

## Ekin Erkan | Animality, Metaethical Judgments and Predictive Justice

(2020-04-02)

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In a wading pool of philosophical mire and superimpositions - square cubes retrofitted upon cylindrical perforations - Anne-Françoise Schmid, "scientist amongst philosophers and philosopher amongst scientists," rises from the morass, pronouncing that:

[t]he Earth is then silent, and is only perceived by the plants. La Mettrie could have taught us this in *L'Homme-Plante*. This silence is profound, more profound than the philosopher believes it to be, who thinks to have seamed [*couturé*] his system - for example, by his exclusion of women and animals. It is the silence which reaches him when, finally, he learns that there are other philosophies as lively as his and that he must postulate the de jure multiplicity of philosophies. Therefore, philosophy is silent: only isolated philosophies are talkative [*bavardes*]. ... We have the obligation of a silence, but a

new silence, which does not result from the absence of noise.<sup>1</sup>

Indeed, it is not a unified theory that Schmid seeks to impose but rather a political and poetic musing, one which recalls Katerina Kolozova's comments in *Capitalism's Holocaust of Animals* (2019) concerning animality as a brute scaffold upon which Capital materiality creates "victims-in-person." This reduction is the foundational gesture of Capital, diffuse and ripe for exacting surplus out of "pure value" - that is, life-preservation and vestiges of "reason" from divine violence: "[t]he Earth sees us, the animal sees us, the woman sees us. And the planet sees us, too. We believed we were the only ones to see."<sup>2</sup>

What, exactly, does the philosopher's vision, or lack thereof, suggest in terms of metaethics and jurisprudence in our current moment? Contra the impulses of continental philosophers such as those Badiou, Žižek, and Agamben pose, this insight bolsters the piecemeal approach often prioritized by analytics. Specifically, the multitude of questioning that Schmid encourages suggests that we ask *specific questions*, such as: is it ethical for judges to continue imprisoning offenders, given these circumstances?<sup>3</sup> How do we orient a debt jubilee, consolidate rent strikes, sick strikes, and so on? What are the implications of COVID-19's r-naught (roughly 2.2, but possibly as high as 3.5) and what statistical modeling techniques can we exact to more precisely obtain an exact measure?

We will not attempt to resolve all of these queries. Furthermore, our piecemeal approach is not to divorce critique from the coeval possibility of a more conceptual philosophical apparatus - for instance, let us consider the politics of animality vis-à-vis containment. Kolozova's Laruelian project does not prompt the kind of revalorization or anthropomorphizing of the animal that we see in Derrida or Haraway, but posits the cultural exchange and treatment of "animality"

<sup>1</sup> Anne-Françoise Schmid, "The Philosopher's Vision," trans. by Jeremy R. Smith, *Identities: Journal for Politics, Gender and Culture* (March 31, 2020). [www.identitiesjournal.edu.mk/index.php/IJPGC/announcement/view/11](http://www.identitiesjournal.edu.mk/index.php/IJPGC/announcement/view/11); see also pp. 14-15 in this issue.

<sup>2</sup> Schmid, "The Philosopher's Vision."

<sup>3</sup> In agreement with Robert Brandom, we offer that imprisonment is a deferral of recognizance and, thus, is never ethical; nonetheless, the purpose of this essay, which plucks from the verdant fields of metaphysics and jurisprudence alike, is to consider the practical purposes of philosophy *qua* the current pandemic.

ty" as a general equivalent of the real. It has been the motivation of feminist philosophers such as Kolozova and Schmid to reach beyond the strictures of deconstruction and/or post-structuralism in order to recognize that such reductions "ground and sustain patriarchy and heteronormative sexuality" as a "general equivalent of woman or the woman as reified abstraction."<sup>4</sup> This is precisely why Schmid notes that (the animal), the Earth, and the woman return our gaze, which we have always assumed held antecedent immanence. Rather than impart an amphibologic metaphysics of supplanting the perfected real via the philosopheme, or pronounce that COVID-19 is some kind of "hyperobject" (à la Timothy Morton), this approach seeks to emancipate the non-human, beginning with the animal.

