Sovereignty unchained and chained: Theorizing control through »sovereignty«

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The sovereignty turn in critical theory

»A remarkably under-theorized paradigm shift has taken place in critical thought in recent years, and sovereignty […] has emerged as the concept of the moment,« Ronald C. Jennings has recently stated (Jennings 2011, 24).[6] A critique of control, it appears, cannot but take as point of departure some concept of sovereignty. This trend is all the more surprising as it coincides with a widespread admission of the end of state sovereignty in view of economic, social, legal and security concerns that, supposedly, can only be addressed transnationally and are progressively dealt with on the level of institutions that transcend the national state. The credit for saving sovereignty as an ultimate anchor-point for critical analysis, Jennings suggests, goes largely to Giorgio Agamben. Agamben has located sovereignty more deeply, so to speak, by extending its scope far beyond the state. He has reinvented the state beyond the state; through his readings of Walter Benjamin and Carl Schmitt, Jennings claims, sovereignty thinking has been established as a valuable modern tradition. Yet Agamben's rise to prominence would not have been possible without a receptive academic environment. The climate of the immediate post-Cold War period as well as institutional changes in universities contributed to the foundation of a variety of research and study programs concerned with questions of social control such as *governmentality studies*, *critical security studies* and *surveillance studies* (Rothe und Schmieder 2010, 13–16). Although these schools or programs legitimize

6 Only after the completion of this article was Daniel Loick's book *Kritik der Souveränität* (2012) brought to my attention. I could unfortunately not include this reference in my discussion anymore.

themselves by reference to a new transnational reality, their analyses have remained largely within the confines of a traditional understanding of sovereignty by reproducing narratives of total control. The implicit model is »control over space,« a primal dream of state sovereignty (ibid., 6–8). The prevalence of surveillance as an object of critical analysis along with a sustained interest in the visual are indicative of this (Rothe 2009). Sovereignty seems to have been transferred from the state to politics as such. Agamben then provides a coherent theoretical superstructure to these diverse new research agendas.

A factor not less important for the upswing of sovereignty theories à la Agamben was a particularly skillful rhetorical move. Agamben points to what is supposedly a blind spot of the authority of the field, that is Foucault. Foucault, he claims, dismissed far too hastily the concept of sovereignty as a point of departure for understanding modern power, instead turning to governmentality. Sovereign power and governmentality are not, however, mutually exclusive. In fact, Agamben continues, the concept of biopolitics—understood as *the* focus of governmentality[7] and as a kind of control that targets the population as well as the individual body insofar as they are both forms of biological life—would necessarily presuppose the existence of sovereignty (Agamben 2002, 15–16). These claims about the lasting relevance of sovereignty have meanwhile become commonplace. And the claim to have located Foucault's blind spot has turned into the mark of fulfilling his implicit legacy, of realizing the Foucauldian project and of being a legitimate heir. To this end, for example, Eric L. Santner remarks on Foucault's juxtaposition between monarchic sovereignty and the disciplines: »What I believe Foucault has drawn attention to here *without being fully able to name it* [my emphasis], is, precisely, the mutation of the King's Two Bodies into the People's Two Bodies« (Santner 2011, 10), that is, the survival of sovereignty after the king's death. Judith Butler likewise insists that »*what was not possible from his* [Foucault's; M. R.] *vantage point was to predict* […] that sovereignty […]

7 Judith Butler calls the focus on management of population »the hallmark of governmentality« (Butler 2004, 53).

under emergency conditions would reemerge in the context of governmentality« (Butler 2004, 54; my emphasis). Such a reference to emergency conditions, to the post-9/11 era, or alternatively to fascism—which Foucault was not able to address, because, again, he did not sufficiently work out the implicit potential of his own theory (Agamben 2002, 16)—is another frequent move, employed to underscore the urgency of a return to sovereignty. The assumption is thereby taken for granted—and imputed to Foucault—that such emergency conditions reveal the nature of modern societies or even modernity.[8]

