

# Reasonableness, Murder and Modern Science

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Our murder laws have been and now are designed to afford protection against killing to reasonable creatures. In a number of states, murder laws are so worded or so interpreted by the courts that they define "murder" as the killing of a *reasonable* creature in being instead of as the killing of a *human* being. Even those states which define murder as the killing of a *human* being presuppose the importance of rationality, since their laws have their roots in the conceptual and legal tradition of English common law which accepted the Aristotelian definition of "man" as "a rational animal." Consider for a moment the following laws and judicial decisions which still make it quite evident that the intent of the law is to afford protection against killing to reasonable creatures, all of which explicitly reaffirm the common law definition of murder. *In Tennessee*, the murder law (which is the common law definition in toto) reads: "If any person of sound memory and discretion, unlawfully kill any reasonable creature in being, and under the peace of the state, with malice aforethought, either express or implied, such person shall be guilty of murder."<sup>1</sup> *In Michigan*, "murder" has been judicially interpreted to mean: "Murder is where a person of sound memory and discretion kills any reasonable creature in being, in the peace of the state, with malice aforethought, either expressed or implied."<sup>2</sup> *In Delaware*, the murder law was judicially interpreted to cover the following: "Where a person of sound memory and discretion, unlawfully kills any reasonable creature in being with malice

aforethought, is guilty of murder."<sup>3</sup> *In New Jersey*, the courts have also explicitly interpreted murder to be killing a reasonable being with malice aforethought.<sup>4</sup> Many other states such as West Virginia, Vermont, Rhode Island, Pennsylvania, and North Carolina, affirm the common law definition of murder as the killing of a reasonable creature without explicitly stating the definition itself.<sup>5</sup> Other states have kept the common law definition but have inserted "human being" for "reasonable creature" in the definition of "murder," but many of these states formerly had murder laws which were so worded,<sup>6</sup> and "human being" still implicitly involves rationality in the definition of "man" as "a rational animal." The issues which we wish to raise concerning reasonableness and murder are thus relevant to our entire legal tradition, either explicitly or implicitly.

It has been and still is commonplace to assume naively that all human beings are reasonable creatures. It is also assumed that only human beings are reasonable creatures. These two propositions are logically independent of one another, and their truth is now open to serious challenge. We propose to develop such a chal-

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lenge based largely upon recent developments in science and medical technology.

***Are all reasonable creatures in being men?***

It is yet to be determined whether the framers of those murder laws which explicitly afford protection against murder to "reasonable creatures" are to be commended for their farsightedness or condemned for their carelessness. Since this definition of "murder" includes all "reasonable" creatures and is not limited in its explicit wording to "human" creatures, it could presumably be applied if at some point in the future one of our citizens killed with premeditative malice a "reasonable" visitor from outer space. Since we are not confronted immediately with such visitors, however, there are problems enough with respect to the application of the law to current denizens of our states. Is it murder in Tennessee (and elsewhere) to kill a chimpanzee?<sup>7</sup> In the past this question has been easily answered in the negative, for it has seemed so obvious that chimpanzees are not reasonable creatures. Of course, we have known all along that they possessed an acute problem-solving intelligence, but this alone has not qualified them for classification as "reasonable creatures." We have in fact applied a much stronger criterion than the weak one Darwin recognized, i.e., possession of an acute problem-solving intelligence, in excluding them from the class of "reasonable creatures." What is this strong criterion, and does it really apply to chimpanzees?

The strongest criterion for the correct application of the concept of "reasonable" to a living being is the ability to use a language meaningfully. The ability to use "real speech," Descartes claimed, "is the only certain sign of thought."<sup>8</sup> Even the potential for doing so is thought to suffice, for human infants cannot usually do this until around the age of 18 to 24 months; yet we do classify them as "reasonable beings" and recognize that willfully and maliciously killing a small infant who has not yet developed its potential for using language meaningfully is murder.

