Index. No. 162358/15 (New York County)

To Be Argued By:
Steven M. Wise

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

In the Matter of a Proceeding under Article 70 of the CPLR
for a Writ of Habeas Corpus

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of TOMMY,

Petitioner-Appellant,

-against-

PATRICK C. LAVERY, individually and as an officer of Circle L Trailer Sales, Inc., DIANE L. LAVERY, and CIRCLE L TRAILER SALES, INC.,

Respondents-Respondents.

REPLY TO *AMICUS CURIAE* LETTER-BRIEF OF RICHARD L. CUPP BY PETITIONER-APPELLANT

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I. INTRODUCTION

In his *amicus* letter brief, Professor Cupp ("Cupp Br.") focuses almost exclusively on the New York State Supreme Court Appellate Division, Third Judicial Department's ("Third Department") decision in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 150-53 (3d Dept. 2014), *leave to appeal den*., 26 N.Y.3d 902 (2015). However, Professor Cupp fails to cite to the law of New York or of any other jurisdiction. Instead he offers a personal philosophy shared by a small minority of outlier professors that draws from old and debunked philosophical arguments. Finally, Professor Cupp unsuccessfully tries to buttress the justification offered by the Third Department that a "social contract" somehow compelled its decision.

In this Reply, Petitioner-Appellant, the Nonhuman Rights Project, Inc. ("NhRP") will demonstrate the flaws that have long existed in the philosophical arguments upon which Professor Cupps draws and that the "social contract" claim that Professor Cupp and the Third Department offer rely upon misunderstandings of what "social contract" means.

II. ARGUMENT

1. Background to Professor Cupp's arguments

The modern "animal rights" movement began with the 1975 publication of the Australian philosopher, Peter Singer's powerful book, *Animal Liberation.*

Industries that exploited nonhuman animals began to solicit brief philosophical articles intended to construct arguments purporting to prove that all humans, but no nonhuman animals, could ever be entitled to any moral or legal right. Professor Cupp's *amicus* letter brief is their epigone.

An early example appeared in the *New England Journal of Medicine*, which is published by that defender of vivisection, the Massachusetts Medical Society. In it, the philosopher Christina Hoff's article, "Immoral and moral uses of animals," 302 NEJM 115 (1980), set forth what would become a familiar pattern of argument.

First, the writer explicitly or implicitly acknowledges that mere membership in the species *Homo sapiens* is insufficient for rights. "It is sometimes asserted," wrote Hoff, "that 'just being human' is a sufficient basis for a protected moral status, that sheer membership in the species confers exclusive moral rights. . . . One may speak of this as the humanistic principle . . . Without further argument the humanistic principle is arbitrary. What must be adduced is an acceptable criterion for awarding special rights." *Id.* at 115.

Second, the writer proposes some characteristic that all humans, but no nonhuman animals, allegedly possess. Hoff rested her argument upon the claim that nonhuman animals live merely "the life of the moment," while humans have projects, friendships, and a sense of themselves that set them apart. *Id.* at 116.

However, scientists soon began to detect these allegedly uniquely human characteristics in many nonhuman animals. As the NhRP's affidavits demonstrate, the overwhelming evidence that has accrued in the last 36 years make it limpid that Hoff's distinction is, as a matter of scientific fact, untrue, at least with respect to chimpanzees.

Six years later, the *New England Journal of Medicine* published an article by the philosopher, Carl Cohen, to whom Professor Cupp frequently cites, and whose ideas he espouses. In "The Case for the Use of Animals in Biomedical Research," 315(14) NEJM 865, 865 (October 2, 1986), Cohen also made no attempt to argue that mere membership in the human species could be rationally sufficient for personhood. Instead he chose as his uniquely human characteristic such a high level of cognition that he believed it could never be found in any nonhuman animal. However, his argument immediately encountered the obstacle that vast numbers of human beings lack that degree of cognition.

Worse, Cohen's argument betrayed a serious misunderstanding about what rights are. "[T]his much is clear about rights in general," Cohen wrote, "they are in every case claims or potential claims, within a community of moral agents, . . . Animals are of such a kind that it is impossible for them, in principle, to give or withhold voluntary consent or to make a moral choice." *Id*. at 865.

