(Conference Draft)

"Wildlife Poaching and Rule of Law in Africa"

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Dafina Otieno,[1] a young Kenyan female lawyer, stands in front of a room filled with her colleagues, judges and lawyers from across Kenya. She has been asked to demonstrate a closing argument as a capstone demonstration at a training conference for the Kenyan bar on trial skills for wild life poaching cases. Her arguments are skillful. She demonstrates all the elements of good rhetoric. She says:

Mr. Wafulu was one of the Wild Life Services' officers. As you heard in his testimony, he knew one of the two elephants who were killed. The one he knew was a big male elephant he call Jumbo. He had come across him a number of times in the last couple of years. In fact, on game drives, he would often run across him at the same bend in the road. After a while he came to think that Jumbo endeavored to be at the bend in the road to meet him there. Jumbo seemed to look for him. He apparently liked the vegetation in that part of the park near where he would do his rounds. Mr. Wafulu would call to Jumbo, and sometimes it seemed like Jumbo trumpeted back.

Mr. Wafulu wasn't sure, but thinks Jumbo may have risen in the ranks to the second oldest in the herd. The size of the herd had been depleted by other kills of elephants. After his death there was female elephant that seemed to linger in the area. Again, it was as if she was mourning Jumbo's death. She had a baby with her. It too seemed to make the sounds of crying.

Dafina's argument is detailed, (she has numbers of elephants killed by poachers in the last year out of the game park in question), it builds, (she reviews financial information that

[1] Not her real name

shows a sudden payment into the account of the defendant by a Chinese company), it has the right amount of passion, (she shows pictures of the dead elephant, and the holes in his face where his tusks used to be. Dafina reviews the testimony of a witness at the scene who described the fight between the Park Rangers and the poachers. The poachers were well armed. At least one had an elephant gun. Another had a chain saw, used to cut off the tusks.

Her argument is multifaceted, (she argues the "unfairness", its costs to the tourist industry, and its senselessness). She argues that the killing has to stop, that it violates the law, that it impacts on tourism, that the tusks are sought after by Asians who think the tusks make them more virile, … that there is not proof of the virility effect.

She says, that the defendant offers excuses, but there very number shows he has no excuse. He said it wasn't him, but if it was him, he didn't know what was going to happen, he was just the driver, and that he is poor and needed to feed his family. She wraps up with a few sentences. "My grandfather used to always say, when you have more than one excuse, you have no excuse. It is time that Kenyans are held accountable for the killing of elephants, these huge, yet beautiful, animals, even companions that have lived side by side with Kenyans in the bush for generations. What are we doing to ourselves? We participate in the killing elephants… it's like killing a member of one's own family. It is time to send a message: this killing must stop."

The audience is appreciative. They stand spontaneously and applaud their colleague, as if to say, that was really good, you make us proud, you make us want to bring these cases and do justice for our country. And we need to find a way to stop this killing.

But then in response, defense counsel has his turn. The defense lawyer is a slight, and has a very different style, which is almost soft spoken. The young man is Kafedi Mwangi.[2] The room hushes to hear what he is saying. He starts by saying: "Wow, that was quite a speech!... But the evidence does not support the conviction of Mr. Jata Sabinga, for the crime for which he is charged. Kafedi points out that Jata is just 21 years old, and a teacher by day, and taxi driver after school. He is, at best, lower middle class in his wages. When he was contacted by a friend, a biology teacher, Mr. Fang, to pick up a friend of Fang's, he jumped at the chance to make a little extra money. Fang told him that when he made the pickup, he would be given directions of where to go. It would take a couple of hours, and he could make about 25.000 Kenyan shillings (around $240). He didn't know where he was going, or the nationality of person(s) he was driving. What we know now, that one was Kenyan and one Asian, but he did not know their ethnicity when he agreed to provide the transportation.

Kafedi then made a technical legal argument about the statute. The crime charged was under Section 92 of Kenyan Wildlife Conservation and Management Act Rev. 2013. The section by its term required that it had to be brought along with another crime charged. The organized crime charge had to be dropped because there was no showing of organized criminal organization, nor that he aided and abetted the organization. In addition, Second 92 was to be enforced by the Kenyan Wildlife Conservation Commission, and not the criminal court. This criminal court lacked jurisdiction to make a finding under section 92.

[2] Also not his real name.

Finally, section provided for a mandatory fine of 20 million Schillings, (close to $200,000 US, a preposterously large fine). The punishment did not fit the crime, and the court did not have jurisdiction.

Even if the court had jurisdiction over Section 95 Offenses: (related to possession of wild life trophies) the court lacked proof of possession. But more importantly for the court, there was no evidence of intent. His possession was during the transportation at best. He did not see what was in the sack, but even if he knew, …what was he to do about it at that point? He merely transported the person and dropped off the bag at the desired location. He did not ever possess the tusks.

Defense counsel Mwingi's argument to the court was also multifaceted. He asked, where was the Asian client and his accomplice who did the deed? Why were they not before the court? Had the police been bribed to let them go? It was not fair to prosecute the defendant, who was just a driver, when the others involved and benefiting got off scot free. And where was the evidence that one less elephant would really be devastating to the Game Park. Weren't game parks a vestige of colonialist days, and weren't the laws prohibiting poaching primarily to protect game hunters from doing their own killing?"

He also to consider the cost of the game park to the surrounding community. The surrounding community routinely was impact through predation, crop damage, and even violence, from the game in the part. Sure the elephants just did crop damage, but where there were elephants there were other wild animals, lions, and hyenas, and hippos. Also the park sat on prime land, while the farm land surrounding the park had become less and less

fertile for crops. The community was poor and becoming more and more desperate to make a living.

In any event, without evidence of the sort the prosecutor is arguing (that the elephant population is at the point of extinction), the arguments from the prosecutor are merely designed to inflame the passions of the court. For the individuals involved in these cases face making hard choices in hard economic times. Kenya is in economic crisis, and choices made based on one's own understanding of one's need, involving one's very survival, ought to be given a measure of support and understanding.

When he finished: the audience fell silent. It was as if they were troubled. Then they gave him, too, a fulsome applause, as if to say, you make good points. I'll have to think about this some more. This case is not easy.

Despite the difficulties of the case, and the differences of opinion in the room, there seemed to a gradual awakening and sense of confidence in the room, that the Kenyan bar was maturing in its ability to tackle the problems related to wild life poaching. But was this feeling of confidence misplaced? And what might such training programs say about the difficult questions raised by the field of Law and Development? What is the relationship of law and development? Does the formal law need to lead Kenyans in their understanding of how best to handle this crisis? Or, should formal law more likely be understood as creating a moral hazard, where the law is a sham, or a tool, that creates opportunities for exploitation, and corruption?

During the last three years the training program has involved cases involving wild life poaching.[3] As such it has provided an important window into rule of law development in Kenya. It will be my thesis that one of the important impacts of rule of law development involving wild life poaching, has largely gone unremarked by the field of Law and Development. That impact is both an educational impact, (values clarification by Kenyan lawyers and judges as they confront these issues) and also a cultural formation impact. It is the latter that is of particular importance to our discussion here. It is through the courts that Kenyans will struggle with the meaning importance of elephants and rhinos, to their identity, and to their way of life.

Formal legal systems are integral to cultural identity because the law, when truly transparent, has a role to play in helping a country shape itself. It is through the courts and the reporting of cases, that a dialogue can be established between victims, including animals, and those who seek them harm, as well as between courts and legislatures as they seek Kenyan specific solutions to Kenyan's problems. This is not to say that formal legal systems will provide perfect answers to what is a difficult and complex question, (what comes first, economic security or rule of law?), but that they can set up a feedback loop to a well-intentioned legislature to create multiple incentives to protect Wild Animals, as it also refines its dispute resolution mechanisms of carrots and sticks, to produce a Kenyan specific solution to a Kenyan dilemma.

