Drag Racing, Assumption of Risk, and Homicide

Roni M Rosenberg

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DRAG RACING, ASSUMPTION OF RISK, AND HOMICIDE

Roni Rosenberg*

Introduction

Courts in various states in the United States have dealt with the question of whether one participant in a drag race can be convicted of manslaughter for the death of another participant where there is no collision between the two participants but rather the decedent dies as a result of a collision with a third party or a guard rail. Courts have been divided in their treatment of such incidents: Some have indeed convicted such defendants of manslaughter, while others have held that such defendants can be convicted of negligent or reckless driving but not manslaughter. The difference of opinion revolves around the central point of whether there is a sufficient causal connection between the defendant's conduct and the resulting death. Courts that acquit argue that mere participation in a race does not create the causal connection required for a manslaughter conviction, while those that convict hold that such a causal connection suffices.

These cases involve issues that reach the core of criminal jurisprudence, which have not been expressed completely in the court decisions to date: Who owns the interest protected by the crime of homicide? What exactly does that protected interest consist of? What are the ramifications of the autonomous consent of the injured party to assume the risk of death?

This essay analyzes the rationales behind the opinions that have acquitted in such cases and suggests an alternative conception of why acquittal is the appropriate result. This approach suggests that such a defendant should be acquitted not because there is no causal connection between his conduct and the death of his fellow participant, but because the protected values at the core of homicide are not infringed upon in such situations. Thus, even assuming that there is a causal connection, it is still not appropriate to convict.

This alternative analysis maintains that the crime of homicide is intended to protect two distinct values, not one. The first value is "sanctity of life" -- the preservation of human life simply because of the value we impart to such life. The significance of the value of sanctity of life is not entirely clear; the essay outlines possible descriptions of such significance. The fact that courts do not accord definitive weight to the injured party's
consent to risk his own life points to an acceptance of one of these interpretations of sanctity of life; however, this interpretation does not appear to be appropriate in the context of criminal jurisprudence.

The second value protected by homicide is society's sense of security, the right of citizens to live free from the constant fear of unprovoked attacks. In the absence of such a prohibition, not only would a person's feeling of security be infringed upon, the person's ability to live life in a reasonable manner and develop himself would be seriously affected as well, since he would constantly have to be on the alert for attacks by others. The crime of homicide is intended, then, not only to prevent individuals from dying but to preserve society's basic sense of security and, consequently, to preserve the autonomy to conduct normal lives.

The owner of the first protected value, sanctity of life, is the individual whose life is being preserved. Thus, such individual can consent to an infringement upon this value. However, the owner of the second protected value, a basic sense of security, is society at large. In a number of situations (including the drag race scenario) the death of a person may indeed be caused by another (in the sense of but-for causation) but the sense of basic security of society is not harmed. In such cases, the autonomous consent of the injured party should indeed prevent the other's conviction for homicide. For the most part, these two values are relevant not only to homicide but to all violent crimes. As such, while this article focuses on homicide, it can be applied, mutatis mutandis, to many other crimes as well.¹

The structure of this article is as follows: Part I presents several American court decisions, dealing with the question of conviction of a participant in a drag race for causing the death of another participant even though there was no direct collision between the two. The article goes on to critiques briefly the main rationales that underpin those opinions that acquit. Part II presents an alternative conceptual approach for such acquittal and a defense of this position from potential critique.

¹In this context there is a distinction between crimes where the absence of consent is one of the elements of the crime and those where this is not the case. For example, with regard to rape, the element of consent is what defines the crime; that is, if there is consent there is no crime. This article is relevant primarily to crimes where consent is not an element of the crime. However, that does not mean that the two protected values are not relevant even with regard to crimes where the absence of consent is an element of the crime itself.
A. U.S. Cases

1. Convictions

U.S. courts are divided with regard to the question of whether a participant in a drag race should be convicted for the death of another participant, where there was no collision between the parties.

In *Commonwealth v. Peak*, defendants and decedent participated in a drag race on a public highway at speeds of 100 miles per hour and above. Decedent collided with a vehicle traveling in the opposite direction, which had pulled over to the shoulder in an attempt to avoid the racers. This collision resulted in decedent's death. Defendants were accused of involuntary manslaughter. Their defense was that the person killed was driving recklessly and illegally, and this severed the causal connection between defendants' participation in the race and decedent's death. In this instance, defendants argued, they were not the ones who killed decedent; rather decedent caused his own death.

The court held:

> Defendants by participating in the unlawful racing initiated a series of events resulting in the death of Young. Under these circumstances, decedents own unlawful conduct does not absolve defendants from their guilt. The acts of defendants were contributing and substantial factors in bringing about the death of Young. The acts and omissions of two or more persons may work concurrently as the efficient cause of an injury and in such case each of the participating acts or omissions is regarded in law as a proximate cause.

In *State of Iowa v. McFadden*, defendant and decedent engaged in a car race as a result of which decedent lost control of his vehicle and crashed into a third vehicle that was not participating in the race. He was killed, as was a child in the third car. There was no collision between defendant's vehicle and either of the others. Defendant was indicted for manslaughter (of decedent and of the child) under Section 707.5 (1), The Code 1979. The defense argued that while defendant was guilty of reckless driving, he could not be convicted of manslaughter since there was no direct causal connection between his conduct and the deaths, as required under criminal jurisprudence. This argument was

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3 *Id.*, at 383.
4 320 N.W. 2d 608 (1982).
based on the fact that decedent was aware of the risks of the race and himself drove recklessly and illegally; thus, he killed himself.