It is not sufficient that a living being merely be able to "parrot" the sounds of a human language for it to be correctly classified as "reasonable." We do not think that it is murder willfully to kill parrots, parakeets, mynah birds, talking bulldogs, etc., for we do not recognize them as reasonable beings. What they lack, despite their

ability to imitate human sounds, is (1) the ability to correlate conventionalized symbols (as opposed to natural calls and cries) with their denotated objects and to generalize their usage beyond the context of their initial introduction, (2) the ability to combine groups of those symbols into sentences constructed according to conventionalized rules to syntax and to construct novel meaningful combinations, and (3) the ability to communicate with other language-users to make their meanings, intentions, and desires known and to facilitate symbolic communication for its own delightful sake or as a means of achieving their goals or satisfying their intentions and desires. Any living thing which *can* learn and use conventionalized symbols in these three ways may be correctly said to have the ability to use a language and to be a reasonable being. This is not being offered as a *minimal* definition of "language," for any creature with such linguistic facilities will be a clear-cut user of language.

**F**or the greater part of human history, we have assumed that only members of the human species are reasonable beings in the aforesaid sense. We have known, of course, that some members of our species do not fulfill the definition, for there have always been profoundly retarded humans who did not satisfy any of our three criteria for language and reasonableness. As late as ten years ago, this assumption was virtually unchallengeable, for all attempts to teach a *verbal* language to even our closest animal relatives, the chimpanzees, were abysmal failures. Within the past ten years, however, researchers have discovered that it is quite possible to teach *graphic* and *gestural* languages to chimpanzees. Paucity of imagination alone prior to that time forced researchers to equate language itself with *verbal* language. Within the past

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decade, however, a number of non-verbal languages have been successfully taught to chimpanzees, who have learned to communicate quite admirably with their human mentors by means of such non-verbal language systems and which do satisfy our three criteria. For example, at the Yerkes Regional Primate Research Center at Emory University in Atlanta, Ga., chimpanzees have been taught a complex computerized language;<sup>9</sup> at the University of California, Santa Barbara, other chimpanzees have mastered a graphic language system based on plastic block symbols;<sup>10</sup> and at the Universities of Nevada and Oklahoma, chimpanzees have been taught a language system which they now use to talk to humans and even to one another, and which is actually used by innumerable human beings functioning in human society—the American Sign Language for the deaf.<sup>11</sup> This latter achievement is particularly important for our present purposes. Do we or do we not recognize deaf persons as reasonable beings? Many of them are certainly unable to learn and use a *verbal* language, but deaf mutes do successfully use a *gestural* language—the same language which many chimpanzees are now able to use. Even Descartes recognized the gestural speech of the deaf as an instance of “real speech.”<sup>12</sup> We are thus forced to face the following dilemma: either such deaf persons are not reasonable beings and it is not murder willfully to kill them; or chimpanzees are reasonable beings, and it is murder to kill them. Even those chimpanzees which have not actually learned such symbolic languages have the potential for learning them, and this alone is sufficient for recognizing a newly-born human infant whose umbilical cord has been severed as a reasonable creature in being, capable of being murdered.

We do not know as yet what the upper limit of the development of linguistic reasonableness in chimpanzees is. We do know that they can match the linguistic skills of a two-and-a-half to three-year-old human child. Even if the skills of a five year old turn out to be their maximum, it would seem that our murder laws would still apply to them, for our laws do not say or presuppose that murder involves the killing of a *highly* reasonable creature in being. And we should be very careful about introducing such adjectives as “highly” lest we exclude our own children from coverage by the law, and perhaps even ourselves if the standards are set high enough!

### ***Are all men reasonable creatures in being?***

It is time now to examine the premise that all men are reasonable creatures in being. Are all “human beings,” as we understand the central notion of that term, reasonable creatures in being? Are there not some cases within a medical context that offer little room, if any, for debating the question as to whether some dimension of rationality still exists in the patient? If so, it would seem that some valid exceptions could be offered to the criminal statutes on homicide being discussed here.

For example, there are presently “existing” in institutes provided for the retarded in all states, “beings” who simply vegetate. These “beings” cannot speak or communicate with others. They cannot move voluntarily, cannot feed themselves, cannot sit up, and have no control over their bowels and bladders. They simply lie in one position until moved by an attendant. In most instances, they are unable to respond to the presence of heat or cold stimuli, or manifest any discernable awareness of light. One could plausibly argue that these beings represent a very primitive form of biological life within a human body. They definitely are not reasonable creatures.