However, the NhRP's affidavits and supplemental affidavits demonstrate that, with respect to chimpanzees, the scientific evidence that has accrued in the last 30 years reveals Cohen's distinction as illusory. Moreover, Cohen plainly erred in his assertion that all rights are claims. As the NhRP explained in its Opening Brief ("Opening Br.") at 56, only "claim-rights" possibly require (in a small minority view) an ability to make claims; moreover adherence to Cohen's theory that claim-rights-are-the-only-rights would exclude millions of human beings from being rights-bearers as well as many nonhuman animals. More fundamentally, the right to bodily liberty that the NhRP asserts on behalf of Tommy is an "immunity-right" that has nothing to do with making a claim or bearing a duty. *See* Steven M. Wise, *Rattling the Cage – Toward Legal Rights for Animals*, 56-59, 253-254 (Perseus Books 2000). It therefore remains both irrational and fundamentally unfair to consign an autonomous being, such as a chimpanzee, to perpetual detention simply because he allegedly can't make a claim.

Cohen's argument, which he supports with no scientific evidence whatsoever, is essentially the claim of Professor Cupp, who likewise fails to support his argument with any scientific evidence. Yet the *Lavery* court perpetuated these errors that Hoff and Cohen made and now Professor Cupp makes in his *amicus* brief.

2. The Second Tommy Petition presented new grounds not previously presented in the First Tommy Petition specifically pertaining to duties and responsibilities.

The second petition for a common law writ of habeas corpus and order to show cause filed by the NhRP on behalf of Tommy ("Second Tommy Petition"), presented substantial new grounds, not previously presented, that were intended specifically to respond to *Lavery*. (Cupp Br. 2). While the NhRP disagrees with *Lavery*'s novel personhood legal standard, it provided the lower court with *sixty new pages* of affidavits that contained hundreds of facts neither previously presented with respect to Tommy nor determined by any New York court. These new and *uncontroverted* affidavits demonstrated that chimpanzees routinely bear duties and responsibilities both in chimpanzee communities and in chimpanzee-human communities and therefore can be "persons" even under the erroneous *Lavery* holding. (Opening Br. 29).

In his attempt to demonstrate that the NhRP failed to provide new grounds not previously presented in the first petition for a common law writ of habeas corpus and order to show cause filed by the NhRP on behalf of Tommy ("First Tommy Petition"), Professor Cupp points to just six lines therein. In those lines, the NhRP merely mentioned broad evidence that chimpanzees "possess moral agency." (Cupp Br. 3). But a broad claim of "moral agency" is not synonymous with the specific capacity to bear duties and responsibilities upon which the *Lavery*

court unexpectedly focused. The NhRP could not have known that duties and responsibilities would be relevant to its argument for personhood at the time it filed the First Tommy Petition in December 2103. Once the *Stanley* court determined itself bound by *Lavery* in *Matter of Nonhuman Rights Project Inc. v. Stanley*, 16 N.Y.S.3d 898, 903 (Sup. Ct. 2015), the NhRP immediately assembled affidavits to establish that chimpanzees do, in fact, bear duties and responsibilities.[1]

3. Professor Cupp's argument that legal personhood is contingent upon the ability to bear legal duties and responsibilities simply because this is the "norm" lacks legal precedent and would establish dangerous precedent for human beings and misapprehends the nature of the common law.

a. The "norm" is a grossly insufficient basis for denying legal rights to Tommy.