[3] The author has been part of a team of Kenyan, US, and British judges, lawyers, and law professors, who gather each summer for a couple of weeks and conduct trial advocacy training programs for Kenyan judges, prosecutors and defense lawyers. (Approximately 100 each year). The training has evolved over the years. It started with training involving sexual based gender violence cases. This training was particularly gratifying as it inspired the formation of Kenyan women lawyers who open up clinics for victims of SGVB

In order to explore this thesis, I propose a couple of steps. First I take a look at the scope of problem, to see the problems regarding elephants as a part of an overall crisis in economic development in Kenya. I will then look at why a too narrow look at economic measures is likely to ignore important nonrational, and culturally specific issues imbedded in the situation. I will examine the economic theory broadly, and then the failing of economics to make normative decisions from values based on unstated assumptions about efficiency and Gross Domestic Product measures. I greatly assisted in this regard by the work of Alvin Plantinga, and is critique of naturalism, and also by the work my colleague at Emory, ethicist Cynthia Willet, on the topic of interspecies ethics.[4] Willet shows theoretical difficulties with valuing the behavior of poachers as both a matter of economics, but also from the perspective of moral philosophy. I will then argue that there is a context specific feature to interspecies ethics not unlike that described by Stanley Hauerwas, as a necessary of cultural context for a religious community to develop its understanding of itself. I will then return to that role the courts play as means to explore its value as a tool of economic development, as a way for Kenya to engage in a understanding of itself and its cultural identity, and create the normative process and structures for creative problem solving.

Wild Life Poaching—a crisis wrapped in a Crisis.

With the slaughter of elephants and rhinos in Africa at record levels, lawmakers in the U.S., UN, and Africa are stepping up efforts to save some of the world's most iconic species. The training program I describe above, was an effort of the Kenya Prosecutors, Kenya WildLife

[4] Cynthia Willett, Interspecies Ethics, Columbia University Press/ New York, NY, (2014).

Services, Lawyers Without Borders, (LWOB), and the National Institute for Trial Advocay, as well and the US Embassy in Kenya, were sponsoring the program.

The statistics are staggering presented at the conference were staggering.[5] More than 100 elephants are being killed across Africa every day. Since 1989, the population of African elephants has fallen by half, to about 500,000. Black rhinos have been made extinct. Similar declines have been seen with white rhinos. The killings are fueled by a demand for tusks and horns in Asia that has made ivory and rhino horn more valuable than gold or cocaine. Illicit wildlife trafficking generates $8 to $10 billion annually,

These estimates paint a dire picture. A 2014 study published in the *Proceedings of the National Academy of Sciences*—the largest undertaken to that date—suggested that 100,000 elephants were killed between 2010 and 2012, a number far in excess of the species' ability to reproduce. In 2011 alone, an estimated eight percent of the entire African elephant population was killed. Today, fewer than 500,000 are believed to remain, and the study's lead author suggested that many elephant populations were on pace to be wiped out within a decade. According to the transnational crime and illicit network analysts at the Center for Advanced Defense Studies (C4ADS), poachers have already eliminated the bulk of elephant populations in the traditional habitats of central Africa (Central African Republic, Democratic Republic of the Congo, and northern Cameroon) and are pressing both east into Kenya and Tanzania and further southwest into Republic of Congo, Gabon, and southern Cameroon. Only southern Africa is experiencing elephant poaching below true crisis levels,

[5] Lawyers Without Borders, Kenya: Course Materials: Volume II, Nairobi, Kenya, (Thomson Reuters, Nairobi, Kenya, August, 2015). Copy on file with the author.

but as populations elsewhere are hunted to extinction, this region is expected to come under increasingly severe pressure as well.

In some ways the fight to save the elephant has been a recurring one. During the 1970s and 80s, under-funded government forces and militias fighting in Africa's many conflicts poached elephants and rhinoceros by the hundreds of thousands, providing bush meat as well as high-value ivory to barter or sell to sustain their operations. Together with poaching gangs, these groups fed international criminal networks that delivered poached ivory to what was then a legal ivory market. In response to the decimation of elephant populations, the ivory trade was effectively banned in 1989 when ivory was added to the Convention on International Trade in Endangered Species (CITES). But the illicit ivory trade has reemerged in the wake of two misguided "one-off sales" allowing certain African nations to sell their stockpiles; one to Japan in 1999 and another to China in 2008. Significant demand was rekindled for a good that had become increasingly taboo during the post-1989 ban.[6]

While demand in Japan has since diminished, now demand for wildlife products has been driven by a rising middle class in China and Southeast Asia, whose ranks increasingly desire ivory, horns, and other materials for trinkets and medicinal products that Western scientists say don't really work. The Chinese market is responsible for an estimated 70 percent of global poaching,

[6] https://www.csis.org/analysis/wildlife-poaching-and-insecurity-africahttps://www.csis.org/analysis/wildlife-poaching-and-insecurity-africa

In addition to the international community various African countries have awakened to the crisis and developed different rule of law strategies to try to fight the problem of wild life poaching. These countries are important as a case study for examining the relationship between rule of law development and economic development because it presents all the difficulties of the developing world: a country with a portion of the population whose poverty makes them easily exploited, a demand for the country's resources, owned by none, and yet vital to the prosperity of all, and a court system with a history of corruption tasked with enforcing laws which don't quite get the rule of law part right. For our part we will focus on Kenya, as will argue that for each country their will need to be a country specific solution.

Kenya has already been engaged in using both formal rule of law prosecutions and market strategies to combat the problem. There may be enough history here to gauge the effectiveness of these strategies by traditional economic measures.[7] Up until recently Kenya seemed to be emerging from a corrupt and unstable period of conflict and seemed to have opened a window, presented by its rich natural resources and relatively stable governance situation. It also possessed an educated population, to adapt effective strategies to combat the problem.

Yet even as a matter of economics, the effect of wild live poaching on the economic development of Kenya is just part of complex picture of economic development. Like Ebola, and its effect on rule of law strategy measurements in Liberia, other crisis can

[7] Clark C. Gibson, Politicians and Poachers: The Political Economy of Wildlife Policy in Africa, Cambridge University Press, Cambridge, Eng, 1999)

overwhelm analysis of economic development and rule of law strategies. The NYT, Sunday, July 30, 2017, Jeffrey Gettleman, Disappearance of Fertile Land Fuels 'Looming Crisis' in Africa. Part of the economic equation is the growing population. In Kenya the population now stands at close to 40 million people. The majority of Kenyans are trying to survive off land whose agricultural potential is declining. The growing number of people to feed means that every inch of the land needs to be cultivated. There is not time to let land be fallow and replenish itself. Add to the infertility of the soil is the population growth--estimated at current birthrates and lengthening life expectancies across Kenya and Africa means that the population of Africa will reach close to 4 billion people in the next 40 years. Add to the soil depletion the impact of climate change and desertification. In other words, the crisis of wildlife poaching is just one part of larger Crisis of biblical proportions.

As a result, while major steps have been taken to build the prosecutorial infra structure to fight wild life poaching, there still remain some difficult, perhaps overwhelming problems that prevent effective enforcement of the laws. Some are technical, with draconian sentences and unrealistic fines, as applied to the common Kenyan poacher. The organized crime part of the killings has remained undeterred. International regional actors have also stepped up their activities, that the efforts so far have failed and will likely continue to fail if Kenya doesn't, elevate its diplomatic game. It must, at the same time it develops its rule of law capacity, negotiate with China (and other SE Asia countries) for diplomatic agreements. Kenya must seek through these agreements to tie continued access to Kenya markets to both prosecutions by China and other countries of its own citizens for illegal trading, and engage in public education processes to shame those who are fueling the market for ivory and rhino horn.

Still, what happens when these modest gains run into the problems of extreme poverty and even starvation? How will Kenya be able to overcome this double punch, provide for stability and basic economic security?

I. Failings of Economics as a product of Scientific Naturalism.

A. Context.

Our temptation is to address the questions of wild life poaching, like the question of the looming economic crisis in Kenya with traditional tools of economics: efficient markets will provide the best solutions. Of course the crisis exacerbates the inefficiencies of lack of information in the market about the nature of the crisis, and the development of rational solutions. So we look to other historical examples of how "economically successful" countries have handled similar crisis. And, immediately recognize that there are some similarities between crop management solutions and wild life management solutions.

Like the dust bowl in the US during the great depression, soil depletion, along with the loss of the buffalo, and hunter herder native American culture, the great mid west plains were a place of crisis. Solutions that were developed where focused on agriculture: irrigation, paying farmers to keep lands fallow, rotating crops, and experimenting with the creation of genetically modified crops for greater yields.