Let us, then, direct the instrument of animality into the contemporary sphere. Rather than erect bold and all-encompassing theories, Schmid and Kolozova provoke a multitude and overflow of *questioning* (experimenting, calculating), i.e., a science. Has not the epidemic status of COVID-19 taught us the reproductive risks of a philosophy of *answers*, rather than a non-philosophy of questions? Within the tradition of the (standard) philosopheme, from Plato's *Timaeus* to Derrida's "The Animal that Therefore I Am," the animal is prodded forth as an *answer*, reduced to the calculus of a mere machine, an automaton devoid of any semblance of epiphenomenal sensoria, or disembodied as a superlative category, appropriated for framing truth claims by instantiating the real through animality-as-transcendence. In our contemporary moment, we ought to consider how it is that the caged human occupies the position of animality - whether it be those undocumented migrant children caged in detention centers across the United States<sup>5</sup> or in the case of inmates serving out their sentences in prisons. COVID-19 has illuminated the logic of animality by making explicit exactly *how* animality operatively presents itself as a reduction.

Indeed, prisons have long served as the sites of increased and exacerbated infection due to close quarters and unsanitary cell conditions, but this is even more so the case during a pandemic. In turn,

<sup>4</sup> Katerina Kolozova, *Capitalism's Holocaust of Animals: A Non-Marxist Critique of Capital, Philosophy and Patriarchy* (London: Bloomsbury, 2019), 147.

<sup>5</sup> Contrary to popular belief, this project began with the Obama administration's William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 and has been continued by Trump.

while some local districts such as New York City, Los Angeles, and Cuyahoga County in Ohio have reduced sentences and released "non-violent inmates," other districts have tightened restrictions by limiting prisoners' mobility, effectively putting all prisoners in lockdown and, in some cases, involuntary solitary confinement. In addition, the Federal Bureau of Prisons has noted that it is working with the U.S. Marshals Service to "significantly decrease incoming movement" to U.S. prisons by limiting group gatherings and visitations.<sup>6</sup> Furthermore, criminal trials that require in-person appearances of parties or counsel have been suspended, following jurors dropping out of cases due to self-isolation. This is all despite the Sixth Amendment constitutional clause that ensures a speedy trial procedure in criminal and juvenile court proceedings, which is suspended through the close of business on Monday, April 20, 2020 (or as provided by subsequent order).

Just as sociability is contingent on social relations and is determined by the species-being of humanity's normative scaffolding, so too is the possibility of jurisprudential judgment determined by one's peers. Thus, COVID-19's contingent suspensions have set into flux the determinate deontic statuses of commitment and the practical attitudes upon which our norms are causally efficacious.<sup>7</sup> How, then, does the deontology of practical reasoning continue in light of such suspensions?

Indeed, this pandemic does not bar the *possibility* of jurisprudential proceedings in the last instance. In fact, at least since 2013, "predictive justice" machine learning software has been utilized in court to set bails, determine sentences and, increasingly, to contribute to determinations concerning guilt or innocence.<sup>8</sup> There is growing development of risk-assessment algorithmic software that perform

<sup>6</sup> See U.S. Department of Justice, Federal Bureau of Prisons, "Bureau of Prisons COVID-19 Action Plan: Phase Five," *Federal Bureau of Prisons* (March 31, 2020). [https://www.bop.gov/resources/news/pdfs/20200331\\_press\\_release\\_action\\_plan\\_5.pdf](https://www.bop.gov/resources/news/pdfs/20200331_press_release_action_plan_5.pdf).

<sup>7</sup> "Norms (in the sense of normative statuses) are not objects in the causal order. Natural science, eschewing categories of social practice, will never run across commitments in its cataloguing of the furniture of the world; they are not by themselves causally efficacious - no more than strikes or outs are in baseball. Nonetheless, according to the account presented here, there are norms, and their existence is neither supernatural nor mysterious. Normative statuses are domesticated by being understood in terms of normative attitudes, which are in the causal order." Robert Brandom, *Making It Explicit: Reasoning, Representing, and Discursive Commitment* (Cambridge, MA: Harvard University Press, 1994), 626.

