

A STEP AT A TIME: NEW ZEALAND'S PROGRESS TOWARD HOMINID RIGHTS

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All members of the Homindae Family (humans, chimpanzees, bonobos, gorillas, and orangutans) share complex cognitive aptitudes not shared by most other animals. Yet only human hominids have legal rights to life and personal security. The campaign to win fundamental rights for all hominids took a small but significant step forward in 1999 when New Zealand's Animal Welfare Act banned the use of non-human hominids in research, testing, and teaching except where such uses are in the hominids' best interests. In preventing human interests from trumping non-human ones, the Act took a first step toward dismantling speciesism within the hominid family. Larger steps are now being planned. A Non-human Hominid Protection Bill has been drafted with provisions to protect non-human hominid lives, partially restrict their trade as property, and confer legal standing though guardianship provisions. This will be submitted to the New Zealand Parliament later this year.

INTRODUCTION

The campaign for hominid rights in New Zealand began inauspiciously in 1980 with an unsuccessful submission by the author to Labour Member of Parliament, Michael Moore (now head of the World Trade Organization), proposing, among other things, that his planned Animal Charter¹ confer rights on great apes (chimpanzees, bonobos, gorillas and orangutans).²

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¹ *MPs Launch Charter for Animals*, The Star (Christchurch, New Zealand) 25 (Oct. 9, 1980).

² Letter from Rowan Taylor to Michael Moore, Labour Member of Parliament, (Sept. 25, 1980) (on file with author). "My second point concerns a particular group of Class A animals—the apes. A strong argument can be made for granting them every human right which they are capable of exercising, or which we are capable of exercising on their behalf. Locally, this would mean that the dozen or so chimpanzees who are currently incarcerated in zoos and circuses in this country should be liberated and made state 'wards.' They should be placed in congenial environments which guarantee them optimal autonomy, emotional and physical health, intellectual stimulation, and privacy. Internationally, the Government should accord minority ethnic status to each of the four species of great ape (chimpanzees, gorillas, bonobos and orang-utans), and provide conservation aid, along with diplomatic initiatives on their behalf, to halt the destruc-

The proposal, loosely modeled on a draft bill by U.S. lawyer Stephen Burr,³ was inspired by a raft of research findings whose philosophical implications had been noted by Gordon Gallup, Jr.⁴ and Carl Sagan⁵ among others. But it was not until the 1990s, after an international movement had been spawned by the book, *The Great Ape Project*,⁶ that the New Zealand campaign resumed in earnest. The Great Ape Project New Zealand (GAPENZ) chose to make its first target the nation's animal welfare legislation, which was then under review.

The first fruit came on October 5, 1999, when the Minister for Food, Fibre, Biosecurity and Border Control, the Honorable John Luxton, announced that the country's new Animal Welfare Act⁷ would take the "small but nevertheless important step"⁸ of banning harmful experimentation on non-human hominids.⁹ As Paula Brosnahan has

tion of their habitat, the decimation of their populations, and their ill-treatment in the laboratories and showgrounds of developed countries. Several people have seriously mooted suggestions of this sort over the past few years. Overseas, of course, they have been opposed by commercial and scientific interest groups. In New Zealand, however, there is little likelihood of such opposition." *Id.* at 6-7.

³ Stephen Burr, *Toward Legal Rights for Animals*, 4 *Env'tl. Affairs* 205, 235 (1975) (proposing three different classes of animal protection, with the most cognitively advanced animals—great apes and dolphins—in class A, having the right to life).

⁴ Gordon G. Gallup, Jr., James L. Boren, Gregg J. Gagliardi & Larry B. Wallnau, *A Mirror for the Mind of Man, or Will the Chimpanzee Create an Identity Crisis for Homo sapiens?*, 6 *J. of Human Evolution* 303, 311 (1977).

⁵ Carl Sagan, *The Dragons of Eden: Speculations on the Evolution of Human Intelligence* 120 (Random House 1977) ("[i]f chimpanzees have consciousness, if they are capable of abstractions, do they not have what until now has been described as 'human rights'? How smart does a chimpanzee have to be before killing him constitutes murder?").

