various (conflicting) demands being made of the legal system in its response to cases of this sort is that ultimately we have unrealistic expectations of what it should achieve. No one would seriously suggest that the legal system should send a message to the public that the consequences of their actions are irrelevant but, especially in more serious cases, where the punishment is likely to be more severe, the nature and extent of the **J. Crim. L. 546* offender's moral culpability must surely play a vital role. Law reformers and law makers have to decide what should be the minimum moral culpability requirements to justify the imposition of criminal responsibility and liability for a consequence. The LRC's recommendation offers no help here at all. Indeed, this was openly acknowledged; "[t]he Commission does not believe that the occurrence of death necessarily increases the culpability of the accused, but a fatality does undoubtedly give a much more serious dimension to the offence'. [43] Unfortunately, the report suggests that the LRC did not examine the arguments whether this dimension--the impact of the law's response in such cases on victims' families--should be addressed by the criminal justice system.

There is no doubt that the criminal justice system should not simply ignore the concerns of victims of crime, but in trying to strike an appropriate balance between their legitimate expectations and those of offenders, we should not forget there is a separate arm of the legal process, the civil system, which is traditionally the forum in which victims can seek adequate redress. A single legal system cannot reasonably be expected to provide satisfactory comprehensive responses to offenders and victims

simultaneously. Thus, despite its superficial attraction, the LRC's proposal should be rejected, because, by its own admission, it does not seek to provide an appropriate rationale for the imposition of criminal liability.

Conclusion

Supporters of the current law on UDA manslaughter and the treatment of one-punch killers as manslayers argue that even though we do not have complete control over the outcome of our actions the fact is that we live in a hard world and consequences do matter in contemporary society. We are judged and held accountable for the outcomes of our action. Whilst it is true that society praises those who succeed in what they set out to achieve, where success comes with a dollop of luck--as is inevitable to some extent--the extent to which we hold persons responsible, and perhaps praise them is reduced and sometimes entirely extinguished. Moreover, our judgments of one another are not made in a context which is the true equivalent of or analogous to that of a criminal trial. People may be rewarded because of their achievements or be blamed for what they do not achieve, but (1) the punishment we feel for being blamed is not the same as that which is deliberately inflicted by the sentencing court when it deprives the defendant of his liberty or imposes a severe financial penalty; and (2) the failure to achieve success may be due at least in part to the actions (or inactions) of others (over whom the defendant had no influence or control), so the blaming of the person directly responsible for the failure to achieve is unduly harsh, and that is clearly not a good reason for adopting the same approach in the criminal justice system.

J. Crim. L. 547 The moral luck argument which is heavily relied on by moderate constructivists in favour of treating the one-punch killer as a manslayer is an extreme argument. On the most charitable view the current law, based on the unlawful act theory, is untenable; even moderate constructivists--who, by definition, accept that the existing law is unfairly wide--are clearly struggling to offer a tenable rationale for a *narrower* form of UDA manslaughter. They have yet to offer an argument establishing a moral link between an assault on V and V's death. [44] The criminal law has important communicative and censuring functions, but in cases such as that of the one-punch killer a manslaughter conviction would merely infer "the misfortune which befell both the victim and [D]. The criminal law is a censuring institution. It should censure people for wrongs, not misfortunes, and should censure them fairly and proportionately'. [45] Apart from the obvious need to protect the public, one of the other major functions of the criminal justice system is to provide a proportionate response to crime and criminality.

The argument favoured here is that liability for manslaughter should depend on the nature of the activity in which the killer was engaged. Activities such as driving carry the inherent risk of killing or causing serious injury. Other activities, even including punching another individual, are inherently less dangerous but may become much more so if the facts follow a particular pattern (such as V's apparent frailty or unusual characteristic which makes him exceptionally vulnerable to even one punch). There is no good reason for deviating from a uniform standard and reducing the minimum moral culpability in one-punch homicides. Liability for manslaughter ought therefore to arise only where there is a foreseeable or foreseen risk of killing or causing at least serious (and preferably life-threatening) harm. It is therefore a matter of considerable regret that the current review of the homicide law is simply ignoring the issue. [46]

Professor of Criminal Law and Criminal Justice, Coventry University Law School; e-mail: b.mitchell@coventry.ac.uk.

