

# Contradictory Approaches to “Standing” in Federal Courts for the Unborn and for Animal Species

*C. Bermeo Newcombe*

## ABSTRACT

This article considers certain contradictions within judicial practices that pertain to the question of standing in federal courts. The article points out the inconsistency between permitting cases to be filed in the name of various animal species and denying permission for cases to be filed in the name of unborn human children.

WHEN THE SUPREME COURT decided *Roe v. Wade*,<sup>1</sup> it had to overcome an “elephant in the living room.” That elephant was the Fourteenth Amendment to the United States Constitution. The Fourteenth Amendment reads: “nor shall any State deprive *any person* of life, liberty, or property, without due process of law.” The Court got around the Fourteenth Amendment elephant by making the extraordinary statement (announced but not analyzed) that “the word *person* as used in the Fourteenth Amendment, *does not include the unborn*.”<sup>2</sup>

Why is this so important? It is important from a legal point of view because recognition of an entity as a “person” is one of the ways that an entity can seek the aid of a federal court. To bring an action in federal court a party must not only have an “injury,” but the entity bringing the action must have “standing” to sue. If a plaintiff lacks standing to sue, the action will be dismissed. Thus, the Court’s decision in *Roe* that unborn children were not “persons” for purposes of the Fourteenth Amendment

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<sup>1</sup> 410 U.S. 113 (1973).

<sup>2</sup> 410 U.S. at 158.

removed the unborn as potential plaintiffs in federal court in their own right because they lacked “standing” to sue.

The idea that unborn children are not legal persons has its judicial roots in a nineteenth-century opinion by the famous Justice Oliver Wendell Holmes. In *Dietrich v. Inhabitants of Northampton*<sup>3</sup> Holmes developed what later became known as the “entity theory” of the relationship between a pregnant woman and her unborn child. This theory is predicated “on the assumption that a[n] [unborn] child...*has no juridical (legally recognized) existence* and is so intimately united with its mother as to be ‘part’ of her and, as a consequence, is *not* to be regarded as a separate, distinct, and individual entity.”<sup>4</sup> Specifically, Holmes wrote that “as the *unborn child was a part of the mother...*, any damage to it...to be recovered for at all was recoverable by her.”<sup>5</sup>

Holmes’s “entity theory” remained entrenched until 1946 when a federal district court in Washington D.C. rejected it in favor of a “viability theory.” Under the viability theory an unborn viable child “should be allowed to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother.”<sup>6</sup> The District of Columbia court branded the entity theory a contradiction: “As to a viable child being ‘part’ of its mother, this argument seems to me to be a contradiction in terms. True, it is in the womb, but it is capable now of extra uterine life... [I]t is not a ‘part’ of the mother in the sense of a constituent element...”<sup>7</sup> Significantly, the D.C. court found that an unborn child had standing in its own right to bring an action against a third party for injury sustained before it was born. Specifically, the court said: “[when] we have a viable child—one capable of living outside the womb—are we to say now it has no *locus standi* (standing) in court...?”<sup>8</sup>

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<sup>3</sup> 138 Mass. 14 (1884).

<sup>4</sup> *Bonbrest v. Kotz*, 65 F. Supp. 138, 139 (D.D.C. 1946).

<sup>5</sup> 138 Mass. at 17.

<sup>6</sup> 65 F. Supp. at 142 (citation omitted).

<sup>7</sup> 65 F. Supp. at 140.

<sup>8</sup> 65 F. Supp. at 140.

## NO “STANDING” FOR THE UNBORN

But while many courts followed the viability theory and allowed an unborn child to maintain an action against a third party for injuries wrongfully committed in the context of an action for medical malpractice or injury to during the commission of a crime against the mother,<sup>9</sup> no court has ever ruled that an unborn child has standing to maintain an action in the context of a constitutional claim for deprivation of life in violation of the Fourteenth Amendment to the Constitution. In short, while unborn children may be considered “persons” and entitled to sue in their own right for various torts committed by third parties,<sup>10</sup> they are not recognized as persons for purposes of the Fourteenth Amendment’s prohibition against depriving a person of life or liberty.

Thus, at least for constitutional purposes, the U.S. Supreme Court has remained steadfast in its refusal to recognize an unborn child as a “person” within the meaning of the Fourteenth Amendment. For example, in *Planned Parenthood v. Casey* the Court reaffirmed *Roe*’s conclusion by announcing that the unborn have never been recognized as persons and “indeed no Member of this Court has ever questioned this fundamental proposition.”<sup>11</sup>

## “PERSONHOOD” AND THE STANDING OF ANIMALS IN FEDERAL COURT

Remarkably, at the same time that courts are diminishing, and in some instances eliminating, the “personhood” of the unborn, other courts are being asked to elevate various animal species to the status of “personhood” and to grant animal species standing in federal court. At least some of these efforts have been successful. In a case entitled *Palila v. Hawaii*

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<sup>9</sup> A Missouri court held that an unborn child was a “person” for purposes of a homicide statute in a case involving a defendant who savagely beat a pregnant woman. The beating resulted in the death of the woman and her unborn child. *State v. Holcomb*, 956 S.W. 2d 286 (Mo. App. 1997).

<sup>10</sup> For example, “Illinois *tort law* (not constitutional law) has recognized the right to bring an action based on injuries sustained to the fetus.” *Roberts v. Patel* 620 F. Supp. 323, 326 (D.C. Ill. 1985).

<sup>11</sup> 505 U.S. 833, 913 (1992).