Cattle ranching turned to more efficient means of production. Cattle were kept in feed lots, pigs in pens, and chickens in massive chicken houses. The managed economic solutions

were to create a "bread belt" for the world. US wheat production soared, as did its production of corn. The US citizen had more than a chicken in every pot. It consumed more meat per person than anywhere on the planet. It had so much excess corn, corn was used as corn syrup and "hidden" in a myriad of products. As a matter of economic prosperity the choices made appeared to be extraordinarily successful.

Yet, the US struggles today with the choices it made following the crisis of the Great Depression. Did its solutions really provide successful solutions to its long term problems of soil depletion, and food consumption needs, and, quality of life concerns? Some have argued that in its focus on economic development it ended up divorcing humans from animals, and also their prosperity from meaningful ways to make and living. The rise of the corporate farm, the size of farms in order to produce the profits to pay for the equipment to manage it, or all unintended consequences of economic driven solutions to the crisis. These were also not purely matters of economic markets. The government subsidies these choice up to today. Yet perhaps these are questions for developed countries to ask, but not for developing countries like Kenya, that are still struggling to provide for the basic needs of its citizens.

Animal rights questions, like questions about human rights, presents some of the most difficult and interesting questions for the field of law and development. As I understand the field, it asks whether the conventional wisdom that Rule of Law strategies lead to the protection of animals, and that this is a necessary condition for development of the right approaches to the protection of animals for the good of society as a whole.

Compare this question to the way the international community looks at women's rights. The literature is pretty clear that in order for women to develop their potential as market actors they need to be secure in the persons and property, and not discriminated against in the opportunities (labor, education, employment/election by government) available to others in the society. These rights are is best provided through laws that protect their rights, and a court system, police, and government institutions with the capacity to enforce these rights.

The Law and Development field asks whether this law first strategy is always the best. Seeing the functioning and capacity of a countries legal institutions to be effected by economics and politics, it wonders whether rights based systems, seemingly imposed from outside the country, are counter-productive to the goals of these laws. The institutions resist enforcement, seeing the laws as lacking an understanding for the people and situations they are designed to protect. Better wait to develop the economic situation first, clean water, roads, and education systems where normative behavior can be taught and learned, before taking the legal rights based approach to the development of rights. Economic development should precede rights based approaches in developing countries.

A. The Nature of Animal Rights--Current Jurisprudence.

Can't we simply just assume that animals have rights, and proceed on that basis?[8] The problems are twofold. First modern epistemologists today seem to eschew any notion of

[8] We would be in good company if we did, for that is what John Rawls does. See Nicholas Woltersdorf, JUSTICE: RIGHTS AND WRONGS, 15, (2008) (hereinafter JUSTICE: RIGHTS AND WRONGS). Woltersdorf writes: "Though Rawl's theory of justice is an inherent natural rights theory, he does nothing at all to develop an account of such rights. He simply assumes them." Id.

natural or inherent rights, even for humans.[9] They see those who use the term animal rights as expressing only some linguistic idiom of rights, who's meaning, "…is only the existence in that time and place of some particular set of institutional arrangements requiring description in those terms." [10] One prominent example of such thinking is Alstair McIntyre, who explains,

…and the rights in question therefore will always be institutionally conferred, institutionally recognized and institutionally enforced rights; and all such rights of course are either rights conferred by positive law or custom or rights exercised in practices or rights arising as promises. They will not be and cannot be natural rights possessed independently of specific institutional arrangements. [11]

The problem, however, with this argument, is that then animal rights are merely *subjective*. Institutions can confer whatever rights they deem appropriate to its time and place. There are no such things as inherent rights. There certainly are no such things as natural inherent rights, conferred by something other than an institution. The rights exist as long as the governed agree that they exist, or as long as the institution is able to enforce their existence. As a result, much of the persuasive power of arguing that animal rights exist, outside a particular culture or set of state institutions, is lost. (But perhaps this loss is not devastating to the cause of interspecies ethics, as we will see in the section on Cynthia Willet).

[9] Quine and Popper. [Expand citation].
[10] JUSTICE: RIGHTS AND WRONGS, *supra,* note 20, p. 32, quoting from Alstair MacIntryre, The Charles E. Adams Lecture, p. 12, February 28, 1983.
[11] Id.

The second reason to question the assumption that animal rights exist comes from the failings of a "capacity" based understanding of human rights.[12] If one becomes entitled to human rights if one demonstrates the capacity to reason and empathize with other humans, once these capacities cease to exist, or diminish, the support for human rights for that person would also diminish. As a result capacity-based theories provide that those with Alzheimer's would lose their human rights, as would those with dementia, as would the very young, and mentally disabled.

There is an important insight here for animal rights theorists. A capacity-based approach may prove that it impossible to distinguish human rights from animal rights.[13] Such theories are incapable of providing reasons for who counts and who does not count for human rights and as between species. But if capacity is not a consideration, what about other "living" things, like fish, and plants, and insects, and bacteria? Why favor "sentient" beings over plants, if capacity is irrelevant. As a result political institutions can arbitrarily draw lines between those who have rights and those who do not. For humans, lines can be drawn on the basis of age, race, health, strength, and as cultural institutions define who counts and who does not, and human rights based on capacity provides no ability to provide a base line set of rights for all human beings. The same is true for other species.

If theories based on "inherent animal rights" or based on "capacities" will not be sufficient, how does a Kenyan legal system determine what kind of animal can be discriminated

[12] JUSTICE: RIGHTS AND WRONGS, *supra,* note 20, p. 36 [Expand- Anticipating religious implications of "conferred" rights based theories with capacity based theories]

[13] *See*, Nicholas Wolterstorff, *Can Human Rights Survive Secularization? Part II*. Vol. 23, No. 4 Perspectives 12 (April 2008); JUSTICE: RIGHTS AND WRONGS, *supra,* note 20, p. 32

against by Kenyans because it is the Kenyan way that such behavior exists by right of Kenyan cultural values and traditions? Some Kenyan's kill and eat cows, where some in India believe it is wrong to kill cows. Kenyan's, generally, don't believe in reincarnation? Do they have a right to believe this way? Or how does one answer Kenyans who argue that their Kenyan indigenous values are equally as valid as western values and are also protected by UN proclamations protecting culture of indigenous populations.[14] Isn't it, after all, a matter of cultural relativism?

[14] Cf, United Nations Declaration on the Rights of Indigenous Peoples, Articles 8 and 9.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

(d) Any form of forced assimilation or integration;

(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

B. Epistemological Problems with Scientific Naturalism[15]

Can a scientific naturalism provide the foundation for animal rights to overcome the resistance to these arguments from the perspective of existing cultural beliefs? The prevailing epistemology in academia for answering questions about the nature of warranted beliefs in animal rights is "scientific naturalism.[16]" Under this epistemology, beliefs about animal rights are tentative and hypothetical and need to be scientifically tested, either in a controlled environment, or with sufficient statistical safeguards, to empirically test and verify their existence before they can be said to be true. They are said to be natural, because the material world, or nature, is the sole source of our data that can be evaluated. Therefore, Scientific Naturalism is tied to theories of evolution.

[15] I mean to distinguish Scientific Naturalism from Secularism. While secularism means non religious, Kosmin, Barry A. "Contemporary Secularity and Secularism." **Secularism & Secularity: Contemporary International Perspectives**. Ed. Barry A. Kosmin and Ariela Keysar. Hartford, CT: Institute for the Study of Secularism in Society and Culture (ISSSC), 2007;or other than religion, Feldman, Noah (2005). *Divided by God.* Farrar, Straus and Giroux, pg. 25 ("Together, early protosecularists (Jefferson and Madison) and proto-evangelicals (Backus, Leland, and others) made common cause in the fight for nonestablishment [of religion] -- but for starkly different reasons.") or, at least non religious in the "public sphere," if not in society generally, and its beliefs are said to be based on science. Kosmin, Barry A. "Hard and soft secularists and hard and soft secularism: An intellectual and research challenge." A paper given Annual Conference of the to the Society for Scientific Study of Religion, http://www.trincoll.edu/NR/rdonlyres/9614BC42-9E4C-42BF-A7F4-0B5EE1009462/0/Kosmin_paper.pdf,
I want leave room for the position that secularism could mean an institutional public religious foundation, akin to a constitution, that is not scientifically tested, but is based simply on that societies shared belief in religious pluralism. As I am using these terms, secularism is also associated with the science of nature--of what is--but may include some public religious beliefs. Instead by focusing on scientific naturalism, rather than secularism, I want to focus on the survival paradigm as related to prevalent theories of evolution. We know what we know about human beings by studying them, and learning from measuring and observing their behavior, in the manner of way biologists learn about plants, and anthropologists learn about people and culture, by studying what they see and can measure about human behavior.
28 Patricia Churchland, NEUROPHILOSOPHY: TOWARD A UNIFIED SCIENCE OF THE BRAIN (1986)

[16]

Does Scientific Naturalism then mean that we should simply poll the world's population to determine what humans believe about animal rights? By way of comparison, world polling data shows that there is no shared human understanding of what rights women do or ought to possess,[17] and one suspects all the more so, with respect to animal rights. In fact, if it were simply a matter of polling, world-wide poaching of elephants would seem to be majority backed-evolved state of the species. They should go the way of the dinosaur, as having lost their "purpose" to the economic development of man kind.