Fatal alone to Professor Cupp's argument is his claim that "[t]he pertinent question is not whether chimpanzees possess anything that could be characterized as a sense of responsibility (which he appears to concede), but rather whether they possess a *sufficient* level of moral agency to be justly held legally accountable as well as to possess legal rights under our human legal system." (Cupp Br. 5) (emphasis in the original). Temporarily putting to one side (1) the fact this standard does not exist in New York or American law and that Professor Cupp cites no cases or other authority in support thereof; and (2) *Lavery* improperly took judicial

[1] *Lavery* took judicial notice of the fact that chimpanzees do not bear duties and responsibilities, which demonstrates that this evidence was not previously before the court in the First Tommy Petition. *Lavery*, 124 A.D 3d at 151-52. (Opening Br. 59).

notice of the allegedly deficient cognitive abilities of chimpanzees without providing the NhRP with any notice or opportunity to place such facts into evidence, and therefore should not be followed for that reason alone, Cupp's claim illustrates why this Court must reverse and remand to the lower court with an order to issue the requested order to show cause with the purpose of bringing the factual arguments of the parties before the court so that it might rule on the vital issue of the nature of a chimpanzee's cognition. Similarly confused is Cupp's claim that it is somehow relevant that unnamed prosecutors in distant jurisdictions did not bring criminal prosecutions against chimpanzees who allegedly committed certain acts. (Cupp Br. 5-6). Millions of human New Yorkers, the young, the old, the insane, the forever incapacitated, and others, possess fundamental rights that protect their most fundamental interests without their being criminally liable for their actions either.

It is beyond cavil that many humans are accorded legal personhood *despite* lacking the capacity to bear duties and responsibilities. If Professor Cupp's standard were adopted, these humans would lose all their legal rights. Professor Cupp offers no rational reason for granting legal rights to incapacitated human beings who have *no agency*, moral or otherwise, while denying all legal rights to

chimpanzees who, he concedes, possess vastly greater cognitive abilities than do such humans.[2]

Professor Cupp's argument requires adherence to the "norm" that legal rights have never been accorded to nonhuman animals and therefore legal rights may never be accorded to them because this would defy "the norm." (Cupp Br. 12). This reveals a serious misunderstanding of how the common law evolves. *See generally*, Melvin Aron Eisenberg, *The Nature of the Common Law* (1991); Oliver Wendell Holmes, Jr. *The Common Law* (1881). Perhaps realizing the weakness of his claims, Professor Cupp falls back on his version of the thoroughly-discredited humanistic principle, which is merely an irrational bias. (*See* Cupp Br. 16-17) ("appropriate legal personhood is anchored in the human moral community, and we include humans with severe cognitive impairments in that community because they are first and foremost humans living in our society"). This "justification," however, merely embodies the very prejudice and inequality that the NhRP seeks to remedy. *See, e.g.*, *Miss. Univ. Women v. Hogan*, 458 U.S. 718, 724-25 (1982)

[2] This is the problem that the NhRP refers to in its Opening Brief at 54, when it argues that *Lavery* merely relied on a couple of pages from two of Cupp's articles "that express his personal preference for a narrow philosophical contractualism that arbitrarily excludes every nonhuman animal while including every human being" and that no philosophers or jurisprudential writers support the idea that humans should have rights for just being human without pointing to any objective characteristic about being human that would justify rights. Cupp's only rebuttal is to cite an *amicus* brief that Bob Kohn filed in the *Lavery* case that notes "the vast western philosophical canons to the contrary" then provides a *single example*, Bob Kohn's mentor, the philosopher and educator, Mortimer J. Adler, and then we are cited merely to two entire books with no hint provided as to where in those two entire books is there language to support Kohn's astounding proposition. (Cupp Br. 7).

("[c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions").[3]

Cupp's rationale that the norm is unchangeable is identical to that relied upon by southern slave-owners to justify denying legal rights to human slaves. (Cupp Br. 12). The same rationale was used to perpetuate segregation following the Thirteenth Amendment. For example, the court in *West Chester & P.R. Co. v. Miles*, 55 Pa. 209, 213 (1867) upheld racial segregation based solely a moral norm:

> Why the Creator made one black and the other white, we know not; but the fact is apparent, and the races distinct, each producing its own kind, and following the peculiar law of its constitution. Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar, with those natural instincts and feelings which He always imparts to His creatures when He intends that they shall not overstep the natural boundaries He has assigned to them.

E.g., *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (noting the trial court stated "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And, but for the interference with his arrangement, there would be no cause for such marriage. The fact that he separated the races shows that he did not intend for the races to mix").