⁶ *The Great Ape Project: Equality beyond Humanity* (Paola Cavalieri & Peter Singer eds., St. Martins Press 1993).

⁷ *Animal Welfare Act 1999* (2000) (N.Z.) (available at <<http://rangi.knowledge-basket.co.nz/gpacts/public/text/1999/an/142.html>>) (accessed Mar. 27, 2001).

⁸ Hansard, New Zealand Parliamentary Debates, Statement of Hon. John Luxton, Minister for Food, Fibre, Biosecurity and Border Control, *Animal Welfare Bill (No. 2)*, Third Reading (Oct. 5, 1999) (available at <http://rangi.knowledge-basket.co.nz/hansard/han/text/1999/10/05_258.html>) (accessed Mar. 15, 2001).

⁹ In line with recent developments in primate taxonomy, the Act defines nonhuman hominids as "any non-human member of the family Hominidae, being a gorilla, chimpanzee, bonobo or orangutan." *Animal Welfare Act 1999*, *supra* n. 7, at § 2(1). It is only within the last two decades that scientists have admitted the great apes into the human biological family. Michael M. Miyamoto, Ben F. Koop, Jerry L. Slightom, Morris Goodman & Michelle R. Tennant, *Molecular Systematics of Higher Primates: Genealogical Relations and Classification*, 85 *Proc. of Natl. Acad. of Sci., U.S.A.* 7626, 7641 (Oct. 1988); *Mammal Species of the World: A Taxonomic and Geographic Reference* 276 (Don E. Wilson & DeeAnn M. Reeder, eds., 2d ed., Smithsonian Inst. Press 1993). Some scientists now propose to further classify humans, chimpanzees and bonobos within a single genus. Elizabeth Watson, Simon Easteal & David Penny, *Homo Genus, A Taxonomic Review of the Classification of Humans and the Great Apes*, in *Humanity from African Naissance to Coming Millennia* (P.V. Tobias, M.A. Raath, J. Moggi-Cecchi & G.A. Doyle, eds., Angelo Pontecorboli Pub. forthcoming 2001); Morris Goodman, Calvin A. Porter, John Czelusniak, Scott L. Page, Horacio Schneider, Jeheskel Shoshani, Gregg Gunnell & Colin P. Groves, *Toward a Phylogenetic Classification of Primates Based on DNA*

pointed out in this journal,¹⁰ the experimentation ban falls well short of the proposals put forward by GAPENZ¹¹ and others.¹² But there is little doubt that the Minister was right. The ban is an important step, not so much in its immediate impacts, but in what it foreshadows—the legal dismantling of speciesism within the hominid family.

STEP 1: THE ANIMAL WELFARE ACT 1999

In its submissions on the draft legislation, GAPENZ proposed that the new Act include a special Hominid Rights section with provisions largely modeled on New Zealand's Protection of Personal and Property Rights Act 1988 and the New Zealand Bill of Rights Act 1990.¹³ The rights GAPENZ proposed in this section included guardianship provisions and three explicit legal rights: the right to not be deprived of life; the right to not be subjected to torture or to cruel, degrading or disproportionately severe treatment; and the right to not be subjected to medical or scientific experimentation where it is not in the best interests of the individual hominid.

Ultimately, the Primary Production Committee decided that the rights and guardianship provisions GAPENZ proposed were inappropriate for this particular Act as they “would change the intent and approach of the bill from welfare to rights.”¹⁴ However, Committee members did accept that hominids merit special treatment of some sort because of their sophisticated mental abilities—abilities that are in many ways closer to those of young human children than to other mammals.¹⁵ The Committee, therefore, recommended a ban on the use

Evidence Complemented by Fossil Evidence, 9 *Molecular Phylogenics and Evolution* 585 (1998); Jared Diamond, *The Rise and Fall of the Third Chimpanzee* 21 (Radius 1991).

¹⁰ Paula Brosnahan, *New Zealand's Animal Welfare Act: What Is Its Value Regarding Non-Human Hominids?*, 6 *Animal L.* 185 (2000).

¹¹ The Great Ape Project New Zealand, Inc., *Submission on the Animal Welfare Bill (No. 2)* (Oct. 1998) (on file with author).