<sup>8</sup> See *State of Wisconsin v. Eric L. Loomis*, 2015AP157-CR (April 5, 2016).

predictive coding techniques which utilize Bayesian optimization methods, propping up the development and widespread use of predictive policing and crime prediction software.<sup>9</sup> For example, PredPol is a company that markets itself as harnessing “the power of information, geospatial technologies and evidence-based intervention models to reduce crime and improve public safety.”<sup>10</sup> Reducing signal amplitude (or variability), such probabilistic coding algorithms proffer local intensities through experimental evidence, training in continua and weighting various connections with signal value inputs so as to output residual error in advance. PredPol markets itself as implementing a machine learning algorithm that adequates three different localizable data points (crime type, crime location and crime date/time); this algorithm trains itself through historical and event-oriented data-sets that can be shared with “local government[s] or the community.”<sup>11</sup>

In turn, these predictive justice algorithms wield the allure of objectivity. As of April 2020, a partnership between the Trump administration and Alphabet, Inc. has produced Verily’s Project Baseline screening triage website to determine symptoms, travel history and other risk factors that can be ordered for prioritized treatment. However, it is more than foreseeable that such data could be integrated by government agencies such as the Immigration and Customs Enforcement or utilized as a legal prosthesis during times of epidemiological crisis, allowing normative judgments to be unconsciously structured by data. This bears the possibility of a mechanical re-ordering, with predictive policing and justice structuring legal processes along the linealities of “animality,” crafting naturalized normative statuses vis-à-vis a typology of inferential norms devoid of any conceptual content. That is, such instantiations of machine learning posit a kind of “bare materialism” that eliminates the normative character of *discursive practice*, with the logical space of rational and communal reasoning - i.e., of meta-linguistic

characterization and ontological adjudication - separated from justice in-the-last-instance. Judge, juror, and executioner are wrapped into one commitment - data. Without the deontological and ethical conceptual content born from deliberation (in the case of a jury of peers) or sapient agency (in the case of the arbitrating judge), such datafication reduces ethics to a bare minimum, i.e., the status of “animality.”

Drawing on the long philosophical history of pragmatism, philosopher Thomas Nagel (who began his career as a philosopher of mind but moved towards jurisprudence) makes the case that:

[w]hat creates the link between justice and sovereignty is something common to a wide range of conceptions of justice: they all depend on the coordinated conduct of large numbers of people.<sup>12</sup>

But what happens when such conduct is coordinated without conceptual determination? According to Nagel’s remark, the sole means of providing fair jurisprudential practice is through an all-encompassing institution of common coordination. This means that there is a decided difference between the demanding normativity of moral judgments and generic evaluative judgments; it is the functor of evaluative attitudes (or *expressivism*), which is not only directed at *facts* but *normative commitments*, that we lose with predictive justice. Through communal contact between inside and outside (e.g., prisoner and visitor), the coordinated conduct of normativity reaches towards a judgmental and meta-linguistic conceptual register that is barred by the use-value combustion of “animality.” It is the philosophical recognition of the “affirmative act” that conditions the constitution of “subject of truth” in jurisprudence; in addition to a factual register, this requires an inaugural “meta-ontological decision” of recognition-cum-recognizance, a judgment which synthesizes intuited individuals into discrete cognitions. But what happens when this coordination is automated, such that algorithmic governmentality is universalized? One’s *human* judgment and rational practice is seen as not only superfluous but part and parcel with contamination, a *risk*. Such *risk* is an unforeseen consequence

<sup>9</sup> See D. H. Ballard and R. Rao, “Predictive Coding in the Visual Cortex,” *Nature Neuroscience*, Vol. 2, No. 1 (1999): 79-87.

<sup>10</sup> PredPol markets itself as implementing a machine learning algorithm that adequates three different localizable data points (crime type, crime location and crime date/time); this algorithm trains itself through historical event data-sets which can be shared with “local government or the community to see the relative patrol coverage across the city.” *PredPol Website*. <https://www.predpol.com/law-enforcement/#predPolicing>.

<sup>11</sup> Bernard Harcourt, “Risk as a Proxy for Race: The Dangers of Risk Assessment,” *Federal Sentencing Reporter*, Vol. 27, No. 4 (2015): 237-43.

<sup>12</sup> Thomas Nagel, “The Problem of Global Justice,” *Philosophy and Public Affairs*, Vol. 33, No. 2 (2005), 115.

of speculative arbitration - a metaphysical constraint that pairs cognitive rationality with an obligation to truth<sup>33</sup> - and is precisely what predictive justice unwittingly eradicates. To sanitize now means to animalize, to "lock up and throw away the key" for any foreseeable future; invariably, this also means divorcing disciplinary conditions from the rational motives that bridge reasoning with judging.

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<sup>33</sup> Ray Brassier, "Concepts and Objects," in *The Speculative Turn: Continental Materialism and Realism*, eds. Levi Bryant, Nick Srnicek and Graham Harman (Melbourne: re.press, 2011), 51.