Footnotes

1 See Law Commission, *A New Homicide Act for England and Wales? A Consultation Paper,* Consultation Paper No. 177 (2005); and Law Commission, *Murder, Manslaughter and Infanticide,* Law Com. No. 304 (2006).

2 The two Law Commission reports (ibid.) devote just two and five pages respectively to the subject.

3 See Home Office, *Reforming the Law on Involuntary Manslaughter: The Government's Proposals* (TSO: 2000).

4 V may, of course, even have an unusually thin skull which, in the circumstances, would not normally have been fractured; but under the principle in *R* v *Blaue* [1975] 3 All ER 446 D must take the consequences of this--the unusual (and unforeseeable) characteristic does not provide a defence to a charge of UDA manslaughter.

5 [1972] Crim LR 260.

6 [1996] 2 Cr App R (S) 72.
7 See *R* v *Church* [1966] 1 QB 59.
8 See, e.g., *Fourth Report of HM Commissioners on Criminal Law* (1839).
9 See R. Buxton, "By Any Unlawful Act' (1966) 82 LQR 174 at 192.
10 A. P. Simester and G. R. Sullivan, *Criminal Law: Theory and Doctrine,* 3rd edn (Hart Publishing: Oxford, 2007) 378.
11 *R* v *Arobieke* [1988] Crim LR 314.
12 W. Wilson, *Criminal Law: Doctrine and Theory,* 2nd edn (Longman: Harlow, 2003) 399, 400.
13 See Home Office, *Violence: Reforming the Offences Against the Person Act 1861* (HMSO: London, 1998), Draft Bill, clauses 2(1) and 14(2).
14 It is interesting to compare the Law Commission's recommendation in 1996 to abolish UDA manslaughter precisely because the gap between what was intended or foreseen and the outcome (death) was too wide (see *Legislating the Criminal Code: Involuntary Manslaughter,* Law Com. No. 237 (1996) para. 3.6, with the Commission's subsequent proposal to retain a redrafted (slightly narrower) version of the offence (Law Commission, above n. 1)).
15 C. M. V. Clarkson and H. M. Keating, "Codification: Offences against the Person under the Draft Criminal Code' (1986) 50 JCL 405 at 422.
16 See, especially, A. Ashworth, "Manslaughter: Generic or Nominate Offences?' in C. M. V. Clarkson and S. Cunningham (eds), *Criminal Liability for Non-aggressive Death* (Ashgate Publishing: Aldershot, 2008) 236-9.
17 See, e.g., S. Cunningham, "Punishing Drivers Who Kill: Putting Road Safety First?' (2007) 27(2) *Legal Studies* 288.
18 See, e.g., *R* v *Lidar* [2000] 4 *Archbold News* 3.
19 *Hyam* v *DPP* [1975] AC 55.
20 *R* v *Adomako* [1995] 1 AC 171.
21 J. Horder, "A Critique of the Correspondence Principle' [1995] Crim LR 759 at 764.
22 A. Ashworth, "A Change of Normative Position: Determining the Contours of Culpability in Criminal Law' [2008] 11(2) *New Criminal Law Review* 232-56.
23 See J. Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Hart Publishing: Oxford, 2007) ch. 12, where he cites his "Obligations and Outcomes in the Law of Torts' in P. Cane and J. Gardner (eds), *Relating to Responsibility: Essays for Tony Honoré on his Eightieth Birthday* (Hart Publishing: Oxford, 2001); and "The Wrongdoing that Gets Results' (2004) 18 *Philosophical Perspectives* 53-88.
24 Ashworth, above n. 22 at 17.
25 [1989] 2 All ER 865.
26 (1985) 81 Cr App R 150.
27 (1983) 76 Cr App R 293.
28 It would surely be unjust to convict those such as the educationally retarded defendant in *Elliott* v *C (A Minor)* (1983) 77 Cr App R 103. This was the approach favoured by the Law Commission in 1996; see n. 14 above at para. 4.43.
29 In civil law it may be thought right to attach less importance to D's moral culpability, so that the argument for the adoption of an objective might be stronger. Ashworth has long argued that the gap between what was anticipated and what was ultimately caused ought to be reduced before criminal liability is justified broadly because "punishment should be based on the "intrinsic" element of culpability or wrongdoing on the part of the offender' (see A. Ashworth, "Taking the Consequences' in S. Shute, J. Gardner and J. Horder (eds), *Action and Value in Criminal Law* (Clarendon Press: Oxford, 1993) at 120). On the other hand, formal legal accountability for V's death under the civil system may be justified since the general aim there is one of compensation and equivalence.
30 J. Horder, "Two Histories and Four Hidden Principles of *Mens Rea'* (1997) 113 LQR 95 at 96. Unfortunately, as Ashworth has very recently shown, it seems that the problem of closing the gap and maintaining a sense of proportionality continues to be ignored or overlooked, not only in causing death by dangerous driving (where "dangerous' requires a risk of personal injury or substantial damage to property) but also in the new offence of corporate manslaughter which is completely silent on the nature of the risk; see above n. 22.
31 These three reasons are taken from the writing of Anthony Duff; see especially his *Intention, Agency and Criminal Liability* (Basil Blackwell: Oxford, 1990).
32 A. M. Honoré, "Responsibility and Luck' (1988) 104 LQR 530 at 540-5.
33 See the references in n. 23.