¹² Over sixty professionals from biology, psychology, ethics and law made submissions supporting the hominid rights proposals. Only two submissions opposed it. David Penny et al., *Submission of Professor David Penny and 37 others to the Select Committee on Primary Production Concerning the Animal Welfare Bill No 2* (Oct. 27, 1998) (on file with author); Roger S. Fouts, *Submission of Dr. Roger S. Fouts to the Primary Production Committee on the Animal Welfare Bill (No. 2)* (Oct. 20, 1998) (available at <<http://www.cwu.edu/~cwuchi/nztext.html>>) (accessed Mar. 3, 2001).

¹³ The Great Ape Project New Zealand, Inc., *supra* n. 11, at 4.

¹⁴ Primary Prod. Comm., *Rpt. on Animal Welfare Bill (No. 2)*, xxi (May 17, 1999) (Wellington, N.Z.) [hereinafter Committee Report].

¹⁵ A large amount of research and observation has accumulated in the past half century showing that non-human hominids have self awareness, insight, foresight, reasoning ability, empathy, sense of humor, cultural diversity and inventiveness as well as limited capacities for symbolic language, numeracy, artistic creation, tool-making, “theory of mind” (the ability to imagine what others are thinking) and even moral awareness. Fouts, *supra* n. 12; Penny, *supra* n. 12; Gallup, *supra* n. 4; Richard Byrne, *The Thinking Ape: Evolutionary Origins of Intelligence* (Oxford U. Press 1995); Steven M. Wise, *Rattling the Cage: Towards Legal Rights for Animals* 163-237 (Perseus Books 2000).

of non-human hominids in research, teaching or product-testing unless the Director-General of Agriculture and Forestry (who has responsibility for animal welfare) is satisfied that such use is “in the best interest of the individual great ape or is in the interest of that great ape’s species and the benefits are not outweighed by the likely harm to the great ape.”¹⁶

“Best interest” means having the best outcome. For example, it would allow experimental use of a new cancer treatment on an individual hominid if he or she had a malignancy and might be cured by the experiment. However, the Committee’s decision to insert species’ interests into the calculus of best outcome raised the possibility of a conflict of interests between the species and the individual. The Committee resolved this conflict by requiring the species’ benefits to not be outweighed by the harm to the individual. But the inclusion of species’ interests also raised another potential conflict. Since humans and chimpanzees share over 99% of their functional DNA¹⁷ and have the same blood groups, they are susceptible to many of the same diseases. Chimpanzees could thus be used in research on shared diseases on the pretext that the research was for the benefit of the chimpanzee species when the intended beneficiaries were human. Aware of this risk, the Committee stated: “We expect the Director-General to act in the best interests of the great apes. These provisions are not intended to provide a back-door method of approving experiments on great apes for the benefit of humans.”¹⁸

In principle, then, the experimentation ban is clearly on the side of the non-human hominids. But since none of New Zealand’s three dozen non-human hominids were ever at risk of being subjected to harmful research, and since the Act contains none of the other provisions requested by GAPENZ (i.e. the right to life, guardianship, and personal security) the overall significance of the New Zealand legislation has been questioned.¹⁹

The GAPENZ view is that the Act is significant, even if its practical effects appear limited. Although the Act does not protect great apes’ lives and does not confer explicit legal rights to them, it does give them more than they or any other non-humans have had before—and therein lie the grounds for optimism.

For a start, the Act appears to be the first legislation in the world to explicitly prohibit harmful research and testing on other hominids. At the very least, this sends a moral message to other nations. Cynics

¹⁶ Primary Production Committee, *Primary Production Committee Reports Back on Animal Welfare Legislation* (press release) (May 17, 1999) (on file with author).

¹⁷ Goodman, *supra* n. 9, at 286 (“[h]umans and chimpanzees are more than 98.3% identical in their typical nuclear noncoding DNA and more than 99.5% identical in the active coding nucleotide sequences of their functional nuclear genes. . . . In mammals such high genetic correspondence is commonly found between sibling species below the generic level but not between species in different genera.”).

¹⁸ Committee Report, *supra* n. 14, at xxi.