The court dismissed this argument and found that the test of causation in criminal jurisprudence is similar in principle to that in tort law and that causation in this situation was sufficiently direct in order to convict:

Finally, defendant has suggested no specific policy differences, nor can we think of any, that would justify a different standard of proximate causation under our involuntary manslaughter statue than under our tort law. The Root court opined that "legal theory which makes guilt or innocence of criminal homicide depend upon such accidentally and fortuitous circumstances as are now embraced by modern tort law's encompassing concept of proximate cause is too harsh to be just." We do not agree. Proximate cause is based on the concept of foreseeability. We believe the foreseeability requirement, coupled with the requirement of recklessness, will prevent the possibility of harsh or unjust results in involuntary manslaughter cases. We disagree with the Root court's apparent opinion that drag racing on a public street is "not generally considered to present the likelihood of a resultant death."  

2. Acquittals

In Commonwealth v. Root, the case cited but disregarded in McFadden, defendant was indicted for involuntary manslaughter for the death of his friend subsequent to a drag race between them. In order to pass defendant's vehicle, decedent swerved into the opposite lane and crashed head-on into a truck. Clearly, defendant could be convicted of reckless driving and of arranging a race on a public road, but the state's claim was that he could also be convicted of causing the death of his friend by participating in the race. The argument was that not only did defendant act against the law but his actions were a direct cause of the death of the decedent, as required for manslaughter.

The court acquitted defendant of manslaughter, stating that in criminal law causation must be more direct than in tort law. In this situation the court held that decedent assumed the risk of death. He drove recklessly and illegally and, in essence, killed himself. Defendant did not directly cause decedent to pass into the other lane and therefore it was not possible to attribute to him the death of decedent. The court distinguished between this situation and that in Levin where a defendant swerved, causing

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5 Id., at 618.
the decedent to swerve as well, such that it was possible to convict him of manslaughter. In this case, however, the decedent caused his own death.

Under the uncontradicted evidence in this case, the conduct of the defendant was not the proximate cause of the decedent's death as a matter of law. In *Kline v. Moyer* and *Albert* the rule is stated as follows: "Where a second actor has become aware of the existence of a potential danger created by the negligence of an original tortfeasor, and thereafter, by an independent act of negligence, brings about an accident, the first tortfeasor is relieved of liability because the condition created by him was merely a circumstance of the accident and not its proximate cause." … In the case now before us, the deceased was aware of the dangerous condition created by the defendant's reckless conduct in driving his automobile at an excessive rate of speed along the highway, but, despite such knowledge, he recklessly chose to swerve his car to the left and into the path of an oncoming truck, thereby bringing about the head-on collision which caused his own death.\(^7\)

In this context it is important to note that the dissenting opinion in this decision held that defendant's conduct was a proximate cause of decedent's death, since "but-for" defendant's illegal and reckless conduct, the accident would not have happened.\(^8\)

In *Velazquez v. The State of Florida*,\(^9\) defendant and decedent decided to engage in a prohibited drag race. Decedent, who was not wearing a seatbelt and had a blood alcohol level that was above the legal limit, was killed after he flew from the car as a result of a collision with a safety rail. Defendant was indicted for vehicular homicide under section 782.071(1), Fla. Stat. (1987). The court held:

Turning now to the instant case, it is clear that the defendant's reckless operation of a motor vehicle in participating in the "drag race" with the deceased was, technically speaking, a cause-in-fact of the deceased's death under the "but for" test. But for the defendant's participation in the subject race, the deceased would not have recklessly raced his vehicle at all and thus would not have been killed. However, under the authority of *J.A.C.* and the better reasoned decisions throughout the country, the defendant's participation in the subject "drag race" was not a proximate cause of the deceased's death because, simply put, the deceased, in effect, killed himself by his own volitional reckless driving -- and,

\(^7\) *Id.*, at 579-580.
\(^8\) *Id.*, at 583-584.
consequently, it would be unjust to hold the defendant criminally responsible for this death.\footnote{Id. at 353. See also State of Oregon v. Petersen, 270 Ore. 166 (1974), where the court acquitted due to lack of a causal connection.}

In actuality, one can extract from these cases three different positions relating to the question at the heart of this essay. The first position, demonstrated in the decisions that acquit,\footnote{See Root and Velazques.} is that in criminal jurisprudence, the causal connection must be more direct than in tort law, and in these instances of drag racing, there was no direct causal connection between defendant's participation in the race and the death of the other driver. The decisions that convict\footnote{See Peak and McFadden.} indicate two different rationales for this result: One is that causation in criminal law and tort law are the same; thus, the defendants could be convicted of manslaughter even in the absence of a direct collision between the defendant and the decedent. The other is that while there is need for a more direct causal connection under criminal jurisprudence, here the causal connection was sufficiently direct for the purposes of conviction for manslaughter.\footnote{See the minority opinion in Root.}
3. Critiques of the Rationale for Acquittal

In those cases where courts acquitted, the main reason for the acquittal was the absence of the requisite causal connection between the conduct of defendants and the death of decedents. In essence, the judges held that decedents killed themselves by driving illegally and recklessly. Interestingly, the judges found two distinct elements that enabled them to negate this causal connection: the decedents' voluntary agreement to participate in the race, thus assuming the inherent risks involved, and the reckless driving during the actual race, which resulted in the collisions. According to these judges, there was no legal causal connection in these cases because decedents agreed to participate in the race and it is possible to attribute to them, personally, the actions that resulted in their deaths. When both of these elements exist, they held, defendants did not cause the death of the decedents; rather, decedents caused their own deaths.

According to the judges who acquitted, then, it seems that both elements are required in order to acquit. That is, in a situation where there is no full and voluntary agreement to race, even if the causal connection is indirect, they would convict because of the lack of agreement. Similarly, if there is full agreement and assumption of risk but the causal connection is direct, here too defendants will be convicted. Only in cases where the causal connection is indirect and there is agreement to participate in the race, with the corresponding assumption of risk, will defendants be acquitted.

