



ILLEGAL ALIENS

*Visitors from space
pose legal entanglements
of the third kind*

BY ROBERT A. FREITAS, JR.

A light flashes in the night sky over Washington, D.C. Interceptors scramble northward from nearby Andrews Air Force Base. The glowing spot becomes a perfect circle of scintillating orange-red. Sirens bay at the false moon while powerful spotlights wave back and forth at the stars, searching for some faint sign of recognition. The President is awakened from his slumber by three uniformed men.

Silently, gracefully, the silvery disc settles to Earth on the White House lawn. Secret Service and army personnel stealthily move forward and surround the craft at a discreet distance. A crowd gathers.

A side panel unexpectedly dilates, letting out a blinding light from within. A humanoid figure appears in shadowy silhouette, clutching a small cylindrical object in one manus. Its arm rises in friendly greeting.

Suddenly the sharp crack of a rifle pierces the air. Several onlookers scream in unison as a fountain of green, foamy liquid spurts from the visitor's head. The creature moans, slumps down into its pool of "blood," and moves no more.

Is the individual who pulled the trigger guilty of murder? Voluntary manslaughter? Has he committed *any* crime?

Probably not. Present-day American law divides all living entities into three strictly separate categories. Those incapable of voluntary movement are "plants." Those capable of voluntary movement but not human are "animals." All human beings are "persons."

This distinction is of critical importance. Our federal and state constitutions and our statutes, codes, charters, and treaties af-

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ford legal rights and responsibilities only to persons. Nonpersons—animals, plants, and nonliving entities, such as cars and computers—have no rights and are regarded as mere property. Property may not bring legal action on its own behalf, although its human owner may do so to recover any losses of property.

The extraterrestrial (ET) in the opening scene was not a member of the species *Homo sapiens* and was therefore nonhuman by definition. However, it appears to have been alive and capable of voluntary motion; hence, it cannot have been a plant. Thus the creature was legally, by rebuttable presumption, an animal.

Technically, the ET should be classified as *fera naturae* ("a wild animal") because no proof of tameness or ownership was evident. Wild animals running loose on private property may be hunted and killed by, or captured and reduced to being the personal possession of, any human being armed with buckshot and a little courage. On federal lands such creatures are under the jurisdiction of the Fish and Wildlife Service of the Department of the Interior; on state lands they are subject to the state's Department of Fish and Game. Either authority may declare a "special open season on said game," or the agencies themselves may destroy an animal that is causing injury to human life or property.

BENEATH THE LAW

Even if the extraterrestrial is somehow regarded as *domita naturae* ("a tame animal"), its legal position hardly improves. Cruelty-to-animals laws exist in virtually all the states, but this does not alter the creatures' basic lack of rights. For instance, a surgical operation, even if it produces the most intense pain and suffering, may nonetheless be considered justifiable and noncriminal if its purpose is to "make the animal useful to man." Thus the violent castration of a young horse or bull does not fall within laws prohibiting cruelty to animals. And most statutes specifically exclude invertebrates. If an ET resembles a cross between a sea scorpion and a grasshopper, it may have no protection whatsoever.

The very idea of treating an extraterrestrial visitor to our fair planet as a mere animal may at first seem outrageous to many, but this is the letter, if not the spirit, of the law. At various times in human history, blacks, children, women, foreigners, prisoners, and Jews have been regarded as nonpersons in one society or another. Cetaceans of putative high intelligence are routinely slaughtered around the world for dog food. Even corporate personalities of one state are not considered "persons" in another state unless they have strictly complied with conditions set down by that state to carry on business there. We should not expect ETs to fare any better.

How does all this relate to crimes involving off-world visitors?

Consider the crime of homicide. Statutes

describing the corpus delicti for this offense always include two parts: (1) the killing of a human being (2) by a human being. Since criminal laws are always strictly construed by the courts, the corpus delicti for homicide cannot be met under current law in any case involving extraterrestrial beings. If a man kills an alien visitor, he is not guilty of murder, since no "human being" has died. Shockingly enough, the converse situation, in which a human is slain by an ET, yields the same result: There is no murder, since the man died at the hands of a nonhuman.