It might be worth noting that these strategies of appropriation are based on a very selective use of Foucault's work, whether be it because of the peculiarities of the publication history of his lecture courses,[9] or because of a decision not to consider the broader context of his reflections. Judith Butler, for example, develops her argument on the basis of a single lecture taken from the original 1977/78 lecture series Sécurité, territoire, population and published in isolation in 1991 under the title »Governmentality«. Eric L. Santner exclusively uses *Surveiller et punir* (1975) as well as the first volume of *Histoire de la sexualité* (1976; English translation 1978), which introduces the concept of biopolitics. In Foucault's oeuvre, however, the governmentality lecture and the first volume of *Histoire de la sexualité* have an explicitly provisional and programmatic character. The concept of governmentality eventually ceases to be a designation for a specific form of government, a government that seeks to control and organize a population (biopolitics), and instead becomes a tool for Foucault that allows for an analysis of monarchic, liberal and neo-liberal regimes alike in the lectures that follow and in

8 Foucault discusses fascism and totalitarianism in *Il faut defendre la société* (1997, 213–61) as well as in *Naissance de la biopolitique* (2004a, 113–25), yet he seeks to understand them in their singularity. The debate to have with Foucault is thus less a moral one, focused on the question of denial, but a debate about the explanatory value of emergency conditions and regimes of violence.

9 The publication of Foucault's Collège de France courses only began in 1999 and is still ongoing.

Naissance de la biopolitique (lecture series at the Collège de France 1978/79). Put differently, Foucault comes to understand each of these regimes in terms of governmentality, and each instance of governmentality represents a different form of the enactment of sovereign power. Thus, there is no need to argue for a combination of governmentality—or biopolitics—and sovereignty, since Foucault never dismissed the latter, but only shifted focus.[10] By drawing attention to the techniques, measures, and institutions of government and their reflections and justifications, he seeks to explore the weak points of political sovereignty. Each kind of governmentality is for him indicative of specific constraints on sovereignty; a defining constraint for modern sovereignty is the liberal economy. To the degree that the concept of governmentality becomes a generic and analytical term, biopolitical measures become measures among others and less a defining feature of an era.[11]

In a nutshell: Many protagonist of the *sovereignty turn* do not consider that Foucault's shift towards an understanding of political sovereignty through the techniques, measures and programs of government occurs precisely in order to trace the limits of sovereignty. Through these critics, Foucault's project is thereby reversed. Political sovereignty emerges no longer as a claim, as inexorably always already caught up in the vicissitudes of government, but it comes to precede every government, measure, law, and institution, and employs them strategically for its own preservation. This article, then, attempts a critique of such an—ultimately onto-

10 In the 1979/80 lecture series following Naissance de la biopolitique (1978/79), Foucault returns to the question of the source of sovereignty instead of pursuing the analysis of its enactment. He redefines his interest in sovereignty as an interest into the forms of truth by means of which sovereignty attempts to legitimate itself.

11 Foucault's reconceptualization of biopolitics corresponds to Derrida's position in his seminars on sovereignty: »I am not saying that there is no ›new bio-power,‹ I am suggesting that ›bio-power‹ itself is not new« (Derrida 2011, 330). This assumption allows for an analysis of biopolitics in its specificity.

logical—model of sovereignty by exploring moments of its genealogy and by discussing its political implications. I will propose instead to make the ontological impossibility of sovereignty—understood as self-legitimizing, indivisible, self-determining and so on—the point of departure for critical thought. I will return to Foucault's multivalent concept of governmentality as well as discuss Derrida's idea of a »divisible sovereignty« (Derrida 2009, 77) to theorize this ontological impossibility of sovereign power. Although the last part of this article seeks to illustrate the argument by two key elements of the US criminal justice system (prosecutorial discretion and mandatory sentences), the paper as a whole remains first and foremost an intervention into a theoretical superstructure.