An even more primitive form of biological life exists in many irreversibly comatose patients where a patient exists without any functional brain cortex and is permanently deprived of his capacity for using language. It is the absence of cerebral function that provides the legitimacy of the brain-function approach to defining death.<sup>13</sup> Generally, in these cases, the patient’s “existence” is totally dependent on artificial life-support measures; however, in some instances a patient might spontaneously breathe, but this is the extent of his self-supportive functions. Are these beings, the profoundly retarded and the irreversibly comatose patients, reasonable creatures in being? And is the chimpanzee who can articulate an awareness of his own identity, express a sense of joy and pain, and communicate in depth with people and with others of his own kind, not a reasonable creature in being? Because the law does at times question the utility and applicability of certain legal terminologies and redefines these terms to comply with contemporary needs, it is not unrealistic to suppose a negative application, at some time in the future, of the homicidal statute in question to the termination of a profoundly retarded being’s life, or the life

of an irreversibly comatose being. It would seem that most philosophical, as well as normative, definitions of "rationality" preclude the "beings" in our two examples from identification as "reasonable creatures in being" and would possibly include the chimpanzees in question. We can, perhaps, better understand the inclusion of the words "reasonable creature" in defining who can be a victim of homicide, by briefly looking at the historical origin of their use. In doing this, we will see a continuing acceptance of the implication that simply being born as *Homo sapiens* confers "rationality" and status as a "reasonable creature in being," though in fact, the intended use of "rationality" is the other way around.

Prior to the fourteenth century, the ancient law was consistent in holding that anyone who procured the abortion of an unborn child by any means was guilty of murder if there was, at the time, a living fetus in utero. Obviously there were religious overtones to the court's reasoning and up until the middle of the fourteenth century the term "reasonable creature in being" was not employed. However, the law began to recognize an inconsistency in its position on murder—that since there could be no homicide without a living human being as the victim, the killing of an unborn child could not be murder, but instead, needed to be redefined as another crime. Thus, in order for murder to be applied, it became necessary for the fetus to be born alive and exist independently as a "reasonable creature in being."<sup>14</sup> The fetus born alive then became the "reasonable creature in being" capable of being murdered. The basic motivating factor underlying the use of "reasonable creature" was to underscore the Aristotelian concept of man as a "rational animal," and to provide for "rationality" as the separating element to be used in distinguishing man from animal. Whether or not man was in every instance a "reasonable creature" at birth was not considered. The implication of man as a "reasonable creature in being" begins at the onset of life and continues until death occurs in the traditional sense. This implication, with the unfolding of the psychological and physiological functions of the brain, is only now being questioned.

After the initial definition of a "reasonable creature in being" in the fourteenth century, the courts continued to struggle with determining the exact time when the status of "human being" was established. This struggle was strictly confined to the newborn fetus and its ability to survive independently from its mother and not to

any reconsideration of the implication that being *Homo sapiens* carried with it "rationality." By mid-nineteenth century the English cases had not reached uniformity on whether breathing, heart action, severance of cord, established the status of "human being" for the purpose of the law of homicide. In American Jurisprudence, many states adopted into their criminal codes the same definition of murder given by Lord Coke in England, except that in England the act of murder is committed "under the king's peace," where here it is committed under the peace of the state.<sup>15</sup> In coming to a decision as to when a child becomes a "reasonable creature in being," a Tennessee court ruled that a child must be born alive and have an independent circulation established.<sup>16</sup> This decision is followed in those jurisdictions still using Lord Coke's definition of murder.

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While the courts have been careful in interpreting the meaning of the phrase "reasonable creature in being," *the accent has been on "in being" and they have paid little attention to the critical words "reasonable creature."* The broad implication of their meaning, as discussed, has gone for the most part virtually unchallenged; however, the groundwork for challenging the implication, at least scientifically, is now being laid by our new approaches to the dimensions of rationality.

American courts have examined the concept of what it is to be a "reasonable creature" in apparently only two cases.<sup>17</sup> These cases were decided over a century ago, and though the court in both cases extended the meaning of a "reasonable creature in being" to include a slave, a lunatic, or idiot, it does not go unnoticed that an irreconcilable inconsistency in the court's reasoning was also created that continues with us today—excusing the mentally defective from criminal responsibility because of the absence of the element of rationality, while at the same time protecting the mentally defective as "reasonable creatures in being."