Similar difficulties will arise in rape cases. The usual common-law definition of the offense goes like this: "The unlawful carnal knowledge of a woman by a man forcibly and against her will." But *woman* is strictly defined as a female member of the human species, and *man* as a male *Homo sapiens*. Even assuming he/she/it/they have the necessary physiological equipment, no extraterrestrial being legally can

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be either the perpetrator or the victim of rape.

Paradoxically, if the female in question gives her consent and no force is used, the *human* member of the interspecies couple will be charged with the crime of bestiality (copulation with a beast) and may be prosecuted under state sodomy statutes. These offenses traditionally carry stiff penalties. Not too long ago the common-law punishment for bestiality was death, sometimes by burning, sometimes by burying alive. And as recently as 1953 eight states stipulated a maximum of life imprisonment for such "crimes against nature." The alien partner gets off scot-free in this affair, since nonhuman animals cannot be held guilty of criminal conduct.

A few broad-minded jurists have suggested that a "person" is a person not because he is human but because rights and duties are ascribed to him. In this view, becoming a person is like joining an exclusive country club. If your appearance is acceptable, your references impeccable, and your behavior vouched for by credible sponsors, you're in.

Ultimately, then, the granting of legal

"person" status in our system of justice is a political question, a matter of basic public policy. Society must decide to whom it wishes to grant legal rights and duties. Certainly any sentient being who demonstrates the humanlike characteristics of rationality, possession of technology or a symbolic language, a sense of time, manipulative appendages, emotions, self-awareness or consciousness, or the ability to make moral choices should be considered worthy of personhood in our society.

Assuming we elect to treat extraterrestrial beings as legal persons, what kind of persons will they be considered?

One possibility is that ETs might be afforded refugee status. Refugees are, technically, stateless persons, neither citizens nor nationals of any country on Earth. A common definition of this status is: "any person uprooted from his home who has crossed a frontier—natural or artificial—and who looks for protection and sustenance from a government other than his former one." Space creatures stranded here, out in the galactic boondocks near Sol, seem to fit this description rather well.

If extraterrestrial visitors are regarded as refugees, will they have any legal rights? In many nations they won't. However, in the 20 or so countries where the convention relating to the status of stateless persons has been adopted, refugees do have the same rights as those held by any foreign national. (This may not amount to much—Uganda was a signatory even during Idi Amin's regime—but at least it's a start.) In the United States, which is not a signatory to the convention, even stateless persons are protected by the Bill of Rights.

ETs might also be viewed as aliens, persons owing allegiance to a foreign government. Since other worlds are foreign, within the meaning of the appropriate statutes, extraterrestrials will most likely fall under this classification. In this country aliens, too, are protected by the Bill of Rights, and all are subject to the criminal jurisdiction of the United States.

PUBLIC OFFENDERS

There are countless subclasses of aliens. For example, an *illegal alien* is one who has entered the country without passing through the normal channels of admission administered by the U.S. Immigration and Naturalization Service. In a surprise-contact scenario, the extraterrestrial visitor will commit a technical illegal entry and thus may be subject to immediate deportation proceedings. (With rides on the space shuttle costing about \$4 million just to low Earth orbit, this should prove interesting!)

A related subclass is the *alien enemy*, the citizen of some hostile foreign power. If the President feels that the landing of an ET may be a prelude to invasion, he is authorized by law to order the federal marshals to "apprehend, restrain, secure, and remove" all alien enemies. For the alien this could mean isolation, interrogation, and concentration camp. However, even if Con-

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gress declares war on the visitor's home planet, there is another little-known subclass of aliens in international law called *friendly enemies*. One jurist explains, "A belligerent state is free to exempt enemy nationals from the treatment applied to persons vested with enemy character."

The immigration technicalities can be circumvented by classifying an ET as an *essential alien*. According to law, with the concurrence of the attorney general, the CIA director, and the commissioner of immigration, any alien deemed "essential to the furtherance of the national intelligence mission" or otherwise vital to the interests of national security may be admitted for permanent residence regardless of regular admission procedures. Since any nation on Earth in possession of an extraterrestrial being and its fancy hardware could gain a significant military, technological, or economic jump on the others, the essential-alien dodge is certainly within the realm of possibility.