It is not clear, however, why the first element, decedents' agreement and implicit assumption of risk, does not suffice. In other words, why does this assumption of risk fail to prevent conviction where cause of death is direct, for example, had these decedents been killed not as a result of a collision with a third party but by colliding with the defendants? Why would we not say that each participant was aware of the possibility of a collision between them and therefore agreed to assume the risk of death under these circumstances? The question is: What is the precise relationship between these two elements that allows for acquittal? While both elements are indeed important, they need to be placed into an alternative legal construct that offers a different explanation of why these elements are significant in legal terms and why, consequently, the defendants should be acquitted of manslaughter.

Moreover, even if we say, with regard to drag racing, that decedents killed themselves, as opposed to being killed directly by another, the question arises as to why assisted suicide is a crime (at least in most states). With regard to assisted suicide, the actualization of the risk is achieved by the suicide himself who is well aware of the risk involved. This seems similar to the situation we have been discussing with regard to drag races. It is possible to explain the crime of assisted suicide as a protection on autonomy, since in
In some cases of suicide there is no completely free and autonomous action due to the distress under which the suicide exists. However, such an argument may be equally relevant in the context of dangerous games, such as drag racing, where the decision to participate may be motivated, at least in some situations, from a desire to fit in with a group or some other pressure.

These critiques demonstrate a need for an alternate conceptual explanation of why it is appropriate to acquit defendants of manslaughter in the cases discussed. The rationale presented below, differs in essence from the reasons given by the judges who acquitted in the cases discussed, since it proposes to acquit defendants not because they were responsible for their own deaths but due only to the fact that decedents agreed to assume risk of death (without connection to the question of whether they killed themselves or not) and posits that such agreement may prevent conviction of one who causes harm, where the protected values that stand at the core of the crime involved (including homicide) are not infringed.
B. The Alternative -- Focus on the Values Protected by Homicide

The starting point is that the crime of homicide, and respective convictions, must be delineated so as to protect the values that stand at the core of this crime. Thus, prohibited actions must be those that infringe upon these values. Acts that do not so infringe should not be included even if they fall within the formal definition of the crime. Thus, it is not necessarily the case that all conduct that causes the death of a person is be included within the scope of criminal homicide, since not every instance in which death results involves an infringement upon the protected values.

1. Sanctity of Life

In order to determine whether agreement of the decedents to assume the risk of death in drag races should prevent defendants' conviction for manslaughter, we must address two questions that reach to the roots of criminal jurisprudence, questions that have yet to be discussed in the framework of the court decisions quoted above: the first is who owns the protected interest in homicide, and the second is what is the content of the interest projected? With regard to the first question, it seems that courts that dealt with the topic of drag racing took the traditional approach that with respect to all criminal activity, the owner of the protected interest is society in general and not a particular individual. Thus, for example, when A kills B, he has not harmed only B but society as a whole because he has infringed upon the social value at the core of homicide. With regard to the second question, it appears that courts believe that the main protected interest at the core of homicide is the sanctity of life. According to this approach, life has value in and of itself, and this value belongs to society as a whole and not to a particular individual.14

According to the court decisions quoted above, since the value at the core of homicide is sanctity of life, and the owner of this interest is society as a whole, decedents cannot agree to give up this value. Thus, if there is a causal connection between participation of defendants in a drag race and the death of decedents, it is appropriate to convict defendants since even if decedents agreed to assume the risk of death, such agreement

does not prevent conviction of defendants who have infringed upon a protected value belonging to all.

However, the concept of sanctity of life, far from being clear cut, can be understood in at least four different ways. Not all coincide with the courts' position. While the prohibition against homicide has been accepted throughout human history, the question of the rationale underpinning this prohibition is not simple.\(^\text{15}\)

McMahan notes:

> There is no moral belief that is more universal, stable, and unquestioned, across different societies and throughout history, than the belief that killing people is normally wrong. Yet no one, to my knowledge, has ever offered an account of why killing is wrong that even begins to do justice to the full range of commonsense beliefs about the morality of killing. Perhaps the overwhelming obviousness of the general belief -- its luminous self-evidence -- discourages inquiry into its foundations.\(^\text{16}\)

The most reasonable and intuitive answer to this question is that homicide causes significant harm to the victim. Homicide infringes upon all of the victim's future enjoyments and options. As such, Marquis notes:

> What primarily makes killing wrong is … its effect on the victim. The loss of one's life is one of the greatest losses one can suffer. The loss of one's life deprives one of all the experiences, activities, projects, and enjoyments that would otherwise have constituted one's future. Therefore, killing someone is wrong, primarily because the killing inflicts … the greatest possible losses on the victim.\(^\text{17}\)

According to this position, the value of life is embedded in the potential of using that life. This explanation clarifies, for example, why from an ethical standpoint (though not necessarily from a legal one) it makes sense to permit suicide and even active euthanasia. The reason is that the victim is the owner of the interest of his future good; therefore, he has the ability to waive this good.\(^\text{18}\)

\(^\text{15}\) For Dworkin, for example, the various opinions relating to the significance of sanctity of life are the source of the disagreements regarding abortion and euthanasia. See RONALD DWORINKIN, LIFE'S DOMINION - AN ARGUMENT ABOUT ABORTION AND EUTHANASIA 71 (1993).


\(^\text{17}\) Don Marquis, Why Abortion is Immoral, 86 JOURNAL OF PHILOSOPHY 183, 189 (1989).