Moreover, even if the polling were otherwise, (or one could get the UN to back a principle for the protection of Animal Rights,) under principles of science, how would one judge whether these attitudes and beliefs are true, or, warranted, or mistaken? Might these beliefs have just randomly arisen in the world's consciousness? What criteria will be used to judge whether the belief is true.

Here is where principles of science need to rely on naturalism. Judging the truth of the belief is based on whether the belief is better for, natural, or, at least conducive to the *survival* of a particular tribe. The question then is whether the belief about animals having rights is better for the survival of the humans (or of the world generally with all its species) then beliefs about animals not having rights. Under presumptions of scientific naturalism, there is no such thing as morality; there are just different cultural norms, which are measured against one overarching principle, *survival*. [18] The argument goes that as societies evolve, different cultures try out different norms or values for protecting themselves and

[17] Pew Surveys. 2007 Muslim Values Survey. [Expand]
[18] [Expand Citation to Neurophilosophy]

ensuring their survival. The Kenyans have precedent for a system of norms and values they have chosen for themselves. These include ideas that give humans a superior position in the culture, allowing humans to kill animals if and when they determine they need to: for survival, to show their courage (manhood), to protect and provide for their families. [19]

[19] These same questions can be asked about the International Criminal Court's project to criminalize as crimes against humanity Charles Taylor's actions during the Liberian civil war.

At its heart, the justification used by Charles Taylor and other leaders who perpetrated atrocities is survival. This instinct for "survival" justifies a whole range of bad behavior, from genocide, to violence against women, as a strategy of terror to further protect the tribe. For example, the *genocidairres* of Rwandan Hutus first demonized the Tutsi's, then made them less than human by calling them "cockroaches" then exaggerated the threat to the Hutus from the Tutsi rebel group, and told historical narratives that blamed the Tutsis for the Hutus situation. Exaggerating problems of scarcity, and drawing on the fear and survival instincts the *genocidairres* enraged the population to rampage and kill Tutsi on a level seldom seen since WWII. [19]

It is important to see how the *genocidairres* used strategies invoking violence against women. Tutsi women were portrayed as always working in the interest of Tutsi, including stealing away Hutu men. Tutsi women were not to be trusted, not befriended, not employed as a secretary or a concubine. And any Hutu man married to a Tutsi woman was to be considered traitors. [19] (Of course Africa, is not the only place such strategies were employed. One need only think of the Ottoman massacre of the Armenian, the Holocaust, the Iraqi's of the Kurds, the Serbs and Croats of the Bosnian, and the US of its own Native American population. While sometimes the atrocities have been perpetrated on members of one's tribe—Cambodia communists Khmer Rouge (KR) against Cambodian civilians after the fall of Phnom Penh—in each of these situations similar demonizing and dehumanizing propaganda was used to incentivize the genocide. Women often took the brunt of the savagery. (Id. Fate of Africa, at 116.)

Who is to say the instincts for survival shouldn't be able to justify terrorist strategies and even genocide, even when carried out against women and children? After all, self defense, and the defense of others is a justification for the killing of others in criminal law and tort. It is often seen as a law of nature that individuals and their ethnic groups be able to exercise their right of self defense, as they see fit, and unconstrained by second guessing by the international community. So what is the basis of law, its moral foundation that overcomes the law of survival and gives the law its standing to prosecute, condemn, and punish acts of genocide, and crimes against women and children?

To answer these arguments, the Rule of Law movement has given scholars of international law a chance to return to first questions about the nature of law, with a big "L"[19] and a chance for a better understanding of the philosophical/religious basis for an international understanding of "human rights." The connection between human rights and religion is also at the heart of these debates. This is especially true in trying to establish rights for women to be free not only from the ravages of war, rape, and other acts of violence against women and children, but also in post conflict societies to bring about changes in domestic abuse, genital mutilation, and even make bigamy illegal.

The question of the role that religion plays in effecting the development of the rule of law, especially in crimes against women, is much more than a theoretical discussion. The harm done to women is real and pervasive

But, as a matter of epistemology, does "scientific naturalism" ever produce "warranted" or "true" beliefs about the whether certain societal norms should be held?[20] It seems problematic, in the light of problems of species extinction. In other words, the theory of evolution" cannot by itself produce warranted beliefs in the Kenyan culture concerning the morality of killing elephants. But even if such evidence could be shown, it does not lead to the ability to discern the truth of the broader project, that which combats violence against elephants on the belief that elephants are entitled to the respect, dignity, and same treatment that humans are entitled to under the law. The question is whether empirical evidence of health and prosperity consequences of violence against elephants will ever produce the proof of the efficacy of animal rights for elephants. In fact, since evolution proceeds on a random basis, it is improbable as a matter of epistemology that the evolutionary survival paradigm will ever produce reliable beliefs of any kind. Scientific evolution provides an insufficient basis for grounding knowing (warranting) true beliefs about the nature of other human beings, much less animals.

To show why this is, we start by asking the question: What is the probability that reliable or true beliefs are produced by the condition of Naturalism + Evolution (scientific

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in some countries. In addition, the behavior of men is justified with reference to the religion and tribal cultures from which these leaders come. Can law defeat these practices? What do we mean by law? Can secular law defeat these practices? Does there need to be a religious understanding of law for the Law to defeat or change tribal rules and customs? What is the best strategy for law reform in these countries?

The first step is to look carefully at beliefs that produced on the basis of instincts for survival. As a matter of philosophy, what is the ability of survival instincts to produce "true" or warranted beliefs? What weight should be give to arguments grounded in survival.

[20] Much of what follows came from a lecture Plantinga gave at Belloit College, to the American Society of Philosophy. The audio of the lecture can be found at http://www.hisdefense.org/OnlineLectures/tabid/136/Default.aspx.

evolution)? Or, what is the probability (P) of reliable beliefs being dependent on Naturalism plus Evolution, expressed mathematically as P(R) /N+E. This mathematical representation helps us to take apart this question by first defining what is meant by Naturalism and scientific evolution, and then using analytical philosophy shows why the probability is either low or inscrutable (unknowable) that scientific evolution would reliably produce true beliefs.

A survey of philosophy for definitions of Naturalism or scientific evolution produces the following: the chore of evolution is to produce survival through its blind mechanisms, or mutations brought about by chance.[21] If the purpose of evolution is to produce survival, or adaptive behavior that will lead to the survival of the human species, then what is the probability that human's so oriented, will produce beliefs that are reliable. We first note Darwin's own doubt about the question of whether evolution would produce reliable belief, but recognize that later philosophers, (Quine and Popper, the current prophets of scientific naturalism,) are encouraged that evolution might produce a high probability that the beliefs we hold are true beliefs.[22] Are these philosophers correct?

There are three possible meanings that can be given to the proposition that Scientific Naturalism will produce true beliefs. The first can be called *epiphenomenalism.* This theory, developed by John Maynard Smith, is that beliefs don't cause behavior at all and that beliefs are invisible to evolution. Of course if beliefs are invisible or immaterial to evolution, then a person's belief in international animal rights as having a basis in scientific

[21] Patricia Churchland, Neurophilosophy (1986). Plantinga on Patricia Churchland.
[22] Quine and Popper

evolution is irrational, in that beliefs are invisible to behavior. People who believe that animal rights are intrinsic in what it means to be human are asking an incomprehensible question: because what it means to be an animal, much less a human, is logically disconnected from what beliefs humans hold. Humans are only behavior.