[3]In 1947, UNESCO created a committee on the theoretical bases of human rights which included leading intellectuals, philosophers and political scientists. A standard questionnaire was sent out to politicians, scholars, academics, religious leaders, and others, soliciting their opinion on the idea of a Universal Declaration of Human Rights. While the respondents tended to agree that there should be human rights, they strongly disagreed on what the theoretical underpinnings of these rights should be. Human Rights - A Symposium Prepared By UNESCO (1947).

More recently, opponents of marriage equality utilized this moral "norm" or tradition justification to deny same-sex couples the right to marry. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2602 (2015) (The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest.). As the United States Supreme Court recognized, "for centuries there have been powerful voices to condemn homosexual conduct as immoral . . . shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family." *Lawrence v. Texas*, 539 U.S. 558, 571 (2003). Rejecting lawmaking grounded in moral commands, the Court declared that its "obligation is to define the liberty of all, not to mandate our own moral code." *Id.*

In overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court condemned *Bower*'s misguided reliance on "the history of Western civilization and Judeo-Christian moral and ethical standards." *Id.* at 572. It advised courts to look forward, just as the authors of the Fourteenth Amendment did, who "knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Id.* at 579. Rather than bowing to a "history and tradition" of legal discrimination against gays and lesbians, the new, more inclusive direction of "our laws and traditions in the past half century are of most relevance here." *Id.* at 571-72.

Lawrence reaffirmed that the Court has "*never* held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons." *Id.* at 582 (O'Connor, J., concurring) (emphasis added). *Bowers*, the outlier, "was not correct when it was decided, and it is not correct today." *Id.* at 578. Consequently, "[m]oral disapproval of [a] group . . . is an interest that is insufficient to satisfy [even] rational basis review[.]" *Id.* at 582 (O'Connor, J., concurring) (citations omitted). *See also Kerrigan v. Commissioner of Public Health*, 289 Conn. 135, 256-57 (2008) (same).

The present case involves the reach of the broad, flexible, and ancient common law writ of habeas corpus. Contrary to Professor Cupp's position, this Court's ability, and indeed duty, to change the norm is at its apex. Tommy's thinghood derives from the common law. It is now time to bring this extraordinary being within the protection of the common law.

b. Professor Cupp fails to support the *Lavery* court's failure to differentiate between a "claim" and an "immunity."

In its Brief, the NhRP engaged in extensive discussion of how *Lavery* misunderstood its argument that Tommy was entitled to the "immunity-right" of bodily liberty protected by the common law of habeas corpus, which correlates with a "disability." (Opening Br. 56). *Lavery* mistakenly believed that the NhRP was arguing that Tommy was entitled to a "claim-right," which correlates with a

"duty, when it was seeking only an "immunity right" of bodily liberty." Professor Cupp does not challenge this. Instead his brief response was that Hohfeld described his system of rights with respect to "persons" and believed that "persons" meant human beings. (Cupp Br. 13).

But Hohfeld knew that such human beings as fetuses were not "persons". *See Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 15-16 (1884) (Holmes. J.) Moreover, who or what Hohfeld understood to be a "person," a century ago is irrelevant to how the entire system of legal rights operates. It does not require the State of New York to apply Hohfeldian rights only to those "persons" Hohfeld may have imagined. This is especially so in the State of New York, where "person" is specifically not synonymous with "human," and where the determination of who and who is not a "person" turns not on biology, but on public policy and moral principle, *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 201 (1972). In sum, it is no better public policy or good moral principle to act irrationally in determining who *is* a "person" than it is in determining what rights one should have *as* a "person."

4. Professor Cupp erred in contending that personhood is limited to those who participate in a "social contract."

Professor Cupp's discussion of social contract reveals him to be, again, an outlier, while demonstrating his fundamental misunderstanding of what "social contract" means. Traditionally, social contract has addressed the authority of the

State over the individual. J.W. Gough, *The Social Contract* 2-3 (Oxford Clarendon Press 1936). At its most elementary, social contract is *not* about the participation of individuals, but *is* about the idea that individuals submit some freedoms to the power of the State in exchange for the State's protection of their other freedoms. Social contract incapacitates tyranny. *See, e.g.¸ Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655, 663 (1874) ("There are limitations on [State] power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name").