\(^\text{18}\) McMahan, supra note 16, at 464.
The second explanation relates to a unique characteristic of man, his autonomy to plan and write his own history19 (according to McMahan, this ability includes several elements, such as analysis, judgment, choice, and imagination).20 This explanation differs from the first in that it does not relate to future good taken from the person, since this good changes from person to person, but to the value of the autonomy that every person has by nature. According to this explanation, homicide is prohibited because it harms the victim by infringing upon the value that defines him, his autonomy. McMahan emphasizes that this value is not removed from the actual person (that is, infringing the value means harming the person himself). Furthermore, since the significant characteristic that sets man apart from the rest of nature is his autonomy, he may decide autonomously to end his life by suicide, even via someone else.21

Thus, according to these two understandings of sanctity of life, the crime of homicide is intended to protect harm to a real person, whether that harm is prevention of his future good or infringement upon his autonomy.

The third explanation of the prohibition against homicide relates to Kant's approach regarding the intrinsic value of each man simply because he is a man.22 This value originates from the fact that man is a rational and autonomous creature who legislates his own rules.23 In this context it is important to note that Kant and his followers distinguish between the good of man and the intrinsic value of a person.24 While it may indeed be possible for someone to waive his own future good, since he waives something that belongs to him, he cannot waive the intrinsic value of being human, since this value does not belong to him personally; rather it is a general ethical value.25 Therefore, argues Kant, suicide is forbidden since even if a person waives the good that belongs to him (his physical future life and options) there is still an infringement upon the intrinsic value of that person that does not belong to him in particular.26 Additionally, in a slight departure from Kant's description, one can say that sanctity of life means that the life of man has intrinsic value that is not related to the particular person. This value belongs to every person simply by virtue of his being human, regardless of his rationality or autonomy.27

21 Id., at 464.
22 See Dworkin, supra note 15, at 71-72.
25 Id. at 609, 611.
26 Kant, supra note 23, at 83-84.
27 JONATHAN HERRING, MEDICAL LAW AND ETHICS 502-503 (2010). Some have argued in this context that sanctity of life is only a religious value and is not relevant to law. Herring, at 505. Dworkin is of the opinion that there is intrinsic value to life without connection to religion. See Dworkin, supra note 15, at 81,84. Feinberg refutes Kant's description of autonomy as detached from concrete man. According to Feinberg, the significance of autonomy is giving significance to a person's choices and desires and not to
The final explanation of the crime of homicide is rooted in the religious principle that says that a person's life has sanctity in and of itself (whether because the person's body does not belong to him but to God or because the person was created in God's image and it is a divine command that a person cannot harm his body). Therefore a person may not commit suicide and someone else cannot engage in active euthanasia, even if someone suffers greatly.28

The first two approaches cannot, it seems, serve as a basis for the opinions that convicted defendants of manslaughter for their participation in a drag race. The reason is that under these approaches, decedents' voluntary assumption of risk should prevent conviction of defendants, since the individual in question owns the protected value, and he can waive what belongs to him. Both the third and fourth approaches, however, can indeed serve as a basis for conviction. These approaches maintain that the infringement caused by the death is not focused on the specific victim but on a general value that is not related exclusively to him. From this perspective one can argue that even though decedents agreed to assume the risk of death, there is still infringement upon the protected value which is general and not related to the actual person.

However, it is doubtful whether either of these theories is appropriate in the context of criminal jurisprudence. The fourth approach presents difficulties, since the American legal system does not generally rely on values particular to the religious world view of a part of society (so long as these values have not been translated into specific laws) for the purpose of criminal conviction. The third approach, too, should not be used to base the court's understanding of sanctity of life. First of all, even under this approach, neither society nor a particular person, is harmed as a result of infringing upon the intrinsic value of man as described by Kant; rather, the injured party is morality in general.29 Secondly, even if this infringement upon morality is, in and of itself, an infringement upon society, determining penal law as per infringement upon an ethical value does not maintain the proper distinction between law and ethics. It is troubling to think that infringement upon an ethical value, if there is no actual damage to an individual or to society, can serve as the basis for conviction under criminal law.30 While it is not necessarily the case that there is no intrinsic ethical value in man that is unrelated to good that belongs to that

rationality and abstract autonomy that is related to the concept of man in general but detached from the actual individual. See JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW - HARM TO SELF 94-96 (1986).

28 See James Rachels, The Value of Human Life 2 PHILOSOPHICAL INQUIRY 3, 7 (2002). Rachels notes this approach but refutes it.

29 See Velleman, supra note 24, at 609, 611.

30 This is Hart's position. The prohibition against homicide where there is consent is not required to enforce the value of sanctity of life but is rooted in paternalism. See H. L. A. HART, LAW, LIBERTY AND MORALITY 30-34 (1963). See also, Dworkin, supra note 15, at 157.
man, it is doubtful whether infringing upon this value alone, with no actual harm to the victim or society (or at least chance of such harm), can be a proper basis for criminal conviction.

While it appears tempting to suggest that the point of controversy between the position to convict of manslaughter and that to acquit is due to differing understandings of sanctity of life, even the approach that acquits does not permit decedents to give up their right to life. They acquit defendants in the situations described above because they were not the ones who killed decedents but rather decedents killed themselves. As such, it appears that according to all opinions in these decisions, the sanctity of life belongs to society rather than to the individual, and the only way to acquit defendants is by negating the causal connection between their participation in the race and the death of decedents.