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***“The law is notoriously slow to move or to change.”***

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In the Mississippi case of *State v. Jones*, tried in 1821, the defendant Jones was charged with murder in the killing of a slave.<sup>18</sup> The court was confronted with the question: Was a slave a reasonable creature in being such that he could be murdered? While ruling that in some respects slaves were considered as chattels, the court held that they were also considered in other respects as men. The court did not define or explain in what respects that slaves were considered as men, but simply reasoned that since a slave could be held responsible for homicide—the law viewing them as rational beings capable of committing a crime—they can be victims of murder as rational beings, thus, they are included within the definition of a “reasonable creature in being.”<sup>19</sup> If the court had stopped here, the inconsistency to follow would not have emerged, and perhaps in time the criminal code would have been amended or modified to provide for a clearer definitive meaning of a “reasonable creature in being.” However, apparently employing the same defective reasoning, the court extended the meaning of “reasonable creature” to include lunatics, idiots, and unchaste women. The latter (unchaste women) apparently provided protection to the prostitute and unfaithful wife. The only other case applicable to the question being discussed is the Texas case of *Perryman v. State*, which concurs with the Mississippi opinion.<sup>20</sup>

The legal inconsistency is obvious. A slave can be charged with murder because he is a rational being, and thus he can be murdered because he is a rational being. *However, a mentally defective person can be murdered because he is a rational or “reasonable creature,” but he cannot be charged with murder because he is not a rational being.* The law, beginning with the reports of Lord Coke’s First Institute of the Laws of England, allows that only those persons who have not a want or defect of will are capable of committing a crime. This theory of responsibility has been kept intact to the present day as a viable legal doctrine. Hart

writes that in most contexts, the expression “he is responsible for his actions” is employed to assert that a person has certain normal capacities which society associates with its concept of rationality. The capacities in question are those of understanding, reasoning, and control of conduct. They constitute the most important criteria of moral responsibility.<sup>21</sup> Thus, the law on one hand established that the mentally defective is not a rational being in order to excuse his criminal responsibility, and yet, on the other hand, allows through *implication* that he is a “reasonable creature in being” and can be murdered.

**L**est we go so far that our discussion be misinterpreted as calling for the death of an “idiot,” or a profoundly retarded child because he is no longer a “reasonable creature in being,” we must return to the original thesis and intent of this paper. Are all men reasonable creatures in being; and, are all reasonable creatures in being men? It would seem that with a proper examination of the terms “reasonable” and “rational” a termination of a profoundly retarded child’s life or the life of an irreversibly comatose patient under our murder statutes would not be murder, while the killing of the educable chimpanzee discussed in Section I could be considered murder. The law is notoriously slow to move or to change; however, this fact has its meritorious moments as well as its negative moments. Even if our courts should decide by arbitrary fiat that our murder laws do cover the profoundly retarded and the comatose human and do not cover the chimpanzee, the theoretical and moral issues concerning “rationality” which we have raised in this paper would still remain to be resolved. The law is moving to digest, interpret, and spew forth again legal guidelines for what is happening within the new and exciting bio-ethical field. Only recently have we begun to re-examine such terms as “death,” “corpse,” and “when life begins”; and to re-define these terms in law prompted by changes in science and medical technology and new social needs created thereby. We are calling for a corresponding re-examination of the meaning and scope of the crucial concept of “reasonable creature.” We also call for a recognition of the fact that any law which professes explicitly or implicitly to give legal protection against murder to severely retarded human beings as “reasonable creatures” must also give equal protection to chimpanzees with equal or superior functional abilities.