Professor Cupp's position, erroneously embraced by the Third Department, that social contract means that "[s]ociety extends rights in exchange for an express or implied agreement from its members to submit to social responsibilities" is unfounded. *Lavery*, 124 A.D. 3d at 151. To the contrary, it is the *government* that grants express or implied agreement to be responsible. *See generally Lemmon v. People*, 20 N.Y. 562 (1860) (comity between states "has its foundation in compact, express or implied. The social or international compact between the States, as such, was fixed by the Federal Constitution. (*Const. U. S., art.* 1, § 10.) (2.)"). In *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 SAN DIEGO L. REV. 27, 70 (2009), cited by *Lavery*, Professor Cupp begins by discussing the social contract justification for the Revolutionary War as a basic lesson for children and

immigrants. Without explanation, Professor Cupp inexplicably segues from providing a lesson in limited government to providing an erroneous lesson in contracted rights and responsibilities: "We are taught from a young age that just as government must give us representation to go along with taxation, it must give us rights that correlate with our societal responsibilities." Professor Cupp fails even to try to substantiate his peculiar notion that the social contract requires that rights correlate with responsibilities or to explain his reasons for making the leap from the government owing duties and responsibilities to the requirement that beings owe those duties as well to bear rights.

The social contract theorist, John Locke, argued that individuals are bound morally by the law of nature not to harm each other, but that without government to defend them people's rights are not secure. Under the social contract, as Locke imagined it, "the State has an interest in protecting its citizens . . . ; this surely is at the core of the Lockean 'social contract' idea." *Roberts v. Louisiana*, 431 U.S. 633, 646 (1977). To this end fundamental rights impede and temper the exercise of *State* power.

Thus, contrary to Professor Cupp's interpretation, rights cases invoke a breach of *State* responsibilities, not social responsibilities of the individual. *In re Foster Care Status of Shakiba P.*, 181 A.D.2d 138, 140 (1st Dept. 1992) ("Recognizing that 'it is the unique mandate of our courts to enforce the

obligations we owe to children under our social contract'"); *People v. Wynn*, 424 N.Y.S.2d 664, 667 (Sup. Ct. 1980) (holding criminal rights to be from "a system of justice evolved over centuries from origins rooted in a fundamental philosophy processed from experience in our political and social ascent from historical tyrannies. It is a corporal part of our social contract covenanted by the Constitution"); *500 W. 174 St. v. Vasquez*, 325 N.Y.S.2d 256, 257 (Civ. Ct. 1971) ("Perhaps chief among the assurances which together make up the social contract is the judiciary's promise never to close the courthouse doors. Through them should walk unhindered every citizen with a dispute to settle or a grievance to air").

Contrary to Professor Cupp's position, social contract does *not* require concurrent holding of rights and responsibilities. The holder of the right is the individual and the holder of the responsibility is the government. *In re Gualt*, the *Lavery* court's own authority, states the social compact "defines the rights of the individual and delimits the powers which the state may exercise." 387 U.S. 1, 20 (1967). Professor Cupp's assertion that the right of habeas corpus relief requires that a person must be capable of reciprocal rights and responsibilities is entirely at odds with the basic tenets of social contract which focuses on the rights and responsibilities of the government, not individual beings.