Sovereignty: A genealogical sketch

Personal rule and state rule

Jean Bodin (1530-96), commonly called the first modern philosopher of sovereignty, defines sovereignty as the right to command, specifically as »the power to make law« (Bodin, b. 1 ch. X). The ultimate *raisons d'être* for such authority, according to Bodin and his followers, are peace, security, and the general wellbeing (happiness) of the subjects. Already before Bodin, political sovereignty had been thought of as a necessary condition for both the existence and the preservation of the community. God's relation to all earthly affairs commonly served as a model.[12] Since

12 Physics before Newton, inspired by Aristotle's conception of God as an unmoved mover, conceptualized the relation between the sovereign and his subjects in terms of movements and their sources. Fourteenth-century impetus theory argues for the utter dependency of all movements on their source. For example, the trajectory of a projectile is understood as an imprint of force by a sovereign source (the weapon), which then gradually declines through the resistance of the air. Thus, the original cause can still be considered as present as long as the movement lasts, or, in other words, the assumption that a kind of self-preservation or innate potential for persistence is at play here can be avoided. Both in theology and in political theory. the idea of an ongoing necessary presence and of the activity of the source of a movement in order to

the right to command by enacting laws used to be bound to a prince or the pope or the emperor, Bodin painstakingly seeks to establish command as a pure constitutive power, rooted in an unconstrained personal decision. To be sovereign, he declares, »means exemption from all laws whatsoever« (ibid.). Yet in the course of his analysis he cannot avoid putting this into perspective. The sovereign ends up being »bound by the just covenants and promises he made« (ibid.), by all laws that concern questions of honor, and »by ›honour,‹« Bodin clarifies, »I mean that which conforms with what is natural and right« (ibid.). Thus the pure constitutive power of the sovereign seems from the outset to only be possible within the confines of tradition, custom or natural rights (however defined). It is immediately caught up in a logic of repetition. Yet the constitutive act also renews itself through a continuous rupture of this logic: »owing to the variety of circumstances, of places, and persons« that »cannot be comprehended in any law or ordinance,« the law has to be adjusted, or made anew from case to case—a power transferred from the sovereign to the magistrates who will perform it in his name, according to Bodin (ibid.). Bodin does not overlook this mutual dependency between personal force—for example in the form of discretion—and the law in its abstract regularity. Already in Bodin, therefore, two dangers of (and to) sovereignty emerge: a reduction of the moment of personal force in favor of routines, norms, and laws as well as a reduction of routines, norms and laws in favor of the moment of personal force. These reductions do not dissolve the interdependency of force and law. They only naturalize order, suggesting either quasi-natural rule or uncontrollable powers at work at the price of rendering this interdependency uncontrollable. Unchecked force becomes internally unstable and so law and force are almost unavoidably overburdened with the tasks at hand. What is commonly described as almightiness comes into view here as utmost impotence. This is not to say that the effects of rule cannot be terrible anymore. Spinoza observes that power turns into violence precisely when it exceeds its own capacities. Thus divisibility and justifiability,

sustain the same boiled down to the idea of a *creatio continua* (Blumenberg 1996, 176–81; Foucault 2004b, 264).

what Derrida calls effects of a force inscribed by iteration, are not deficiencies to eliminate; they are defining features of every sovereign power. »There is no intrinsic legitimacy of power«[13] (Foucault 2012, 76).

Such assumptions must change, then, the direction of analysis and critique: We must endeavor »to make the non-power, the non-acceptability of power, not the end of the enterprise, but the point of departure« (ibid., 77). Or, in Derrida's words: »The question is not that of sovereignty or nonsovereignty but that of modalities of transfer and division of sovereignty said to be indivisible« (Derrida 2009, 291).