Based on this understanding of international human rights, beliefs in international human rights and animal rights are invisible to behavior. It is nonsense to ask whether a particular Kenyan violated international animal rights law, or international animal rights when he kills an animal It is nonsense to ask whether men's belief that elephant's are man's property and can be treated like property are true beliefs. Beliefs are invisible to our hypothetical Kenyan's behavior, and anyone else's behavior, for that matter. Similarly Kenyans' beliefs about the treatment of animals are invisible and irrelevant to evolution. As a result, the whole project of linking beliefs to behavior is irrational and nonsensical.

A second meaning that can be given by a theory of scientific naturalism is to say that beliefs do affect behavior, but beliefs are only complex chemical/material complex neurological events. We might then ask, "What is the probability that beliefs that are produced without regard to the content of those beliefs by complex chemical material neurological events, would produce beliefs that are reliable?" We think that the probability that such beliefs would produce reliable or true beliefs is either very low or unknowable.

In fact, in this regard, human's might argue that history seems to support their treatment of animals as having led to their survival. The more has animals, especially

domesticated and available to his consumption, the better the chance his clan survives. If animals are available to humans, then more children will be produced.

Under this way of thinking, enlisting use of violence to kill or control animals is a rational means to survival. Such a complex neurological response is as likely to be produced from the chemistry of survival instincts. Yet, the likelihood that such a belief is true belief based on Naturalism, is improbable. It is no more likely true than any other random belief that is produced without regard to the content of the belief.

A third possibility is that beliefs do have some ability to effect behavior and that there is some syntactic semantic content to the beliefs. So, for example, a Kenyan might act in killing an elephant based on his belief that to do so is his divine right, because he is the superior to animals, and he can do whatever he wants to with them. What is the probability that his belief is a reliable or a true belief? Using naturalism, plus evolution, as basis of a theory of animal rights will not help determine whether this Kenyan is right in his beliefs. Either Naturalism so defined makes this a low probability that his beliefs are true, or the probability is inscrutable. Our experience teaches us that beliefs are not acting as the sole effectors of behavior.

The problem is that what is true regarding our beliefs, is also true for animal rights activists. On the criteria of scientific naturalism, it is just as improbable that the belief that animals should not be mistreated or treated as property, are true beliefs.

For naturalism the question remains as to how reliable is the relationship between beliefs produced by chemistry--a hugely complex set of neuron firings--without regard to the content of those beliefs, the other things that can affect behavior, in producing beliefs that would be probably true or reliable. One prominent epistemologist sums up the argument as to why scientific naturalism will not be able to warrant any belief as true as follows:

The difficulty with naturalism "concerns the adequacy of the canons of justification implicit in scientific and ordinary linguistic practice--what reason is there to suppose that they guide us towards the truth? This question, given metaphysical realism, is substantial, and, I think, impossible to answer; and it is this gulf between truth and our ways of attempting to recognize it which constitutes the respect in which the facts are autonomous. Thus metaphysical realism involves to an unacceptable, indeed fatal, degree the autonomy of fact: there is from that perspective no reason to suppose that scientific practice provides even the slightest clue to what is true. [23] "185 ff.

We see that Scientific Naturalism is insufficient warrant the truth of any belief. If human's can only rely on principles of survival to produce warranted beliefs, then, since, survival principles don't produce true beliefs, neither can scientific naturalism.

[23] Alvin Plantinga, WARRANTED CHRISTIAN BELIEF, 185, (2000).

As a result, we need to supplement the data we can use to help us determine the truth of human beliefs. So we distinguish between beliefs, desires, memories, purposes, and feelings to describe why humans act the way they do. If we focus only on beliefs that are the product of complex chemical neurological reactions, we are no closer to being able to determine whether our beliefs are reliable, or true. We appeal then to more than survival in determining whether beliefs are true. We then use some combination of desires, memories, purposes, and feeling to describe the warrant of any belief.

My argument so far has been as follows: that as a matter of scientific naturalism, international community's rule of law initiative to promote animal rights is not worthwhile. Using narrow definitions of epistemology, 1) that beliefs can never be warranted, unless empirically verifiable, and 2) that evolution is random, so all we measure is what is, not what ought to be.

It is with good reason, then, that "research" interventions are looked at skeptically by research institutions and NGOs working in this area. If the prevailing epistemology of academia is that we can never know or warrant the truth of our beliefs about intervening in the world, then the research will itself always be incomplete, if not useless. Yet, still, as a matter of serving up the evidence that helps predict consequences of survival, the research will at least inform the public debate on public health, if not tell whether a belief is warranted, in a broader sense. Can the research do more? Can an interdisciplinary approach designed to use not only scientific techniques, but also history, anthropology, social psychology, religion and law to provide warrant for its beliefs. In other words, if

scientific naturalism is insufficient, can it none-the-less provide support for a process for determining animal rights in indigenous cultures.

What if we attempt to marry science with nonscientific, nonrational, even religious experience and see what advantages there are to seeing international human rights as having this kind of nonrational experience-based grounding? I will argue that while history presents strong lessons of caution in any attempts to import a religious basis for human rights into a society that theories of cultural relativism do not defeat a well designed project, and that fundamental "religious" belief about human nature, backed by a dialogic process, suggests optimism and hope to incentize efforts going forward.

In addition a carefully designed "scientific naturalism" that also attempt to measure "religious" or human nonrational experience based beliefs in these rights, may not only provide a natural law basis for animal rights but may additionally suggest strategies for the promotion of animal. These strategies may provide advantages over purely secular scientific strategies-- especially for projects that partner with Kenyans in a way that promotes community dialogue and a cultural, community, even religious understanding for animal rights.

Can nonrational experience or "religious reasoning" or "religious experience" provide warranted beliefs about the rightness or wrongness of human behavior? In other words, do humans share some religious experience or "common humanity", or spark of moral intuition, or "image of God" created into their being, that can be appealed to help determine the "truth" or warrant of particular beliefs about how women should be treated?

There are a number of approaches that can be taken to answering this question.[24] One might look at the history of particular religions in their ability to produce "warranted beliefs about animal rights. [25] Unfortunately, while some have argued more recently for native religion's doctrinal support for treatment of animals, the history of the world religion doctrines about animals are not conducive to the establishment of animal rights.[26]

Or, one might refuse to use religious reasoning, instead arguing that religious experience is an impermissible basis for arguing for animal rights. Of course this leaves us back in the futile position of scientific naturalism, unless we can expand our definitions of rationality, to include giving support for some kinds of non-rational, non-empirical reasons, to justify the warrant of any belief. Otherwise, unless one can somehow get Kenyans to agree to define essential interspecies rights--that which inherently measures what it means

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[24] Among Emory Law School's faculty in its Center for Law and Religion, there have been at least three schools of thought about the relationship between religion, and religious epistemology, and the development of the Rule of Law. The first is to reject all religious based justifications for the development of International Human Rights and the Rule of Law. The second response is to argue that religious justifications provide a superior basis for "knowing," or "warranting" that a particular act in defense of the government is "wrong" or "evil" or merits punishment. A third response is try to marry religion and science by using history as the laboratory of human experience. It is in this camp that I fall. I want to propose that both rational and religious justification needs to work hand in hand to provide a better understanding for the development of the Rule of Law. I will argue that an epistemology of "head" and "heart" will best balance "knowledge of right and wrong" from "religious/moral" experience in history, and help develop strategies from a historical understanding of how cultures embrace law, with a capital "L," through processes of education and case-by-case cultural self actualization of the Law as something grounded in that cultures own history and identity.

[25] John Witte's new book details the natural rights philosophy imbedded in Calvinism. See, John Witte Jr. THE REFORMATION OF RIGHTS: LAW RELIGION, AND HUMAN RIGHTS IN EARLY MODERN CALVINISM, Cambridge, (2008).

[26]

to be human in relationship with other species, to include the inherent dignity of animals to be entitled to reverent treatments--- the project will fail.

A third approach might be to take a deotological approach and assume the truth of the animal rights, either on interspecies grounds, or on deotological *aprior* reasoning principles, and attempt to make a number of types of appeals or arguments in favor of combating violence against elephants and all animals, trusting in, or having faith that Kenyans will "recognize" the truth of *aprioris*.

A fourth approach is to try to marry deontology and utility in a theory that allows some weight to be given to nonrational religious experience. Better that we try to examine what we mean by human's religious experience, (or moral intuition) and see whether common experience of being "other directed" can provide a foundation for warranting of animal rights.

