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April 29, 2014: The Fight Over the Personhood of Animals

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Title: The Fight Over the Personhood of Animals.

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4/29/2014—If you want to see law at least a little as it used to be, look no further than Steven M. Wise, whose litigation on behalf of the legal rights of certain animals was featured in the New York Times on Sunday. (Story here) What makes the story particularly significant jurisprudentially is that Wise is using not the Constitution, but the common law method of writs and incremental steps to recognize these legal rights. And it seems that the foundation of these steps is “evolving public morality” based on new scientific learning about the mental life and capacities of at least some animals. What is not clear to me is the basis of this movement. Wise’s intellectual hero seems to be Oliver Wendell Holmes and his realist jurisprudence. Wise criticizes teleology because it led to a human dominated universe, as opposed to the utilitarian traditions of the ancient world. (There is much to Wise’s thinking I have to learn about). On the other hand, Wise criticizes legal positivism, which he describes as the idea that rights come from the State. Universal human rights are grounded in the way human beings are—they are in that sense derived not created. I guess my question is whether moral evolution is getting somewhere. Some Darwinian theorists deny that evolution can properly be thought of as having a goal or hierarchy. Not everything moves toward greater consciousness. It depends on the needs of an environmental niche. But moral evolution does sound like it has a direction, a telos. Recognizing the legal rights of animals would then be a part of the kind of teleological thinking Wise criticizes. We are getting closer to the good. Or, does Wise believe we should recognize the legal rights of animals only to be logically consistent? Humans have rights and some animals are like humans. Therefore some animals deserve rights. Wise seems impatient with such musings. He argues that human rights are recognized only on the ground that the “why” of such rights is not raised. But if that is the case, then the alternative to legal positivism by the State is just a different form of legal positivism by the rest of us. Rights are just a posit. If that is the case, can they really last?