2. Private Versus Public Crimes

There is another approach that maintains that ownership of the protected interests in crimes changes depending on whether it is a crime that harms the public or a crime that harms an individual. Under this approach, homicide, rape, assault, robbery, fraud, etc. are crimes that harm the individual, and the individual owns the protected interest. On the other hand, such crimes as treason, contempt of court, tax evasion, poisoning the water supply, etc. are crimes that harm the community, and the public owns the protected interest, not the individual. It is possible to understand Feinberg in this manner:

Willful homicide, forcible rape, aggravated assault, and battery are crimes … everywhere in the civilized world, and no reasonable person could advocate the "decriminalization." … The common element in crimes of these two categories is the direct production of serious harm to individual persons and groups … still other crimes that have an unquestioned place in our penal codes are kinds of conduct that rarely cause clear and substantial harm to any specific person or group, but are said to cause harm to "the public," "society," "the state," public institutions or practices, the general ambience of neighborhoods, the economy, the climate, or the environment.31

The fact that the individual owns the protected interest with regard to certain crimes does not contradict the fact that societyconvicts the individual by holding a trial. Society as a whole may not be harmed by a crime but sees in the protected interest of the individual an important value that it, in turn, must protect. As Duff explains: "We should interpret

a public wrong, not as a wrong that injures the public but as one that properly concerns the public, i.e., the polity as a whole.”

With regard to the question of the content of the protected interest at the core of the crime of homicide, Feinberg can be understood to present a different approach than the traditional one. Feinberg opens his book with the question of when it is appropriate to transform certain conduct into a crime, and he bases his discussion on Mill's principle of harm (that Feinberg develops). Under this principle, conduct should be criminalized only if it causes or may cause harm to another. According to Feinberg, causing harm to another includes two basic elements, both of which must be present: harming the interests of another (set-back interest) or infringing upon a right (wrongful). In this context Feinberg argues that it is impossible to say that someone was harmed when he has agreed to be harmed. While in such a case the interest of the person may have been harmed (set-back interest), there was no infringement upon his right since he agreed to the harm.

One class of harms (in the sense of set-back interest) must certainly be excluded from those that are properly called wrongs, namely those to which the victim has consented. These include harms voluntarily inflicted by the actor upon himself, or the risk of which the actor freely assumed, and harms inflicted upon him by the actions of others to which he has freely consented. I have not wronged you if I persuade you, without coercion, exploitation, or fraud to engage in a fair wager with me, and you lose, though of course the transaction will set back your pecuniary interest and thus harm you in that sense. The harm principle will not justify the prohibition of consensual activities even when they are likely to harm the interests of the consenting parties; its aim is to prevent only those harms that are wrongs.

Feinberg makes no distinction between different types of harm; from his perspective, any time there is free and autonomous consent on the part of the injured party the injurer should not be tried or punished since no right of the injured party has been infringed.

33 JOHN STUART MILL, ON LIBERTY 68-69 (PENGUIN BOOKS ED. 1974).
35 Feinberg, Ibid.
If we apply Feinberg's approach to drag racing, we can say that as opposed to the traditional approach that sees society as the owners of the protected interest with regard to sanctity of life, Feinberg sees the individual himself as owner of the protected interest and thus believes that it is appropriate to acquit defendants regardless of the question of whether or not there was a causal connection between their participation and the death of deceidents but simply because deceidents assumed risk of death upon themselves.

Feinberg's approach, while compelling, assumes that homicide involves only harm to sanctity of life. Since he maintains that this value belongs to the individual, the individual can waive it. If we look further, however, we see that homicide impacts upon yet another value that we have yet to mention.

3. Two Values Protected by Prohibition against Homicide

(a) What Are the Protected Values:

In order to flesh out and delineate the protected values at the core of homicide, we must undergo a Hobbesian exercise and ask: What would occur in the world were there no prohibition against killing? This will allow us to see what needs to be protected by such a prohibition.

In this context it is appropriate to quote Hobbes as he describes the state of nature:

And from this diffidence of one another, there is no way for any man to secure himself so reasonable as anticipation; that is, by force, or wiles, to master the persons of all men he can so long till he see no other power great enough to endanger him … Whosoever therefore is consequent to a time of war, where every man is enemy to every man, the same consequent to the time wherein men live without other security than what their own strength and their own invention shall furnish them withal. In such condition there is no place for industry, because the fruit thereof is uncertain: and consequently no culture of the earth; no navigation, nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all,
continual fear and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.\textsuperscript{36}

Thus, in the absence of a prohibition against homicide, not only would people be likely to die as a result of being attacked by others, everyone would experience a life of fear and constant anticipation of an attack that could prove lethal.\textsuperscript{37} Thus, even if someone succeeded in preserving his life, he would live under constant threat of death. This fear would significantly infringe upon his basic sense of security and, consequently, would infringe upon his autonomy, since it would be difficult to achieve his goals or plan his life in a reasonable manner.\textsuperscript{38} Furthermore, even if we would never reach the extreme state of nature described by Hobbes, there would still be the fear that in the absence of a prohibition on killing, at least some people would attack, injure, or kill others. As such, people would indeed live in a state of fear of such attacks.

Hobbes' assumption, however, is not indisputable. Why not assume that human nature is inherently good and that the majority of people would not try to kill each other? If this is the case, then even without the prohibition against killing, people would not experience the fear that leads to loss of personal autonomy. Even if we do not approach Hobbes’ extreme natural state of war of all against all, however, it is likely that at minimum some people will act belligerently toward others. This likelihood, in and of itself, impacts negatively on people's basic sense of security and personal autonomy. Furthermore, even if no one actually exercises the ability to attack others, it is likely that the uncertainty regarding personal safety will create a general sense of fear. The prohibition against killing mitigates the likelihood of attack by another and thus, also decreases the fear of such an attack. Fear does not only stem from actuality, but also from the possibility of such an actuality. In this way, the prohibition against killing represents a safeguard of a basic element of our normal existence.

Moreover, irrespective of the dispute regarding basic human nature and what would happen without a prohibition against killing, lawmakers are charged with taking a more conservative approach and must assume the worst. Assuming otherwise would be foolish as the risks of taking a more lenient approach are very high. Therefore, even though it may be unclear what exactly the result would be of not having a prohibition against killing, it is reasonable to assume that certain motivations (hatred, personal gain, survival, etc.) would push people to try and kill each other.