I will argue that under either these last three approaches, we can better examine the strengths and weaknesses of the assumptions we are making behind rule of law strategies to combat gender based violence. My hope is that this theory discussion will lead to principles that can guide best practices going forward.

"Religious" Experience as Warranting Belief in Animal Rights.

Our focus here is to see whether religious experience can help "warrant" belief in animal rights. To the extent that humans have a shared experience of memories, motives,

feelings, and moral intuitions, that guide their behavior, beyond their instincts to survive, then such shared experience can help form the basis for warranting the truth or rightness of the project. In fact, such experience might be the subject of scientific measurement. As such it might form a new "natural" basis for determining the truth or warrant of dignity rights for animals.

This question is not new. Philosophers of religion have long debated the nature of religious belief. One place to start is by comparing religions and how they each describe the nature of religious experience, or religious belief. Ninlan Smart, for example, has shown the common elements of the "mystical" or "numinous" (supernatural or divine) experiences that the various religions describe. While some describe a being, others may describe no being but a supernatural sense of oneness of all things. Still they describe out of body, out of mind mystical moments. Others describe religious experience that relates to the experience of being a created being. [27]

Still others see the religious experience as the loss of individuality and personhood. The Mystical experience is in submerging or denying oneself and losing oneself in the other.[28] As such it is an experience which is antithetical to instincts of survival. In becoming focused on the other, or the divine, one stops acting out of the survival instinct, and becomes aware of feelings or experience of beauty, love, empathy, sympathy, joy.

[27] Some Christians describe the relationship between feeling of alienation and creation. Schleirmacher. God is the creator. Man is the created being. Man may come to know God, but not be God. Man's sin breaks his relationship with God, and God acts to reconcile Man to God. Man gains individuality and true personhood through man's personal relationship with God.

[28] Joseph Campbell.

Others have talked about a shared sense of alienation and longing for more meaning out of life than a simple materialistic gathering of things for one's protection and survival. [29] Others have sought to distinguish human's emotions from experiences better described as "affections."[30] So beauty and the sublime are used as evidence of divine creation, and lead humans to look for meaning in life beyond human survival, as does human experience of tragedy, evil, and personal failing lead human's longing for living a more loving and fulfilled life. [31] Some have even argued that humans, though often driven by emotions, power, greed, prejudice, fear, are also governed by a conscience,[32] or "natural law," [33]or ethical instincts grounded in all humans.

Still others have tried to describe a particular progression of religious experience; one that starts as starting with feeling of alienation and dependency. [34] These then lead to religious experience of the divine, of human failure in the face of the person of the divine, of the need to orient oneself outside of oneself, in order to experience true meaning and joy.

In a marriage of scientific method and religion, modern philosophers point to the legitimacy of their beliefs about humans in sociology and psychology. For example they point to the fact that psychologists describe human maturity in terms of one's ability to empathize with another's circumstances. [35] This ability to empathize also marks human

[29] Cornelius Plantinga, and Woltersdorf.
[30] Jonathan Edwards
[31] Diogenes Allen, Traces of God in a Sometimes Hostile World.
[32] Doestefsky,
[33] Aquinas, Augustine, John Calvin, Kant, Plantinga
[34] Schleirermacher
[35] Plantinga

ethical instincts, and, again, takes human's ethics away from survival, to choosing consequences that sacrifice self in favor of the others, for society's benefit. [36]

Still these descriptions of human experience will not satisfy the philosopher of science, much less the philosopher of religion. One still needs to know the "validity" that these descriptions possess. Are they "merely" psychological phenomena which serve as Freudian "wish fulfillment" impulses to give life its meaning and value? How is one to distinguish feelings of love, or empathy, from feelings brought by the need to protect one's position, like feeling of the need or "right" to power, sex, or emotions of ambition, fear, and greed? Philosophers have debated criteria for appraising competing religious belief systems and the application of that criterion for determining the validity of those religious beliefs. [37]

Appeals then to these kinds of experiences show the persuasive philosophical weakness for those who want to rely on these experiences to argue the truth of his or her beliefs. Yet if one has had such an experience, it makes it no less real to that person. Can the laboratory of history provide the scientific data sufficient to warrant the truth of beliefs based on these shared experiences of what we might call "nonsurvival" based emotions, memories and experiences.[38]

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[36] NY Times Sunday Magazine.

[37] William James, The Varieties of Religious Experience, 292-295 (1902). For example, William James sets out the following for judging whether a belief is a religious belief: 1. Ineffiability (defies description) 2. Noetic Quality (insight, findings, illuminations, revelations of truth) 3. Transiency (not lasting) 4. Passivity (viewer own will is in abeyance). See also, Ninian Smart, The Nature of Nirvana, in Ninian Smart, Reasons and Faiths (1958)

[38] Friedrich Nietzche believed that morality or natural law could not exist independent of a creator God, as understood by Judeo-Christian theology:

The "truth" of that "other oriented" experience is at the heart of what it means to be human. It is connected to feelings of empathy and love for others, and moral intuitions of right and wrong, and good and evil. According to these thinkers, all humans, once other directed, are capable of "discerning" how one ought to treat the other. And so this "experience" leads to an understanding of the need to respect the other, to the right of the other, including animal, to be treated with dignity, and to visions of justice and peace in human/interspecies relationships, or "shalom.

II. Cynthia Willet's Argument for Interspecies Ethics.

In Professor Willet's book, she makes a number of significant contributions to the understanding of the nature of animal rights. She joins the critique of moral philosophy its failure to get past the subjectivity problem. I will then review her Four Layers of Interspecies Ethics: Subjectless Sociality, Intersubjective Attunement, The Biosocial Neggwork as a Livable Place or Home, and Animal Spirituality and Compassion. This then will lead to our discussion of how a formal and informal rule of law process can lead to a Kenyan specific approach to its version of an interspecies Ethic.

A. Derrida's critique of the concept of self (or subject).

When one gives up [Judeo]Christian belief one thereby deprives oneself of the right to [Judeo]Christian morality. … [Judeo]Christianity is a system, a consistency of thought out and complete view of things. If one breaks out of it a fundamental idea, the belief in God, one thereby breaks the whole thing to pieces; one has nothing of any consequence left in one's hands. . . . [Judeo]Christian morality is a command: it origin is transcendental… it possesses truth only if God is truth—it stands or falls with the belief in God." Friedrich Nietzsche, *Twilight of the Idols*. Expeditions of an Untimely Man, Section 5.

Willet describes Derrida's argument that the concept of the self set in motion a "centrifugal ethic. Derrida unmasks the ruse of the "West's carnophallogocentrism." To say "I can," as in "I can own," "I can train," even, "I can love" leads to an ethic which amounts to the same thing. The subject, "I" determines the matter of knowing, understanding, sovereignty, individuality, autonomy, possession, mastery, law. These are values at the heart of the Cartesian subject. (Willet at 11).

Reason and language, the heart of the Greek's understanding of "logos" is prone to the problems of subjectivity, which is even true with human love.[39] And if it true for the idea of love, it is devastating to the moral philosophy of "response ethics," or that which is based an understanding of a necessary response to the other. Willet writes:

> Born of the moral ordeals and political upheavals of twentieth-century Europe, response ethics (represented by Emmanuel Levinas, Jacques Derrida, and Julia Kristeva among many others) has emerged alongside deontological moral theory (Immanuel Kant) and Utilitarianism (Jeremey Bentham, John Stuart Mill) of the modern period and classic virtue ethics (Aristotle) as a fourth major tradition in the philosophical canon. The genocides of the Holocaust and the violence of colonization to which the intellectual and cultural centers of modern Europe shamefully lent ideological support prompted a profound critique of modern moral traditions.

[39] *Cf.,* David Bentley Hart, The Beauty and the Infinite: The Aesthetics of Christian Truth, (William B. Eerdmans Publishing Company, Grand Rapids, Michigan and Cambridge, U.K. 2003) (where Hart chooses beauty, as opposed to love as the heart of the Christian gospel because he argues beauty is a phenomena that avoids the problem of subjectivity).

Willet sees the need for continued vigilance in any human centric I preferring instead to use a "subjective less ethic." She says:

> A phenomenological approach, once left behind by the post-structuralists and their linguistic turn, recall that experience occurs not primarily through the cognitive and linguistic capacities that stet humans apart from other animals but through bodily and sensory immersion in a partly shared world. (Willet at 12).