That there is *in fact* no »intrinsic legitimacy« and no »indivisibility« was far from unknown to most of the early theorists of the power to rule. What was continuously negotiated and re-negotiated in their conceptions were precisely the »modalities of transfer and division.« Political and juridical conceptualizations of sovereign power could always be understood as pure claims in the ongoing struggle between local lords, cities, princes, bishops, the emperor, the pope and so on, or as mere rationalizations post factum, or they emerged as compromises in the first place. The fief system with its multiple and complex dependencies and obligations was supported by a juridical understanding of the highest power to rule—the term sovereignty only became common in the seventeenth century[14]—as divisible and relative. The two-sword theory was a prominent attempt to compromise and to affirm a shared sovereignty in practice, a division between religious and worldly powers, on a unified foundation (God). This foundation itself became the subject of severe dispute and further relativizations. The common reference to a supposedly Roman *lex regia* that prescribed the transference of power (*translatio imperii*) from the people to the king had been used since the eleventh century to argue for

13 All quotations from non-English sources are translated by the author.

14 *Soverain* and *souvrainetez* appear first in French in the twelfth century and are already used in the thirteenth century to designate rule. However, until the seventeenth century, Latin expressions such as *summum imperium*, or *summa potesta* remain the most common terms (Boldt 2004, 99–100).

the ultimate supremacy of the worldly powers and, consecutively, within the field of worldly powers to challenge the emperor himself in favor of the princes and the princes in favor of the Third Estate (Schliesky 2004).[15] Every claim to indivisibility and legitimacy had to meet with a »reality check« and ultimately could not be maintained. Theory formation happened closely along conflict lines.

Jean Bodin's contributions to the sovereignty debate—along with those of Thomas Hobbes—can be seen as affecting a double rupture, once with the mode of knowledge production and once with the frame of reference for sovereignty. Both men went through the scholarly practice of renaissance humanism and were philosophers with a much broader audience in mind—potentially all of mankind.[16] Their conceptions, although directly informed by the horrors of civil war, were not so much direct interventions. That is, they were more immune to the demands of contemporary situations and their point of reference was a relatively new political entity: the state. They fused the power to rule with state power, abstracted from personal relations, thus making sovereignty territorial and singular. It is undoubtedly true that sovereignty in Bodin and in Hobbes remains a political program and explicitly so (Jennings 2011, 30; Schliesky 2004, 51–52), as the state is still a program too. Yet notwithstanding the state's programmatic character, claims to sovereignty became more difficult to falsify through praxis with this new frame of reference.

Throughout the nineteenth and the beginning of the twentieth centuries—with the stabilization of the state itself—state and sovereignty become almost synonymous in political theory. The element of command or personal force, previously the anchor point for questions of legitimacy, progressively fades from prominence in discussions of sovereignty. Sovereignty is re-phrased as state sovereignty, in other words, it

15 Compare Boldt 2004 for a comprehensive overview.

16 Gavre points out that Hobbes' did not write merely for royalists, but appealed to »the new scientific mentality, the emerging commercial class, and the Puritan dissidents« (Gavre 1974, 1450).

becomes absorbed by the law. Hans Kelsen's (1934) concept of sovereignty of the law, or constitutional sovereignty, is only the most radical expression of this and »means […] an increase of positivism towards a neutral/value-free legal order and thereby towards a neutral state« (Schliesky 2004, 105). Walter Benjamin, Carl Schmitt and others finally rediscover the moment of personal force in their critique of liberalism, notably during the social unrests, *coups d'état* and constitutional crises of the Weimar Republic, when the lack of law or its arbitrary implementation becomes a daily experience. Schmitt does so with reference to Hobbes and Bodin, that is, he goes back to a moment in time when the prince or king was not yet entirely removed from the picture. Only for Benjamin and Schmitt this conception has once and for all ceased to be a program. They end up »revealing«—either critically or affirmatively—force as the ultimate law-giver and the only real power behind the law. How then has the idea of an actual existence of an indivisible force with no other legitimacy than its own strength become plausible?