Moreover, the entire emphasis of the *Lavery* court on social contract as the ground for the express and particular purpose of denying all rights to Tommy was misplaced. The United States Supreme Court has long recognized that the social contract lies "among the great juristic myths of history . . . . *As a practical concept, from which practical conclusions can be drawn, it is valueless.*" *FPC v. Nat. Gas Pipeline Co*., 315 U.S. 575, 605 n.6 (1942) (emphasis added) (citing Henderson, *Railway Valuation and the Courts*, 33 HARV. L. REV. 1031, 1051 (1920)); *see also Ky. v. Dennison*, 65 U.S. 66, 95 (1861) (emphasis added) (discussing the imperfect obligation within the social compact "which binds every organized political community to avenge all injuries aimed at the being or welfare of its society. Certainly, this is the first and highest of all governmental duties; but nevertheless it is, in juridical language, a 'duty of imperfect obligation,' incapable in its essence of precise exposition or admeasurement, and its fulfilement depends on moral and social considerations, accosting the community at large, which a judicial tribunal can neither weigh, define, nor enforce" [sic]); *Watson v. Employers Liab. Assurance Corp*., 348 U.S. 66, 79 n.2 (1954) ("Phrases like . . . 'the principles of the social compact' were in fashion . . . for stating intrinsic limitations on the exercise of all political power. More recently, the power of this Court to strike down legislation has been more acutely analyzed and less loosely expressed.

Rhetorical generalizations have not been deemed sufficient justification for invalidating legislation").

In its Brief, the NhRP demonstrated that habeas corpus has always been available to those not part of a fictitious "social contract." (Opening Br. 54) (citing *Rasul v. Bush*, 542 U.S. 466, 481-82 & n.11 (2004) ; *Jackson v. Bulloch*, 12 Conn. 38, 42-43 (1837). The fact that sister common law countries characterize as "persons" entities that lack the capacity to assume any duties or responsibilities conflicts with Professor Cupp's view of social contract as part and parcel of personhood. Mosques, parks and rivers were designated as legal persons, though they *had no duties or responsibilities*. (*See* Opening Br. 33-34).

Finally, Professor Cupp's position directly contradicts *Byrn*, which made clear that the determination of personhood is a matter of public policy. 31 N.Y.2d at 201. (Opening Br. 31). Cupp wholly ignores the standard set in *Byrn* that "[w]hether the law should accord legal personality is a policy question," "[i]t is not true…that the legal order necessarily corresponds to the natural order," and "[t]he point is that it is a policy determination whether legal personality should attach and not a question of biological or 'natural' correspondence." *Id.*

5. According personhood rights to Tommy would pose no threat to vulnerable human beings.

Professor Cupp has it exactly backwards when he argues that granting Tommy the basic common law right to bodily liberty would somehow threaten the

rights of vulnerable human beings. It is Professor Cupp's position, not the NhRP's, that poses a threat not just to the most vulnerable human beings, but to all rights-holders, for arbitrarily denying personhood to any being undermines every rational claim of every human to personhood and fundamental rights.

Professor Cupp's "slippery slope" argument was made by slave owners and opponents of same-sex marriage. *See also Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting) (expressing concern for the implication on "laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity"). Even the court below, in a case involving different chimpanzees, recognized that the "floodgates argument is not a cogent reason for denying relief." *Stanley*, 16 N.Y.S.3d at 917.

Nor does any difficulty of line-drawing preclude Tommy's personhood. The common law intentionally expands on a case-by-case basis. Line-drawing only becomes problematic when it results in arbitrary distinctions. But, at present, the law is arbitrary when it accords a human being with no cognition legal rights while denying personhood for any purpose to an autonomous chimpanzee. It is incumbent upon this Court to modify the common law to rectify this gross disparity, at least as applied to Tommy.

Whatever "line-drawing" difficulties may appear in future cases, they will be decided based on proven facts and sound public policy and moral principles.

Today, justice, liberty, equality, and scientific facts demand that Tommy be recognized as a legal "person" for purposes of bodily liberty. *Broadnax v. Gonzalez*, 2 N.Y.3d 148, 156 (2004) ("To be sure, line drawing is often an inevitable element of the common-law process, but the imperative to define the scope of a duty—the need to draw difficult distinctions—does not justify our clinging to a line that has proved indefensible"). The line set out in *Lavery* is indefensible.

III. CONCLUSION

Professor Cupp's *amicus* letter brief, and his articles upon which it relies follow a small minority tradition of philosophical opposition to rights for nonhuman animals that lack scientific and legal support. Professor Cupp offers neither science nor law to support his positions. Accordingly, this Court should reject Professor Cupp's arguments.

Dated: December 9, 2016 Respectfully submitted,

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