\textsuperscript{36} THOMAS HOBBES, LEVIATHAN OR THE MATTER, FORME, & POWER OF A COMMON-WEALTH ECCLESIASTICAL AND CIVILL 95-97 (Oxford at the Clarendon Press ed., 1952)
\textsuperscript{37} Roni Rosenberg, Between Killing and Letting Die in Criminal Jurisprudence, 34 NORTHERN ILLINOIS UNIVERSITY LAW REVIEW (forthcoming 2014).
\textsuperscript{38} See GREGORY S. KAVKA, HOBBESIAN MORAL AND POLITICAL THEORY 81-82 (1999).
Robert Nozick, too, describes how society would look in the absence of laws against homicide, assault, rape, etc: "A system that allowed assaults to take place … would lead to apprehensive people, afraid of assault, sudden attack, and harm … to avoid such general apprehension and fear, these acts are prohibited and made punishable."  

Thus, homicide involves harm to society that is not related to sanctity of life. The injury to society (as opposed to the injury to the specific party) is caused by undermining society's basic sense of security. Thus, there are actually two distinct protected values at the core of homicide: that of life itself and the ability to live with a sense of security.

(b) Who Owns the Protected Values

These two values differ with regard to ownership. While the value of preservation of physical life is attributable to the individual, the value of preserving a general sense of security is clearly attributable to society at large. When a person is murdered, both of these values are infringed upon. People who were in no way harmed by the physical injury fear potential attacks on their own lives. They feel the need to protect themselves from such attacks, and as such, their autonomy to go about their daily lives in a reasonable manner is infringed upon (clearly as the number of murders rises, the infringement upon the autonomy of those who are aware of the murders grows as well).

This analysis differs both from the traditional approach and from that of Feinberg. The traditional approach sees sanctity of life as a protected value that belongs to society, without any connection to the general population's sense of security, and Feinberg sees murder as harming the individual but not the community and classifies homicide as a individual rather than a public crime. The approach suggested here is that the main way in which society is harmed by homicide is not because of the injury to the ethical value of sanctity of life but by having the basic sense of security undermined. It is not that sanctity of life is not a value worthy of being protected by society. Society must protect this important value but not because it is some ethical imperative but rather because society has the need to protect an important value that is not detached from the actual person (at least with regard to criminal jurisprudence).

Since the value of sanctity of life, which relates to the protection of a person's physical life, belongs to the individual, the injured party himself may consent to an infringement upon this value. However, with regard to the second protected value at the core of

40 Duff, supra note 32.
homicide, society's sense of security, the injured party cannot consent to an infringement, since such an infringement decreases the sense of security of society at large.

4. Do All Killings Infringe Upon Protected Values?

As indicated above, it is not necessarily the case that every act that causes someone's death (in the sense of but-for causation) harms both protected values. In some instances, society's sense of security is not harmed. Three main elements impact upon the extent of the infringement on the sense of security: guilt of the injurer; the level of causation; and the consent of the victim.

That is, the degree of infringement upon society's sense of security that results from premeditated murder is not the same as that caused by negligent homicide. People tend to fear those who wish to cause harm more than they do the potential negligence of others. In addition, the precautions that people feel they must take to protect themselves from those who wish to harm them are much more complex and time-intensive than those they take to protect themselves from accidents that may be caused by others who are negligent.

Similarly, the infringement upon the sense of security when a person dies as a result of direct causation (shooting or automobile accident) is not the same as when conduct indirectly causes death (even when there is but-for causation). Thus harm to the sense of security is one rationale that distinguishes between direct active causation and causing by omission in criminal jurisprudence. In the absence of a prohibition against active killing, the sense of security would be harmed as everyone would fear that someone might kill him. However, the absence of a requirement to save others does not infringe upon the sense of security because it does not cause a person to live in constant fear that he will be killed.41

Consent of the injured party (the third element) will not prevent conviction when the first two elements exist to a high degree. However, such consent will prevent conviction when the first two elements are absent or exist only to a lower degree. Thus, if the degree of guilt is high (deliberate murder) and the causation is direct (stabbing, shooting, etc) consent of the victim will not prevent conviction because society's sense of security would indeed be harmed by such killing.

41 See Roni Rosenberg, supra note 37.
It seems possible to conclude that direct killing with the consent of the person to be killed should be permitted since the personal value of human life is waived and society's sense of security is not harmed in such cases. According to Fletcher, however, the reason for prohibiting such an act is not because a person cannot consent to an injury to his body or life, for he is permitted to commit suicide or maim himself. However, with regard to society's sense of security, there is the fear that if a person is permitted to kill when asked to do so, he may kill when not asked as well.42

McConnell makes the same point: "If society allows the possessor's consent always to count as a legal justification for killing that person, this may well increase the chances that harm to nonconsenting person will occur."43

Furthermore, the problem of proof with regard to consent to direct killing can also impact upon society's sense of security. Were there no prohibition against killing by consent, every potential murderer (or killer) could claim that the victim consented. In this situation, states McConnell, everyone would be less secure since it would be impossible to confirm consent of the victim. The only way to prevent this is by a general prohibition against killing with consent.44 Another significant consideration in this regard is that giving carte blanche to kill with consent could create an ethical climate that would cheapen the value of human life in general, leading, in turn, to an infringement upon society's sense of security.45

On the other hand, when the degree of guilt is low (recklessness) and the causal connection is not direct (even with but-for causation) consent of the victim will prevent conviction since neither of the two core values is harmed, or even if society's sense of security is infringed upon slightly, autonomy outweighs such minor infringement.