The blueprint of a discourse (a micro-genealogy)

A passage from Kant's late work *Metaphysik der Sitten* ([1798] 1900; *The Metaphysics of Morals*) can serve to illustrate the becoming natural of the force in law, a naturalization to which Benjamin, Schmitt and Agamben eventually fall prey. Through his attempt to separate law and force, the unique from the iterative, Kant unwittingly invents all the themes of the critical sovereignty discourse to come: sovereign decision, state of exception, bare life. Kant's proceeding in this passage can be seen as reflecting a historical watershed moment in political thought. The background for his reflection is a widespread disappointment with the French Revolution. In the eyes of many, debates about the legitimacy and possible partitions of the power to rule led directly to excesses of violence. The French Revolution proved that the production of political knowledge was in need of much stricter control and could not be entrusted to political parties or »the people.« Kant begins the »general annotations« concerning constitutional law (*Staatsrecht*) with the followings remarks:

> Der Ursprung der obersten Gewalt ist für das Volk, das unter derselben steht, in praktischer Hinsicht unerforschlich, d. i. der Untertan soll nicht über diesen Ursprung als ein noch in Ansehung des ihr schuldige Gehorsams zu bezweifelndes Recht (*ius controversum*) werktätig vernünfteln […] Ob nun ein wirklicher Vertrag […] vorher gegangen, oder ob die Gewalt vorherging, und das Gesetz nur hintennach gekommen sei […] das sind für das Volk ganz zweckleere und doch den Staat mit Gefahr bedrohende Vernünftelein; denn wollte der Untertan, der den letzteren Ursprung nun ergrübelt hätte, sich jener jetzt herrschenden Autorität widersetzen, so würde er nach den Gesetzen derselben, d. i. mit allem Recht bestraft, vertilgt, oder (als vogelfrei, exlex) ausgestoßen werden.—Ein Gesetz […] wird so vorgestellt, als ob es nicht von Menschen, aber doch von irgendeinem höchsten tadelfreien Gesetzgeber herkommen müsse, und das ist die Bedeutung der Satzes: »Alle Obrigkeit ist von Gott« (Kant 1900, 318–19).[17]

Kant seems to argue for the futility of all debates about the legitimacy of the highest power (*oberste Gewalt*)—a translation of »sovereign power.« His concern is solely for the consequences that such debates can have: revolution. It is notable that Kant understands—without hesitation—that these debates are about the »origin« of the highest power; power

17 »The origin of the highest power is for the people, who are subjected to it, in a practical sense inscrutable, that is the subject shall not engage into futile reasoning about this origin as if the duty of obedience in view of this power were a still disputable right (*ius controversum*) […] whether there was a real contract at origin […] or the power (die Gewalt) preceded and law only came after […] this is for the people an entirely purposeless and futile reasoning, which nevertheless poses a danger to the state; because if the subject who had finally by his futile reasoning arrived at the last(-mentioned) origin wanted to resist the presently ruling authority, he would, according to its laws, that is, justifiably/by means of the existing rights, be punished, eradicated or declared outlawed (as fair game, exlex) and thus expelled.—A law […] is conceived in such a way as if it had not come from human beings, but from a kind of superior faultless law giver, and that is the meaning of the phrase: ›All authority is from God.‹«

immediately becomes that which precedes the law (»law only comes after«). It is not as if there are no alternatives to seeking legitimacy in origin; it is a path opened up only by the juxtaposition of law and power. Only if »power« is stripped of its iterability does the question of origin emerge.

Kant states, rather than claims, that the origin of this highest power is inaccessible, though not without immediately restricting the generality of the statement: »in practical terms« and »for the people subjected to it.« A (relatively weak) epistemological statement—the origin *is* inscrutable—translates without delay into a normative statement, subjects »*shall not* reason about the origin.« He invests his authority as philosopher to offer a moral imperative as a straightforward deduction from the factual statement (»that is«), although in so doing performs a significant change of register. The only thing that we can be sure is not derivable here is not the origin of the highest power, but the normative claim that one shall not attempt to derive it. In issuing this moral imperative, Kant performs the kind of sovereign act—an act not supported by the laws (of logic), thus an act of force—which he, or this entire text, wishes to make impossible to presuppose as the origin of law. The origin is set up with pure force as the object not to consider, and thus not only offered to consideration, but also almost identified as originating in force or violence.