## Reasonableness, Murder and Modern Science

### Notes

1. See: *Tennessee Code Annotated*, (Indianapolis: Bobbs-Merrill Co., Inc.). Chapter 24, Section 39-2401.
2. See: *People v. Potter*, 5 Michigan Reports 1, Michigan Statutes 28-248.
3. See: *State v. Jones*, 18 Delaware 573.
4. See: 7 New Jersey Laws, 220.
5. In West Virginia, the court in *State v. Dodds*, 54 West Virginia 289 states that "the general definition of the section does not touch the common law distinction between murder and manslaughter." In Vermont, the court in *State v. Blair*, 53 Vermont 37 states "that the section has not altered the common law definition of murder," Statute 53-2301. In Rhode Island, in *State v. Halfway*, 52 Rhode Island 492, it is affirmed that "Statute does not change the crime of murder as it existed at common law but merely provides for degrees." In Pennsylvania, the case of *Commonwealth v. Exler*, 253 Pa. 155 states "that since the statute does not define murder, the word must be taken in its common law sense." See also *Commonwealth v. Dorazio*. In North Carolina, the court in *State v. Phyne*, 124 N.C. 847 states "that statutes where murder is divided into two degrees have not taken away any ingredients of murder at common law." Where a state's legal tradition is based upon common law, unless a statute expressly modifies the common law or is so interpreted by the courts to do so, the common law in question continues to prevail when applicable.
6. For example, the Georgia law now reads: "Murder is the unlawful killing of a human being, in the peace of the state by a person of sound memory and discretion with malice aforethought, either expressed or implied." Georgia Code 5-26-10.
7. The argument of this paper applies to all the great apes, particularly the gorilla which seems to have even greater linguistic potential than the chimpanzee. See Peter Swynne et al., "Almost Human", *Newsweek*, Vol. 89, March 7, 1977, pp. 70-73. For simplicity of exposition, we have concentrated on the chimp, though the basic pattern of argumentation may extend even to porpoises.
8. Reproduced in Tom Regan and Peter Singer, *Animal Rights and Human Obligations* (Englewood Cliffs: Prentice-Hall, Inc., 1976), p. 66.
9. Details may be found in: Emily and Ola D'Aulaire, "The Ape that 'Talks' with People," *The Reader's Digest*, Vol. 107, Oct. 1975, pp. 94-98. See also Duane M. Rumbaugh, ed., *Language Learning by a Chimpanzee: the Lana Project* (New York: Academic Press, 1977).
10. See: David Premack, "Language in Chimpanzee?" *Science*, Vol. 172, May 22, 1971, pp. 808-822; and Ann James Premack and David Premack, "Teaching Language to an Ape," *Scientific American*, Vol. 227, Oct. 1972, pp. 92-99.
11. See: R. Allen Gardner and Beatrice T. Gardner, "Teaching Sign Language to a Chimpanzee," *Science*, Vol. 165, Aug. 15, 1969, pp. 664-672; Roger S. Fouts, "Acquisition and Testing of Gestural Signs in Four Young Chimpanzees," *Science*, Vol. 180, 1973, pp. 978-980; Peter Jenkins, "Teaching Chimpanzees to Communicate," in Regan and Singer, *Animal Rights and Human Obligations*, pp. 85-92; and Eugene Linden, *Apes, Men, and Language* (New York: E. P. Dutton & Co., 1974).
12. Regan and Singer, p. 63.
13. Institute of Society, Ethics and the Life Sciences, Task Force on Death and Dying. "Refinements in Criteria for the Determination of Death." *Journal of the American Medical Association* 221 (July 3, 1972), 48-53.
14. *40 American Law Reports, Third Series 446* (Rochester, New York: The Lawyers Co-operative Publishing Company).
15. J. H. Thomas, Esquire, *A Systematic Arrangement of Lord Coke's First Institute of the Laws of England*, Vol. III, Paternoster-Row, London, S. Brookes.
16. See *Morgan v. State*, 148 Tennessee Reports 417, Nashville, Rich Printing Company.
17. See *State v. Jones*, 1 Mississippi Reports 83. Printed at Courier & Journal Office, Natchez, Miss. and *Perryman v. State*, 36 Texas Reports 321, St. Louis, Mo., The Gilbert Book Company.
18. See *State v. Jones*, *Supra*, p. 83.
19. *Ibid.*, p. 84.
20. See *Perryman v. State*, *supra*, p. 322.
21. H. L. A. Hart, *Punishment and Responsibility* (New York: Oxford University Press, 1968), pp. 211-30.