There are even easier ways to avoid the immigration laws. The creature might be considered an *alien crewman* (serving aboard a foreign vessel) or an *alien in transit*. Both would be exempt because their stay in this country would be only temporary. Similarly, if a space visitor entered the United States for "business or pleasure" or as a "bona fide student, scholar, specialist, or leader in a field of specialized knowledge or skill," it would be considered a *visiting alien* and thus be exempt from immigration laws.

Of course, the President could simply grant an ET ambassadorial status. As a full diplomat, the extraterrestrial would serve as the representative of its own government during its stay on Earth and would enjoy full immunity from prosecution in American courts. Or the creature might be deemed a *consul*, merely a commercial agent for its government and entitled to fewer immunities.

Normally, there must be diplomatic reciprocity before a foreign envoy of any kind is given ambassadorial rank. However, constitutionally, the Chief Executive of the United States is our sole representative in dealings with foreign nations. Neither Congress nor the judiciary can complain if the President unilaterally makes the decision to recognize an ET and its government.

Yet another option is open, this time to Congress. The naturalization clause of the U.S. Constitution expressly authorizes the federal legislature to prescribe rules by which aliens may secure *full citizenship*. There is nothing to prevent a grant of American citizenship to named persons by special act. For instance, Congress passed in 1963 one such bill, which directed the President to declare Sir Winston Churchill an honorary citizen of the United States. This approach bypasses the usual require-

ments of naturalization; so an ET could retain its native extraterrestrial nationality, a rather unique sort of dual citizenship.

If beings from other worlds come to live among us in greater numbers and on a more permanent basis, the legal "quick fixes" we've been discussing may prove wholly inadequate. Congress undoubtedly will be forced to take the next major juridical step: create a special legal classification called *extraterrestrial persons* that would define their rights and duties in American society. Many of our laws may have to be thoroughly revamped to accommodate the complex relations inherent in any multi-species sentient population.

THE CODE OF XENORABI

Consider, once again, the criminal law. In order to emphasize the illegality of killing and to provide special punishments in specific cases, lawmakers should define the crime of *xenocide*—the slaying of an extraterrestrial person by any other legal

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person. Xenocide could be committed with or without malice, intentionally, negligently, or accidentally. If an ET possesses no personal consciousness but is part of a group mind that is deemed, collectively, to be an extraterrestrial person, then killing any individual member of the association might be termed *semicide*. Like mayhem, the criminal act is directed only to a part of the person's substance and not to the whole.

Legislators will probably want to invoke legal sanctions against those who engage in interspecies sexual relations. Humans are already covered by felony sodomy statutes; the equivalent offense for sentient nonhumans could be called *anthroposexus*—unlawful sexual activity with human beings. More specific sanctions of this offense against public decency are likely to be passed by state senators and assemblymen. There may be classifications, such as prostitutional anthroposexus, forcible anthroposexus, adulterous anthroposexus, and anthroposexus by seduction, each with its own set of proscriptions and peculiar penalties.

Laws may also be passed to prohibit *xenogamy*, the marriage between a human

and a sentient nonhuman being of the opposite, similar, or complementary sex. These rules will be closely modeled after the old miscegenation statutes, which the Supreme Court ruled unconstitutional in *Loving v. Commonwealth of Virginia* (1967). (This decision cannot invalidate xenogamy statutes, since species, unlike race, has never been ruled a "suspect classification" under the equal protection clause of the Fourteenth Amendment.)

Entirely new criminal codes might have to be enacted for situations beyond the pale of normal human experience. For instance, for a race of sentient limb-regenerative amphibians, nibbling the body of an acquaintance may be a sign of greeting and approval, much as the human handshake is. All parts quickly grow back, and no real permanent damage is done; the bigger the bite, the deeper the friendship. Human beings, unable to regenerate nibbled limbs, would regard the behavior as criminal (*petit cannibalism*) when practiced on people.

Innumerable possibilities may readily be imagined. *Involuntary vility* could be the crime of exposing one's true, uncamouflaged physical appearance in public, if that appearance is so shockingly ugly as to cause hysteria among human onlookers. A crime for telepathic ETs would be *telerape*, the unlawful thought-reading of the mind of one or both partners of a human couple, without their consent, while they are having sex.