¹⁹ Brosnahan, *supra* n. 10.

may say that moral messages are easily sent but achieve little. GAPENZ's view is that moral messages create a climate of censure that can influence policies, laws and professional practice—provided others send them too.

But the Act does more than just send a moral message. It also has the practical effect of preventing harmful hominid experiments in New Zealand—an increasing possibility in this frontier age of genetic and biomedical research. Chimpanzees are widely used around the world as test subjects in a wide range of outrageous experiments. Even hybridization experiments are one of the many options that the biotechnology age now makes possible.²⁰ While such research may not be inherently harmful, the outcomes could well be, such as those reportedly envisioned by Chinese researchers in the 1980s.²¹

Another significant feature of the Act is that, in singling out great apes, it marks them as being different from other animals. This is reinforced by the Act's use of the term "non-human hominids" rather than "great apes," squarely placing them within the broader human family rather than in the "exotic animals" category. Labels are important. Hominid rights are more likely to win acceptance if they are seen as applying only to beings like us and not as the "thin end of the wedge" for the entire Animal Kingdom.

Finally, the Act not only recognizes that other hominids have interests, but actually makes these the paramount criteria in deciding whether or not a non-human hominid can be an experimental subject. It thus abolishes human-centered justifications for experimentation and puts the burden of proof on researchers to show that their experiment really is in the non-human hominid's best interests. This refusal to allow human interests to trump non-human ones is perhaps the

²⁰ Stewart Newman, *Scientist: Bar Mixed Human-Animals* <<http://abcnews.go.com/sections/science/DailyNews/chimera/0402.html>> (Apr. 4, 1998). This article describes a scientist's bid to patent a particular method of cell hybridisation that can be used to create chimeric animals, including human-chimp hybrids. *Id.*

²¹ David Bonavia, *China May Breed 'Near-Human'*, Christchurch Press (Christchurch, New Zealand) 9 (Dec. 12, 1980).

The Chinese authorities are considering the renewal of partly successful research on cross-breeding men with chimpanzees to produce a strain of helots (serfs) for economic and technical purposes. The Shanghai newspaper 'Wen Aui Bao' said this week that a female chimpanzee became pregnant 13 years ago after being inseminated with a man's sperm. Red Guards, however, smashed up the laboratory according to Mr Qi Young Ziang, identified only as a 'researcher in medicine', in the north-eastern city of Shenyang. Mr Qi's ambition is to create what he calls a 'near-human ape'. Through enlargement of its brain and tongue, it should be able to grasp simple concepts and talk some kind of language. Organs from the proposed monster would possibly prove useful as substitutes for human or artificial organs in transplant cases. It could even drive a car, herd animals, protect forests and natural resources, and be used for exploration of the seabed, outer space, and the centre of the Earth. Asked whether it was ethical to create such a hybrid, Mr Qi said that semen was of no account once it left the body, and could be disposed of like manure. The creature produced would be classed as an animal, so there need be no qualms about killing it when necessary. *Id.*

Act's most significant breakthrough. Arguably, it constitutes a quasi-right, for it irreducibly entitles each hominid to have his or her best interest protected above and beyond any other interests that may be brought to bear. However, without the more fundamental rights proposed by GAPENZ, it is, at best a weak right. For this reason, GAPENZ sees the Act as no more than a first step.

STEP 2: THE NON-HUMAN HOMINID PROTECTION BILL

Having fully utilized the Animal Welfare Act, GAPENZ is now preparing a stand-alone Non-human Hominid Protection Bill (the Bill) to be introduced to Parliament as a Private Members' Bill in late 2001. The Bill's language is less dramatic than that proposed in GAPENZ's submission on the Animal Welfare Act of 1999. The guardianship provision remains the same, but the original rights provisions are replaced by prohibitions with penalties. Two new provisions have been added which: 1) prevent the import or export of non-human hominids unless this in the best interests of the individual or his or her species, and 2) prohibit the trading as property of sanctuary-based non-human hominids. New Zealand does not have hominid sanctuaries at present, but this provision anticipates such a possibility in the future, given that New Zealand is well suited for such a facility.