34 See, e.g., B. Mitchell, "Public Perceptions of Homicide and Criminal Justice' (1998) 38(3) *British Journal of Criminology* 453-72.

35 D. Indermaur, *Perceptions of Crime Seriousness and Sentencing: A Comparison of Court Practice and the Perceptions of the Public and Judge* (1990), Report to the Criminology Research Council, Canberra: Australian Institute of Criminology.

36 B. Mitchell, "Further Evidence of the Relationship between Legal and Public Opinion on the Law of Homicide' [2000] Crim LR 814 at 819, 820. Interestingly, it seems that the American public may take a different view; see P. H. Robinson and J. M. Darley, *Justice, Liability and Blame: Community Views and the Criminal Law* (Westview Press: Boulder, 1995) 169-81.

37 See Ashworth's (1993) illustration in "Taking the Consequences', above n. 29 at 119.

38 See *http://www.lawreform.ie/publications/HomicideReportONLINE.pdf,* para. 5.39, accessed 23 September 2008.

39 Ibid. at para. 5.40.

40 Ibid. at para. 5.44.

41 See Duff, above n. 31 at 191-2.

42 Above n. 38 at paras 5.40, 5.41.

43 Above n. 38 at para. 5.41.

44 The Home Office, which favoured a redefined version of UDA manslaughter that would continue to convict the one-punch killer, asserted that "offences should be based on motivation and outcome' (above n. 3 at para. 2.10), thereby purportedly following the approach taken by the Law Commission as in non-fatal offences of personal violence (Law Com. No. 218, *Legislating the Criminal Code: Offences Against the Person and General Principles* (HMSO: London, 1993)). But the proposals relating to non-fatal offences revealed no gap at all between the injury for which D should be held criminally liable and what D intended or foresaw.

45 Ashworth, above n. 29 at 120.

46 It remains to be seen whether the Ministry of Justice will make recommendations for reforming involuntary manslaughter in line with the earlier reports of the Home Office and Law Commission (see nn. 3 and 1 respectively), or whether it will be silent on the matter.