Kant then explores further what this inscrutable origin could be—violating his own dictum, or rather once again proving himself to be above the law. He arrives at the impossibility to decide between power (*Gewalt*) and contract (*Vertrag*). The term power (*Gewalt*) is accompanied here by the definite article (*die Gewalt*), which makes it ambiguous. *Gewalt* is, on the one hand, a reference to *oberste Gewalt* in the neutral sense of (supreme) authority, but in its opposition to »contract,« it comes to mean »violence/pure force.« That this origin in violence is indeed the focal point is confirmed: *den letzteren Ursprung* does not designate »last origin,« but »last-mentioned origin.« It is an anaphoric reference to *Gewalt* (violence) as opposed to *Vertrag* (contract): »if the subject who had finally, by his futile reasoning, arrived at the last-mentioned origin wanted

to resist the presently ruling authority […].« Thus Kant precisely defines the origin he does not want »the people« to consider: the highest power (*oberste Gewalt*) founded by the same power (*die Gewalt*)—which would be an origin in violence as the anaphoric reference emphasizes. That the subjects (*die Untertanen*) arrive at this conclusion—which is, after all, for them »in a practical sense« impossible to reach—is kept in subjunctive mood, not the existence of this origin itself, which has now, backhandedly, become the fact to be hidden. Kant recalls in detail the consequences of finding this origin. He does not thereby go through the effort of explaining why an origin of law in violence encourages resistance. His response is as immediate as the one that he is about to describe. In his description of the sovereign response, then, the origin of law in violence is affirmed. It turns into a reenactment of the founding event, and Kant speaks in the name of the highest power itself (»justifiably so«): a pure force emerges from behind the law, personalized in the form of »the presently [my emphasis] ruling authority.« The punishment »according to law« turns into a punishment »with the help of all laws«; the German term *mit allem Recht* means both »justifiably so« and »by means of the laws.« The addition of *allem* highlights this ambiguity. The subject accordingly will not simply be tried, but »punished, »eradicated,« and »expelled from the law.« It will be annihilated in its physical as well as in its social existence. *Vogelfrei* means »fair game,« an animal that anybody is allowed to kill. The law becomes an instrument for the self-preservation of the highest power, projected as outside of the law, as the mirror image of the subject that is »eradicated« or reduced to an animal-like existence.

In sum, Kant prohibits looking for an origin, disregards his own prohibition, determines the origin and finally identifies with the force that he assumes to be at this origin. Perhaps he has himself been this force all along. After all, that there is something to look for in the first place was nothing but the effect of the initial juxtaposition of law and force/power. Kant drifts towards what he himself is setting up as he goes along. It is this precedent of the speaking subject that becomes noticeable as the force exerted by Kant throughout the text. Put

differently, the text is ruled by a drive towards the substantialization of that which it seeks to make impossible to think: the origin of the sovereign power and thus of law in pure force. Kant is continuously haunted by that which does not exist because of his attempts to rule it out. When he returns to the law in order to propose it as final authority—Kant is at the threshold of a theory of constitutional sovereignty, a precursor to Hans Kelsen—the »as if« indicates the failure of his enterprise. Law has become the veil only covering a pure force behind it.

The critical sovereignty discourse

Internal instabilities (three theory sketches)

Brought to light then is what Kant conjures up in presupposing it as that which is to be avoided by any reasoning: a force founded only in itself, the power (that) precedes the law (Kant). Giorgio Agamben understands this power as the »primordial juridical fact« (Agamben 1998, 22), a force that is necessarily not only in the law, but also and simultaneously outside of the law and thus can suspend law and always »justifiably so« in view of those who »pose a danger to the state« (Kant). This possibility finds its most fervent advocate in Carl Schmitt. The suspension, »exlex,« makes the citizen animal-like, »fair game« (Kant), defined entirely by their physical existence. To speak with Benjamin: »the rule of law over the living ceases« and »mere life« comes into being (Benjamin 1996, 250), or, with Agamben again, in radicalizing Benjamin's thought: such a suspension—as it does not, strictly speaking, suspend the law but reconstitutes the condition for its application—rather marks »the inclusion of bare life in the juridico-political order« (Agamben 1998, 56). This inclusion of bare life, its availability as last reference point, becomes with Agamben the stake of governmentality as bio-politics and defines the dependency of the latter on sovereignty.[18] Yet these theorizations of the