42 GEORGE P. FLETHER, RETHINKING CRIMINAL LAW 770-771 (1978). A similar claim was presented by a British court in Regina v. Brown 2 All ER 75 (1993). Several people were charged for engaging in sadomasochist sexual relations. The starting point was that the relations were with the consent of all parties and involved clear rules as to how and when the encounter would end. However, the court convicted them under the Offences Against Person Act 1861 Sec. 20. Some judges relied upon the claim that accepting the defense of consent in such a case could lead to people being injured by others without consent. See Cheryl Hanna, Sex is not a sport: Consent and Violence in Criminal Law, 42 BOSTON COLLEGE LAW REVIEW 239, 263-268 (2000). See also Sharon Cowan, Criminalizing SM: Disavowing the Erotic Instantiating Violence, in THE STRUCTURES OF THE CRIMINAL LAW (R.A. Duff, Lindsay Ramer, S.E. Marshall, Massimo Renzo, Victor Tadros Eds.) 59, 64 (2011). See also Ashworth's conclusion that in such situations it is appropriate to give greater weight to autonomy. ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 313-314 (2009).


44 Id., at 84. McConnell notes that with regard to rape one could argue that we do not prohibit sexual relations simply because a rapist might lie and say his victim consented. However, in that case, the victim is alive to tell the court that she did not consent.

45 Ibid.
Nonetheless, some situations fall into a middle ground, such as active euthanasia of terminal patients by physicians. In such cases, the causal connection is indeed direct, but the terminal patient has not only consented but is asking a physician to kill him. In addition, even though the physician does indeed have the requisite intent to kill, his motives are not to harm the patient but rather to benefit him, so that his degree of guilt can be considered to be low. That is, in the case of euthanasia, neither of the values appears to be harmed since the victim consented and society's sense of security is not harmed.\(^{46}\) On the other hand, however, from a legal perspective there is fear of a slippery slope, such that if society permits killing terminal patients at their request it could lead to the killing of terminal patients when such consent is not so clear.\(^{47}\) Thus, it is hard to determine from the fact that euthanasia is prohibited what legal considerations should apply in the context of drag racing and other prohibited games.

5. Efficacy of Consent in the Drag Racing Context

In the cases of drag racing discussed above, adult decedents agree to participate in the race and thus assume the risk of death as a result of such race. Likewise, there is no doubt that the causal connection between the conduct of defendants and the death of decedents is not direct (even though it may indeed suffice to convict in certain circumstances). This is not a case in which defendant shoots decedent, or even directly collides with decedent's vehicles. The causal connection is based on the fact that defendant's very participation in the race causes the race to take place and causes decedent to drive recklessly in a manner that causes his death. Furthermore, the degree of subjective guilt is not on the level of intent or even indifference. It is reckless, that is being aware of the possible outcome while hoping that it will not occur. Since the casual connection is not strong, the level of guilt is low, and the injured party assumes the risk of injury upon himself, society's sense of security is not harmed (and even if it is slightly infringed, weight should be given to the autonomy of the injured party who assumed the risk).

\(^{46}\) See Vera Bergelson, \textit{Consent to Harm}, 28 PACE L. REV. 683, 707 (2008). Bergelson (who was admittedly discussing assisted suicide) claims that the courts decision to convict Dr. Kevorkian who assisted terminal patients to commit suicide was not correct. People v. Kevorkian, 639 NW. 2d 291 (Mich. Ct. App. 2001).

\(^{47}\) For a discussion regarding the slippery slope in euthanasia, see GERALD DWORIN, R.G. FREY, AND SISSELA BOK, \textit{EUTHANASIA AND PHYSICIAN-ASSISTED SUICIDE - FOR AND AGAINST} 112-118 (1998). For a discussion regarding the distinction between logical slippery slope and empirical slippery slope in the euthanasia context, see STEPHEN W. SMITH, \textit{END-OF-LIFE DECISIONS IN MEDICAL CARE - PRINCIPLES AND POLICIES FOR REGULATING THE DYING PROCESS} 261-271 (2012). In general, the logical argument states that if event A occurs, event B will certainly follow. The empirical claim is that if event A occurs, event B will probably follow even though it is not a logical imperative.
Note that the considerations presented by Fletcher and McConnell are less relevant in this scenario. First of all, as opposed to the fear of permitting direct intentional killing, with consent, lest people kill without consent, here such a fear does not exist (or at most is significantly lower), since people are unlikely to force others to participate in dangerous games against their will in order to kill them. In addition, the problem of proof with regard to consent of the victim in direct killing is much greater than that of proof in the case of a dangerous game, since with regard to direct killing the second party is the direct cause of death, and it is not easy to know whether the victim consented and whether the defendant wanted death of the victim. With regard to a drag race, however, the injured party assumed the risk upon himself by participating in the race, and had he not wished to assume such risk, he need not have participated. Finally, permitting direct killing is much more likely to lead to a general cheapening of human life than merely failing to convict of homicide where the decedent assumes the risk to his own life and the defendant does not desire the death (but is merely reckless). The value of human life is certainly much more likely to be cheapened when there is greater likelihood, amounting to almost certainly, that the risk to life will be borne out.

48 I do not claim that there could never be a problem with regard to consent of the injured party in cases of participation in a dangerous game, but the problem of proof is much greater in the context of permitting direct killing with consent than with regard to assuming risk upon oneself.
6. Defense Against Potential Critiques

(a) Individual's Right to Waive Sanctity of Life:

It is possible to argue that a person's consent to being killed does not suffice to prevent conviction because the value of life is too great to waive. However, even a value as important as life itself is not an absolute value in the context of criminal jurisprudence (in the sense of being unwaivable) since the law does not always criminalize conduct that results in someone's death. This is demonstrated in doctrine of omission. It is not possible to convict someone for an omission unless he had a duty to act. This policy decision is true with regard to all crimes, including homicide. Thus, in seeking to convict someone of homicide for an omission it is required to identify a duty for him to act. A who did not save B from drowning even though he could have done so easily will not be convicted of manslaughter unless he had a duty to protect B.