The Bill also transfers the hominid experimentation ban across from the Animal Welfare Act. This is part of a broader strategy to shift hominid protection out of the traditional confines of the animal welfare domain (dominated in New Zealand by the Ministry of Agriculture and the Massey University Veterinary School) and into a more rights-friendly domain administered by a different arm of government. Finding a suitable administrative home for the proposed Bill may be difficult because it charts entirely new territory, sitting somewhere between the portfolios dealing with animals as property and those dealing with the needs and interests of persons. Possible homes include the Conservation Department (which administers the Marine Mammal Protection Act) and some of the "people" Ministries, such as Justice, Internal Affairs, or Social Welfare.

It may be several years before the draft legislation emerges from the Private Members' Bill ballot box for consideration by a Select Committee and public submissions. GAPENZ will use this time to prepare the public and the politicians for the ensuing discussion by highlighting the plight of non-human hominids everywhere and the failure of existing welfare and conservation measures to protect them.

In declining to include explicit rights in the Animal Welfare Act, the Primary Production Committee declined to include explicit rights in the Animal Welfare Act, but it did not reject the hominid rights concept altogether, instead suggesting that the idea be subjected to wider

public debate.²² Just how that public debate is conducted will be very important, as there are still some major obstacles to be overcome.

OBSTACLE 1: ANIMAL RIGHTS

Our experience to date indicates that it would be a strategic error for GAPENZ to align the arguments for hominid rights with those for animal rights. When legal personhood for hominids is perceived, not as a valid end in itself, but as a Trojan Horse for animal rights in general, the distinctive merits of the hominids' case tend to get lost beneath the considerable baggage of the animal rights debate. This is because:

- (a) full-blown animal rights are unpopular with all but a minority of New Zealand citizens and politicians because our economy still relies heavily on pastoral farming, our recreational culture includes fishing and hunting, and the conservation of our unique environment requires large-scale control of animal pests; and
- (b) The most persuasive arguments for hominid rights (i.e. those based on the hominids' human-like cognitive capacities) are either not applicable to most other animals, or are only weakly so, and are thus open to easy ridicule when spuriously extended to rats and fish.²³

Linking the largely cognition-based case for hominid rights to the largely sentience-based case for animal rights, therefore, carries risks to those presenting the case for hominid rights. This is why GAPENZ makes a clear distinction between hominid rights and animal rights, with the former being a rather straightforward extension of the existing personhood paradigm to a small cluster of species that have similar cognitive abilities, while the latter represent a major paradigm shift embracing all sentient animals.

OBSTACLE 2: THE HOMINID CRINGE

Even without the animal rights baggage, achieving hominid rights will not be easy. Humans—like bonobos and chimpanzees—are tribal animals.²⁴ Where and how we set our tribal boundaries varies greatly, but, having set them, we do not readily let others in, particularly if they are seen as alien or inferior. As the civil rights struggles against slavery, racial segregation and apartheid have shown—and as genocidal episodes continue to show, from 19th Century Tasmania, to Nazi Germany, to more recent events in the Balkans and Rwanda—humans will sometimes go to great and even extreme lengths to keep other humans out of their moral and legal tribes.

Non-human hominids suffer the additional handicap of being so like us that they invite comparison, while being just different enough to make the comparison unfavorable to them. The entertainment in-

²² Committee Report, *supra* n. 14, at xx-xxi.

²³ See John Hoyland, *Editorial: The Great Divide?*, *New Scientist* 3 (Feb. 13, 1999).

²⁴ Richard Wrangham & Dale Peterson, *Demonic Males: Apes and the Origins of Human Violence* 168-69 (Houghton Mifflin Co. 1996)

dustry, in particular, reinforces demeaning images of other hominids as slapstick comics or fearsome monsters. This has contributed to a phenomenon that might be termed the “hominid cringe,” an attitude exemplified by the oft-quoted wife of the Bishop of Worcester who, on hearing of Darwin’s theory, exclaimed: “Descended from apes! My dear, we hope it is not true. But if it is, let us pray that it may not become generally known!”²⁵

Today, a significant percentage of humans, and not just religious fundamentalists, still do not regard themselves as descended from chimpanzees—despite the overwhelming scientific evidence for this. And even some who accept that chimps belong to our biological tribe still balk at the idea of including them in our moral and legal tribe.²⁶ Hominid rights supporters, too, sometimes unwittingly succumb to the hominid cringe when they feel obliged to present non-human hominids as flagship animals for some broader animal rights or conservation cause, rather than as a worthy cause in their own right. It is as if great apes, on their own, are perceived as too frivolous to merit such concern.