*Department of Land and Natural Resources* a federal court allowed a bird [called a “honeycreeper”] to bring an action in federal court under the Endangered Species Act to prevent the destruction of its habitat by sheep and goats that had been brought in by a state agency.<sup>12</sup> Remarkably, a federal judge found: “As an endangered species under the Endangered Species Act..., the bird..., a member of the Hawaiian honeycreeper family, *also has legal status and wings its way into federal court as a plaintiff in its own right.*”<sup>13</sup> Another federal judge granted standing to the loggerhead turtle.<sup>14</sup>

#### PHILOSOPHICAL FOUNDATION

Promoting the “standing” of species while at the same time denying “standing” to the unborn under the Fourteenth Amendment was not invented by federal judges. It had its philosophical foundation in the utilitarianism of Jeremy Bentham and his disciple Peter Singer. Peter Singer, a professor of Bioethics, writes: “Human babies are not born self aware.... *They are not persons.* Hence their lives would seem to be no more worthy of protection than the life of a fetus.”<sup>15</sup>

He goes on to suggest: “I have and *know of nothing which enables me to say, a priori, that a human life of any quality, however low, is more valuable than an animal life of any quality, however high.*”<sup>16</sup> He argues that anyone who values human life above animal life is guilty of “speciesism.” The parallel to the concept of racism is obvious. Singer defines “speciesism” as “discrimination against beings, because they are not members of our own species.”<sup>17</sup>

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<sup>12</sup> 852 F.2d 1106 (9th Cir. 1988).

<sup>13</sup> 852 F. 2d at 1107. See *Cetacean Community v. Bush*, 386 F.3d 1169 (9th Cir. 2004), which declared the honeycreeper holding not a holding at all, but dictum.

<sup>14</sup> *Loggerhead Turtle v. County Council of Volusia Florida*, 896 F. Supp. 1170, 1177 (M.D. Fla. 1995).

<sup>15</sup> Peter Singer, *Rethinking Life and Death: The Collapse of our Traditional Ethics* (New York NY: St. Martin’s Press, 1995).

<sup>16</sup> *Ibid.*, p. 242.

<sup>17</sup> *Ibid.*, p. 119.

What has this animal rights (Singer prefers the term “animal liberation”) philosophy spawned from a legal point of view? Besides bringing a number of actions in federal courts on behalf of various species, animal rights supporters have funded a new legal journal at Lewis and Clark Law School called *Animal Law*. In addition, there has been an explosion of newly developed “Animal Law” courses in most law schools. Many of these courses, along with the *Animal Law Review*, promote the following philosophy.

First, humans are not superior to chimpanzees, or to any other species for that matter. Instead, “human beings lie on a continuum with animals. There is no sharp breaking point biologically or naturally. There is nothing that clearly marks the human being as superior to the chimpanzee or sentient animals.”<sup>18</sup> A recent (May 4, 2007) headline from the Associated Press declared: “Activists Want Chimp Declared a ‘Person’” A headline from a Kentucky paper announced: “Fetus Not a Person, Appeals Court Says.”<sup>19</sup>

Second, animal rights activists argue that so-called speciesism is analogous to racism: “Those who ignore the interests of persons of races other than their own are racists..., those who ignore the interests of sentient non-human beings are guilty of speciesism.”<sup>20</sup>

Third, just as African Americans were liberated from slavery, animals should be “liberated” too. “Jefferson...conclude[d] that blacks were mentally inferior to whites.... Experience taught us that Jefferson was wrong, and *experience taught us that slavery was wrong. I think experience will teach us that the way we treat animals today is wrong.*”<sup>21</sup>

Fourth, the slavery analogy has legal implications. Animal rights activists believe that animals should be accorded “standing” in court. Injured animals should be *allowed to bring actions on their own*. Animals should not have to rely on a so-called “owner” to bring an action on their

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<sup>18</sup> 9 *Animal Law Review* 60 (2003).

<sup>19</sup> *Lexington [Kentucky] Herald-Leader* (Sept. 14, 2002).

<sup>20</sup> Mary Anne Warren, *Moral Status: Obligations to Persons and Other Living Things* (New York NY: Oxford Univ. Press, 1997), p. 68.

<sup>21</sup> 9 *Animal Law Review* 60-61 (2003).

behalf.

One prominent law professor sees “striking similarities between the actual law of slavery and the current law governing human treatment of animals.”<sup>22</sup> He explains that injured slaves could only seek redress in court through their owners and that animals “are protected in the same way.”<sup>23</sup> The problem with this, the professor argues, is that “there is no private right of action on the part of animals.... Similarly, there was no right of action on the part of the slaves themselves against [third parties who injured them as well as] their owners in the case of cruelty or mistreatment.”<sup>24</sup>

#### CONCLUSION

Animal rights attorneys continue to file actions in federal courts in the name of various species.<sup>25</sup> Some of these actions are successful.<sup>26</sup> At the same time, no court has held since the announcement in *Roe v. Wade* that an unborn child is a person with “standing” in the context of a Fourteenth Amendment challenge to a denial of life or liberty.

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<sup>22</sup> 9 *Animal Law Review* 66 (2003).

<sup>23</sup> *Ibid.*

<sup>24</sup> 9 *Animal Law Review* 67 (2003).

<sup>25</sup> “The sole plaintiff in this case is the Cetacean Community.... [This] is the name chosen by the Cetacean’s self appointed attorney for all the world’s whales, porpoises, and dolphins....The Cetaceans contend that...they have standing under the ESA (Endangered Species Act).” *Cetacean Community v. Bush*, 386 F. 3d 1169 (9th Cir. 2004). This action was not successful.

<sup>26</sup> In *Loggerhead Turtle v.. County Council of Volusia, Florida* 896 F. Supp. 1170, 1177 (M.D. Fla. 1995).