One of the central rationales for the requirement to identify a duty to act in such a case is the liberty principle. Under this principle, if in all result crimes (including homicide) it were possible to convict for an omission where there was no specific duty to act, we would have to abandon our daily pursuits on a regular basis and would always be required to be prepared to act at any time. Since the legal system needs to allow people to go about their daily lives without constantly being forced to drop everything and embark upon rescue missions, criminal jurisprudence only convicts of omission if there was a duty to act. The duty to act is needed, then, to limit the number of instances in which a citizen must act in order to prevent harm in general, and death in particular, and thus it limits the infringement upon liberty and enables a person to live his normal life as per his choices and understanding. That is, even with regard to sanctity of life, it is often superseded by the value of liberty, such that it clear that it is not an absolute value.

If sanctity of life retreats in the face of preservation of liberty, why should it not retreat when a person wishes to exercise his autonomy and waive this value by consenting to risk his life?

A further indication that sanctity of life can be superseded by autonomy lies in the fact that suicide or attempted suicide is not a crime. While it is possible to argue that the main reason that there is no such crime is not related to the autonomy of a person to take his own life but, rather, to the fact that criminal jurisprudence is not the appropriate tool

to deal with such situations, some scholars do tie the absence of a crime against attempted suicide to considerations of autonomy.

It is also possible to argue that a person's consent to being killed does not suffice to prevent conviction because the act of homicide injures not only the victim himself but also his family and friends as a result of their pain and anguish (and possible economic ramifications). However, such harm is secondary, and it is not clear that criminal jurisprudence is intended to protect such interests. In addition, to the extent that there is injury to relatives and friends, this is outweighed by the autonomy of the person to make choices regarding his own life and death.

(b) The Value of Protecting Passersby:

It is possible to argue that with regard to drag racing, society fears that innocent passersby will be injured, and therefore consent of decedents should not prevent the conviction of defendants. However, two crimes are relevant in the context of drag racing: negligent or criminal driving and manslaughter. Where no one at all is injured, clearly participants can be convicted of criminal driving (a conduct crime) since this crime is intended to address the very creation of risk for passersby even when they have not actually been injured. And if innocent passersby are killed, any participant in the race should be able to be convicted of manslaughter, even in the absence of a direct causal connection, since the risk society fears has come to pass. That is, this is the very scenario to which manslaughter is intended to apply in the context of drag racing.

However, where the injured party is one of the participants, no third party has been harmed, and the risk society fears has not occurred. Since society's sense of security has not been harmed, it is not appropriate to convict defendants of manslaughter but rather to suffice with the conviction for negligent or criminal driving.

(c) Assisted Suicide:

The approach presented here with regard to drag racing appears to be contradicted by the prohibition of assisted suicide, since with regard to assisted suicide as well, neither protected value is harmed. In both drag racing and assisted suicide the injured party has consented to his own death, and in both cases the act has been carried out by decedent

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51 Fletcher, supra note 31. See also Feinberg, Note 27, at 94-96.
52 See Lafave, supra note 50, at 546-548.
himself. However, it is appropriate to distinguish between cases in which decedent consents to be killed definitely (assisted suicide) and situations in which there is merely an assumption of a risk of death. From this perspective, two differences between assisted suicide and drag racing are significant:

First of all, with regard to assisted suicide, where the outcome of death is practically certain, a strong case can be made for the paternalistic involvement of the state to prevent such an outcome, even where the person is exercising his autonomy in choosing to die. On the other hand, when a person's exercise of his autonomy leads him to assume a risk of death, where he does not really have a desire to die and death is not certain, it seems appropriate to grant greater weight to the autonomy of the risk taker by broadening his options and granting a more significant role to his consent. In such cases, paternalistic motives of preservation of human life are weaker. The difference between consent to certain death and consent to risk of death also dictates the degree of the obligation to clarify whether or not there was full consent. As such, it makes sense for the legislator to decide that in the case of certain death, by definition there is no way to demonstrate consent that will be accepted under the legal system.

53 This refers to strong paternalism, not weak paternalism, as the state does indeed determine that even with complete consent the act is prohibited. With regard to granting weight to certainty of the risk more than degree of harm, see Russ Shafer-Landau, *Liberalism and Paternalism*, 11 LEGAL THEORY 169, 187 (2005). For a distinction between strong and weak paternalism, see also Feinberg, supra note 27, at 12-16. Also note that Feinberg himself opposes strong paternalism because of infringement upon autonomy. *Id*, at 149.
Conclusion

Instances of drag racing in which one of the participants is killed test the boundaries of criminal jurisprudence. Will consent of decedents serve as protection against manslaughter convictions? Or does such consent lack relevance since society owns the protected interest by crimes in general and manslaughter in particular?

This article presents an alternate normative method of understanding why the consent of decedents in such cases should provide an effective defense against manslaughter convictions. This conception sees the protected interest at the core of homicide to be double stranded: the protection of the physical life of the individual, where the individual owns the interest; and a basic sense of security, where the owner is society at large. Thus, the injured party can consent to infringement upon the value that belongs to him but not with regard to the interest that belongs to all.

Nevertheless, not every instance of death infringes upon both protected interests. The main considerations are: the degree of guilt of the injurer, degree of causal connection between conduct of the injurer and death of the victim, and consent of the injured party. In the drag racing cases discussed herein, as a result of decedents' consent the right belonging to decedents was not infringed upon, thus taking care of the first value. In addition, the second value is not infringed upon either since society's sense of security is not harmed. As such, defendant should indeed be acquitted of manslaughter and convicted only of negligent or reckless driving.