Having gotten past mind matter subjectivity problem, she uses phenomenology to describe Four Layers of Interspecies Ethics. These are

- Subjectless Sociality (Willet at 135-37). Drawn from the experiences of sociality between parent and new born, she describes a non-capacity based sociality that does not depend on ones' having a clear understanding of one's self, but a biosocial network, mixed into the musicality of the surrounding environment—the affect cloud. (Reference by Difina during her closing argument by the park ranger's thinking that he knew the elephant, that the elephant recognized him, and seemed to tolerate, enjoy, look for him)

- Face to Face Play and other Modes of Intersubject Attunement (Willet at 137-140). Using the analogy of the Greek concept to soul, as distinct from mind, she argues first for the infant soul, and to the animal soul.

> Through affect attunement, creatures may learn expectations for turn taking and cooperation that may also sustain mature modes of communication and social comportment. Laughter is tan ancient social signal that exhibits a pattern of turn taking and modulates social bonds according to playful norms of reciprocity against ingrained social hierarchies and predatory relations. (Willet at 138). (Again, Dafina's description of the sorrow of the surviving elephant "spouse" and child, and wanting to share that with the ranger?)

- The Biosocial Network as a Livable Place or Home (Willet 140-41). Again, Willet:

> The sense of belonging to a community, or what is understood broadly and fluidly as a cluster in a biosocial network, as a living landscape, introduces a third layer of ethical life. Ultimately, multispcieses alliances and not individuals saddled with principles may be the locus of social expectations and restraints. *Pre-socratic Greek and ancient African ethics warn of crime as the overstepping of limits, and threaten the offender with banishment or isolation. This ancient notion of communal justice invokes aspects of what is at stake in biosocial those and some of its participants. … Sharply vertical biosocial gradients (including those of modern bureaucracies, such as neoliberalism's' education prison systems or factory farms and animal research labs) warp the social fabric before any rule-governed moral decision or negotiated relationship between individuals takes place. This warped system is home, and it disturbances and injustices can reverberate as pan-psychic trauma. (my emphasis).*

Apropos of our discussion to describe the elephants in Uganda's Queen Elizabeth National Park as an example of the warped home. Uganda's Lord Resistance Army has been the primary poacher of elephant tusks for financing their cause. It has caused behavior in the elephant population similar to behavior documented in the villages devastated by the LRA kidnapping of child soldiers for its army. The bio ripple cloud impact on the sense of home in both communities is similar and leads to all sorts of dysfunction.

- Animal Spirituality and Compassion (Willet at 141-43). Dogs protecting their masters, owners who pet their animals, these are parts of the phenomena of compassion (agape) between species. Gestures of repentance provoke forgiveness going both ways. Human dog relations are prime examples. (The movie Pop Aye, story of man and elephant friendship, 2017, is an example closer to our subject).

Willet concludes: Ethics forbids allowing the other, this time an animal other, to die alone and un-mourned. Philosophy with music and image as testimony to shared pasts and futures loses not just a part of ethics, but its Paleozoic [approximately 300 million year ago--a time of dramatic geological, climatic, and evolutionary change] ground.

III. Interspecies Ethics and Formal and Informal Adjudication in Kenya

One of the questions left unanswered by our examination of naturalism and interspecies ethics is their relationship to rule of law and economic development. Recognizing the nonrational nature of the reasoning nonetheless vital to elephant protection does not lead to

despair. What we know from the training programs for the Kenya bar is that the Kenya lawyers in court are using rhetorical strategies to, in effect, teach interspecies ethics to the court. It is through the dialogue of lawyers, and, in particular, the point of view of the prosecutor, in her description of the elephant who was killed, that the court is transported through Willet's 4 stages of interspecies ethics. In Dafina's closing argument she reminds the court, as fact finder, of the relationship of human to elephant, starting with a recounting of park ranger's biosocial experience with the elephant. There described was the first two phenomena, the evidence of social interaction between ranger and elephant, that they "looked" for each other, "enjoyed" each other, "knew" each other, and even "played" with each other. Then there was the evidence of the experience of "home" stage-- between the elephant and ranger: that each was "comfortable," and felt "cared for", as opposed to farmed, or owned or imprisoned. As such these phenomena resonate with the things as they "should be," feeling of home, and with the right restraints, but no fixed limits. This "home" experience is shattered by the violence of humans violating the limits of that relationship. Then there is the spiritual phenomena recounted in the sense of loss grief on behalf of the ranger, who fought other humans, to protect the elephant, but also in the experience of compassion and grief that came from the survivors and the park ranger, and other species of animals in the park.

Common law judicial proceedings are Cartesian, (the court is a subject) but they make room for a non-subjective way of knowing. It provides for a phenomenological way of knowing. Fact finders watch witness to tell if they are telling the truth by listening to them and judging the witness's credibility. These proceedings are the way that nonrational, culturally specific, and even religious experiences are shared, and then made known, and

become the ground for community, cultural and national identity. The common law system is based on a set of beliefs grounded in the enlightenment. These beliefs include an understanding that knowledge and truth enter not only through our minds, but through our senses. Our sense our informed by memories We believe the memories invoke shared understandings that are common to each of us who are human, but also culturally shaped and formed by our shared cultural heritage and experience. We are rational to examine these experiences, "listen to the music," and consider what resonates. Our experience may caution us to curb our passions and resist our prejudices--to remember what it was like, and could be like. We remember the miracle of the first smile from our infant, their first laugh, and even how we ourselves would cry when the family pet died.

Yet the judicial process is not all remembering back, perhaps to a time that never was. It also includes room for consideration of the, at times, extreme experiences of and conditions of life. Here the economic tools of measuring and data collection are also important to the court. Counsel on both sides uses these tools, the prosecution to point out the economic harm to the tourist industry from the loss of the elephant, and the defense counsel to the costs (damage done by predation and destruction) to the local community from the existence of the game park. Wild animals can threaten the community and its security and prosperity. In addition the evidence of the impeding economic crisis may be important to evoke self defense and emergency principles. It might hear evidence that points to the corruption of police. It might be reminded that the park is a holdover from colonialist days. It might hear evidence that explains the defendant's circumstances, the lack of good jobs. The evidence of the depletion of fertile land and the growing population give real world context to tough economic times and choices. These facts are implicit in the

defense's arguments about the defendant's economic situation, and made explicit in counsel's questioning of why the Chinese buyer has not been brought to court.

My point is that there are a number of benefits that need to highlighted in any examination of the role that rule of law plays in economic development: these are 1) the learning that takes place in the litigation process, 2) the conversation that can occur between court and legislature, and 3) the development of a shared understanding of purpose and national identity. The legal process can lead to a greater sense of confidence and wellbeing in Kenya as it seeks solutions to its problems.

The learning from the litigation process is in the gathering of evidence on both sides. It can highlight, for example jurisdiction glitches in the regulation process. It can identify types of evidence that court finds it needs to reach a fair result. It can give expression to the needs, goals, and even rights of the elephant.

The common law process can teach the legislature through its reported decisions about the failings of the law. Importantly, it will take transparency and discernment between court and legislature for the educational benefits to occur. For example, an unwillingness to convict can be evidence of corruption, or it can be a signal that the punishment is too severe as applied to local Kenyans. High sentences (like in cases of domestic violence) can teach but can create dysfunction in the community's exercise of its judicial processes. Ideally such information might lead to a Kenyan legislature to legislate alternative dispute resolution processes, (ADR) for certain type of defendant's in certain type of crimes charged. Should a particular defendant be "converted" from poacher to park ranger, or elephant protector?

Should there be an alternative process of confession of guilt, followed by some years of community service on behalf of the poached animal population. Are there other ways the elephants can be protected and supported through the legislative processes?