OTHERWORLDLY DEFENSES

Naturally, all charges of criminal culpability are subject to defenses that may be raised to relieve an extraterrestrial of liability for its acts. One recourse for harried defense attorneys would be to assert lack of capacity on the part of the ET. A plea of insanity is the most common variant. Under the traditional M'Naghten Rule, criminal acts committed by an extraterrestrial could be excused if the ET was unable to understand the nature of its act or, if it knew what it was doing, lacked the capacity to distinguish whether its act was right or wrong. Lack of capacity might also be proved by evidence of mental immaturity, infancy, or feeble-mindedness, the intelligence or the psychosocial development of the alien being comparatively below the human adult norm, at the time the crime was committed.

Another limitation on criminal prosecutions is that an accused cannot be tried for acts that were not criminal when they were committed. If a human, to take a simple example, killed an alien in a jurisdiction that had not yet ruled the ET a "person" at the time of the offense, then the application of any criminal law that spoke only of "persons" would be prohibited under the U.S. Constitution (Article I, Section 9).

One highly unorthodox alternative would be the assertion of sociobiology as a defense in criminal prosecutions. Such a "sociobiology doctrine" could expunge all

liability for acts committed as a direct consequence of biologically predetermined behavioral patterns in specific situations.

Under the doctrine, intelligent trisexual extraterrestrials (requiring three distinct sexes for reproduction) would be excused of the crime of bigamy or polygamy. A sentient praying mantoid that, during normal intercourse, bit off the head of a careless human zoologist-observer, instead of the torso of her mindless mate, could raise "protein hunger" as a valid defense to the crime of homicide. ETs modeled after the common mole *Antichinus stuarti*, among which copulation causes the females to release hormones that kill the male shortly thereafter, might use the doctrine to escape prosecution for murder. Extraterrestrials having the same compulsion to steal as the Adélie penguins of Antarctica might be excused of the crime of petty larceny.

It is not clear whether courts would buy the sociobiology doctrine. Claims of compulsion and coercion generally are no defense when the compulsion derives from some natural characteristic of the defendant. Courts have thus far rejected insanity pleas based on the XYY-chromosome defect (the extra Y supposedly causes a higher probability of antisocial behavior), but there is strong evidence that the judiciary would accept this defense if there existed rigorous scientific proof tying the genetic defect to insanity.

Before the case went to trial, however,

there would be two additional complications that would have to be considered.

First, an accused ET could not be tried, sentenced, or punished unless it was "presently sane." If it could not understand the nature and purpose of the proceedings against it, the creature might be judged incapable of standing trial and be committed to a mental institution until it is capable. If it were determined that the alien would not achieve competency in the near future, then the authorities would have to either release the accused or institute permanent commitment proceedings.

Second, the Sixth and the Fourteenth amendments require an "impartial jury" both in federal and in state criminal prosecutions. Generally, jurors must be chosen from representative cross sections of the community. Exclusions on the basis of race, national origin, or descent are unconstitutional. If at least one juror of the ET's own species were not empaneled, any conviction resulting from the trial could later be overturned on this basis.

After the extraterrestrial was declared guilty as charged, appropriate punishment would be handed down from the bench. The notion that the alien nature of the defendant should be taken into account leads to the concept of pro rata sentencing. ETs with shorter life spans or whose subjective time passes measurably faster than our own should be given shorter prison terms, and vice versa.

Life-fractions might be an appropriate unit of punishment. For instance, the sentence for voluntary manslaughter is usually ten years, a life-fraction of about 14 percent for human beings who live to age seventy. By this measure, an alien creature guilty of the same crime but with a normal life span of seven years should receive only a single year of incarceration. But ETs with 700-year life spans should be locked up for a century or more.

Stiffer sentences might be appropriate for xenocidal acts committed against longer-lived or more highly intelligent or sensitive species. All else equal, killing a millennial sentient may deserve ten times as much punishment as an act resulting in the death of a mere centennial human. With crimes of kidnapping or false imprisonment, however, punishment should be increasingly severe when more ephemeral victims are inconvenienced, since a greater percentage of total life time has been disrupted through the investigation of a criminal act.

The silvery disc murmurs softly its disappointment and glows a faint warning of orange-red luminescence around its perimeter. The fallen humanoid briefly sparkles, then vanishes. A hushed crowd falls back as the extraterrestrial machine rises majestically. Its masters will not return soon, for they have learned that illegal aliens aren't safe on planet Earth.

At least, not yet. **DD**