The hominid cringe is why GAPENZ has been reluctant to pursue recognition of hominid rights through the courts. The option of taking legal action was considered in 1999 when a New Zealand circus chimpanzee, thirty-six year old Lola Ridgway, was sold to an offshore circus that was known to have a poor animal welfare record. She died of dehydration within two days of being transported, leaving an orphaned son, Buddy.²⁷ The option of pursuing an action with Lola and Buddy as plaintiffs was discarded because of the likelihood that a conservative judge, in the absence of clear statutory guidance, would succumb to the hominid cringe and rule that Lola and Buddy were not persons. Rather than risk setting such an unfortunate precedent, it was left to an

²⁵ Theodosius Dobzhansky, *The Biological Basis of Human Freedom* 3 (Columbia U. Press, 1956).

²⁶ Two scientists who vociferously oppose hominid rights are Frans de Waal of the Yerkes Regional Primate Research Center, Atlanta, and Steve Jones of University College, London. Both are prolific writers who have eloquently documented the continuities between humans and other apes but who resist their legal and philosophical implications. According to de Waal, rights should only go to those who can exercise them, not to those who must rely on the goodwill of others—an argument that, followed through, would also deny rights to many humans, including children and the mentally impaired. Frans de Waal, *We the People (and Other Animals)*, N.Y. Times A21 (Aug. 20, 1999). Jones has gone so far as to liken hominid rights to Nazism, on the mistaken assumption that the former are based on genetic, rather than psychological, criteria and overlooking the rather fundamental fact that hominid rights are inclusive and expansive, while the Nazi approach to rights, like that of Jones himself, is exclusive and restrictive. *Id.*; Steve Jones, *View from the Lab: When the Chips are Down, Humans Matter More than Chimps*, Daily Telegraph 18 (Feb. 25, 1999).

²⁷ The New Zealand Herald Online, *Fears for Welfare of Aged Chimp Sold to Fiji* <<http://www.nzherald.co.nz/storyprint.cfm/storyID=3759>> (Mar. 16, 1999); The New Zealand Herald Online, *Autopsy Links MAF to Chimpanzee Death* <<http://www.nzherald.co.nz/storyprint.cfm?storyID=138947>> (June 2, 2000).

animal welfare group to purchase Buddy and fly him to the Chimfunshi Wildlife Sanctuary in Zambia.²⁸

Meanwhile GAPENZ continues to pursue hominid rights through incremental legislative change. The absence of vested interests against, and the accessibility of the New Zealand political process, make this a more promising option in the short-term. And the short-term is all that we may have. Recently reported assessments of the non-human hominids' conservation status predict extinction for some in as little as ten years unless a major attitude change occurs.²⁹

CONCLUSION

Ultimately, GAPENZ anticipates a time when all hominids in New Zealand, human and non-human, will have legal standing and will share the fundamental legal rights to life and personal security. It also expects the New Zealand Government to become an international advocate for hominid rights, as it did for whale protection after the passing of the Marine Mammal Protection Act in 1978. As with other emancipation struggles, hominid rights will not happen overnight, but each small step will bring them closer. The Animal Welfare Act, with all its shortcomings, is an important first step. Larger strides will follow.

²⁸ The New Zealand Herald Online, *Freed Orphan Happy at Last* <<http://www.nzherald.co.nz/storyprint.cfm?storyID=129664>> (Apr. 6, 2000).

²⁹ Peter Gruner, *Apes Face Extinction within 10 Years*, Evening Standard (London, England) 7 (Sept. 26, 2000) (“[t]he world’s great ape population faces virtual extinction within 10 years, a new report warns today. . . . International experts claim chimpanzees could soon be wiped out and that gorilla and orangutan numbers are far lower than previously estimated.”).