For example where the poaching is part of the funding of rebel military activities, the legislative response might be very different from the case we introduced at the beginning. Considerable effort has been made to investigate links between the illicit ivory trade and terrorism in Africa, including the question of whether Al-Shabaab may have funded its 2013 massacre at the Westgate Mall in Nairobi, Kenya with ivory proceeds. Despite circumstantial evidence, however, there is not yet conclusive proof that al-Shabaab has funded its activities by trafficking ivory. More easily proven is the link between ivory poaching and Joseph Kony's Lord's Resistance Army as well as the Sudanese Janjaweed, both of which have been implicated in poaching by forensic evidence. Should there be evidence of this kind of link between elephant poaching and funding of insurgent groups in Kenya, a different response might be in order than a usual criminal court procedure. [40]

[40] What is also clear is that poaching-related violence threatens wildlife rangers and civilian populations in and around elephant and rhinoceros ranges. In Virunga National Park in the Democratic Republic of Congo, home to both savanna and forest elephants as well as critically endangered mountain gorillas, more than 150 rangers have been killed in the line of duty since 2004. Virunga has been affected by nearly two decades of civil war in which under-equipped forces on both sides supplemented their rations with bush meat from the park and sold or bartered ivory to sustain their operations. In April 2014, the park's Belgian chief warden Emmanuel de Merode was shot and wounded in a roadside ambush the park. Meanwhile, thousands of civilians have been displaced or had their livelihoods destroyed by the conflict. The Virunga story is repeated across Africa: while multinational criminal syndicates and ivory dealers reap the financial benefits of the illicit trade, rangers and civilian populations suffer the insecurity left in their wake. Task forces designed to find an prosecute organized crime might require different courts and different approaches. Community courts may not be designed to either do the financial tracking required to find of evidence of money laundering, tax evasion, or criminal conspiracies or racketeering. Or, the task force in the appropriate case could be brought in to support the local investigation of the poaching, bring resources to bear that can better take on organized crime. Protection of witnesses is often a major problem in these cases.

Animal rights is a topic that should involve the courts and legislature in a continual dialogue. The history of conservancy and game reserves shows the colonialist ties between laws meant to protect wild life, and the economic rights of the people living in proximity with and among the animals. Game reserves were set up for the benefit of hunters, who themselves killed the animals (in the wild), but the laws prohibited the poachers from doing the same. One can see why indigenous populations, especially rebel groups, would look askance at such laws. Not only might animals be security risks to them and their families, but they may present them with the means to buy arms and rise up against oppressive colonialist regimes of the past. Even during the independence movement that followed WWII, many governments were captured by their imperialist predecessors. And so "wild life" management was seen as a system imposed from without, with a questionable morality to it, not the protection of animals, but their hunting for sport.

Yet as the situation changes, and the parks are more legitimately run by Kenyans and for Kenyans, the relationship between animals and the community also changes. The question now is whether the change in the nature of the game parks, to true conservancies, has changed the moral equation sufficiently to help persuade the indigenous populations to adhere to the laws.

The economics of the poaching laws is still complex. Like criminal marijuana laws, the laws are aimed at deterring the poachers, instead of trying to change the market's demand for the product. A cold hearted economist might argue that when the demand starts to cut into supply, market forces will react to provide the right level of protections. First, what is needed is to change the ownership of the wild life from a "natural resource" into a

commodity, like a cow, or a sheep, to be "raised" till the commodity has maximum usefulness in the market. Basic economics suggests that with good information resources, wild life can be managed, not as a good in and of itself, but in the light of the market for the animal. Domestication of the animal is put forward as the best strategy. Rhinos should be raised like oxen. Really? They should be farmed as some are in South Africa, their horns "shaved" for their powder, and sold to the Chinese market. Is this right for Kenya?

Of course, elephant tusks are tougher to treat as a commodity, in that the elephant needs to be killed to get the tusks. As opposed to being used as bush meet, that elephant is primarily sought after for the tusks. Still, like cattle (or pigs or chickens, or fish), raised for meat, and skin for leather goods, can't the market provide a remedy to "protect" the elephant, and meet the economic needs of the people where they live. The answers to these questions and remedies needed might change, depending on the community.[41]

[41] So now we have said it. Why exactly should elephants be treated differently than cattle? Of course, the answer to the vegetarian is that cattle, pigs, chickens, and even fish, shouldn't be eaten either. Their concerns are for sentient animals and are a matter of cross species morality.
Economist know economics struggles when it comes to measuring the economic value of something the market has a hard time valuing, including scarcity— scarcity of species. For example, what difference does it make that Buffalo became near extinct? Cattle worked and were easier to farm. Vis a vis humans, were they worse off? Well, as a matter economics, humans may be. Interspecies ethics suggests something lost to the way of life of the Native American, who lived in harmony with buffalo, following its migration, or timing it and living in-between as vegetarians. Like the Masai and their relationship with their cattle, life was better, in some way when the species was sacrificed, but only for necessity. And whose blood was used as hydration during long periods without rain. (Some think that many Masai men treat their women and children like animals. So whatever benefits from the idyllic these portrayal may not have been widely shared).
So in the struggle some turn to "interspecies ethics" to explain how things out to be? Empirical tools are used to get the balance right. Surveys are conducted to measure the quality of life and happiness of the groups. But are these really better, or normative on how others out to live?
Note also that treating all wildlife the same may cause injustice because different community's view each wild animal differently. As a though experiment buffalo were once wild? Cattle were range raised. Were they wild? Wolves became dogs. Wild boar became hogs and pigs. The relationship between wild animal and domestic blurs depending on the community and its view of the animal. One important difference to approaches to elephants and rhinos, is that while elephants need to be killed to get the ivory for carving, the rhino horn might theoretically be

The Kenya legislature has already been learning from its conversation with the courts and these cases. Conservation is gradually going to scale across large areas of community land in Kenya, where an estimated 10 million acres (four million hectares) are now set aside in emerging conservancies. In general, Kenya has one of Africa's most robust and talented suites of homegrown conservation organizations, with groups such as the African Conservation Centre, Save the Elephants, Big Life, and Lion Guardians all developing innovative and locally crafted approaches to community conservation, law enforcement, and wildlife monitoring. A new umbrella organization, the Kenya Wildlife Conservancies Association, was formed in 2014 with the ambitious task of linking the various local conservancies and initiatives into a unified voice and movement.

A key driver of the conservancies movement is the Northern Rangelands Trust, an organization that has spearheaded a network of conservancies in the north and now in eastern parts of the country. Across conservancies in northern Kenya, the trust reports a 43 percent decline in elephant poaching between 2012 and 2014. Recent research across the Laikipia-Samburu ecosystem, home to the country's second-largest elephant population (some 6,500), finds that these conservancies have "significantly higher numbers of elephants and lower illegal killing levels" in comparison to undesignated community lands.

As in elsewhere in Africa,[42] the key to achieving these outcomes it that conservancies provide communities in Kenya with a framework for improving wildlife

shaved, or harvested without killing the rhino. At least one community in Africa has tried to raise rhinos domestically.

[42] Different nations have developed different approaches to the crisis. Nambia is one,[42] with the African Parks Organization[42] leading the way in Malawi, Zambia, Chad and the Congo.

protections through local scouts linked to national authorities such as the Kenya Wildlife Service. And conservancy revenues from wildlife tourism encourage local people to value wildlife as a part of their landscape.

Namunyak conservancy is a case in point. It lies in a key elephant corridor between the Mathews Range and Mt. Kenya to the south. The community, like other conservancies, has its own rangers working to prevent elephant poaching, partly funded by the more than $170,000 earned annually through agreements with tented camp and other tourism ventures.

Yet all of these efforts have been fed in part by the legislative reform movement that led to the enactment of Kenya Wildlife Regulations and Criminal Statutes. In conversation between the courts, Kenya has the potential to further shape and customize its protection of the elephants. Important then in its development and identity will be for the government learn from the advocacy of lawyers representing individuals in real cases. As the cases are reported, the legislature is informed about not only how the law is working, but what the law ought to be. And the community weighs in with its view of the interspecies ethics that are involved in a particularized to the Kenyan community's situation and setting. [43]

At risk is that the law gets too far out ahead of the community and its sense of what is fair and just.[44] The common law works best when it 'bubbles up" from the experience of real people in real situations. This especially true regarding the question of the development

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[44] Hal Berman, Law and Revolution

of animal rights. That does not mean that the community should not engage and continually examine its practices regarding animals. But it must do so in a way for the stage of interspecies ethics to play out in the community's collective consciousness. Common law courts continue to be an important place for the collective consciousness to be developed. And it is of course their hope that principles and rules and habits of behavior can thereby be developed that will stand up in good times and in bad. In and through the common law process, Kenya hears the music in its relationship with its wild life that will last well into its collective future.