18 Agamben's formulation »inclusion of bare life« implies its preexistence as if »bare life« were simply organic life or life defined by physiology. Yet his examples rather suggest that »bare life« is constituted through the withdrawal of law (as something to be included).

moment of personal force, its isolation, overgeneralization and juxtaposition with the law is not without paradoxes; it is internally as unstable as Kant's discourse.

Kant's claim that law only comes after power, for example, finds a poignant expression in Carl Schmitt's *Political Theology*:

> After all, every legal order is based on a decision, and also the concept of the legal order […] contains within it the contrast of the two distinct elements of the juridic—norm and decision. Like every other order, the legal order rests on a decision and not on a norm. (Schmitt 2005, 10)

The decision as the ultimate anchor-point of law becomes the hallmark of sovereignty. Schmitt goes to considerable effort to prove that this decision is indeed a final one, dependent upon nothing; a decision which cannot be described in any way anymore as externally enforced, but is grounded entirely in the subject of the sovereign. An unconstrained act of decision is conceivable, Schmitt claims, only if there are indeed no criteria or norms available that guide or determine it. Schmitt famously defines the state of exception as fulfilling this requirement: the state of exception is a state that »cannot be circumscribed factually« (ibid., 11), that »cannot be subsumed; it defies general codification« (ibid., 13), and so »it can at best be characterized as a case of extreme peril, a danger to the existence of the state« (ibid., 6). Such a state, Schmitt holds, »reveals […] the decision in absolute purity« (ibid., 13). That is, the decision on the measures to take *in* an emergency situation has no support in existing norms, but also and more importantly, the decision whether such a situation is present—»sovereign is he who decides on the exception« (ibid., 5)—cannot resort to any existing norms. The obvious circularity here—that the unconstrained decision is revealed by a state of exception, which is only effected or defined as such by the same decision—is far from a logical deficiency for Schmitt. On the contrary, Schmitt makes it the proof that the decision is, in fact, the ultimate authority. He does so at a price, since it ceases to be a decision and becomes a mere instinct in the presence of danger: »the power of real life breaks through the crust of a mechanism that has become torpid by repetition [the law; M. R.]« (ibid.,

15). Put differently, in order to prove the absolute purity of the sovereign decision, Schmitt is driven towards the point where this decision collapses into its opposite, an instinctive reaction.[19]

Benjamin calls »lawmaking« force (Benjamin 1996, 243) that which Schmitt conceives of as pure decision; presupposing likewise an act of foundation. Attempting to critique the idea that a law that only comes after power (Kant) could ever do justice to the individuals subjected to it, that is, emancipate itself from its origin, Benjamin shows the continuous reappearance of the original law positing force within what is commonly considered as a mere operation of preserving law. He illustrates this supposedly unavoidable contamination by pointing to the »ghostly presence« of the police (ibid., 243). Spectralization, however, as Derrida has convincingly argued, is best understood as the effect of establishing a strict opposition such as positing vs. preserving where in fact the relation is at the same time one of mutual inclusion (Derrida 1991, 90). In his pursuit of justice, Benjamin is thereby driven towards a conception of a force beyond the law. Force—instead of being instrumental—becomes an instantaneous expression of morality (*Sittlichkeit*). The precarity of this conception displays itself in the admission that instances of such divine force or violence »will (not) be recognizable with certainty« (Benjamin 1996, 252) as well as in the kind of examples that are evoked: striking educational measures (Benjamin 1965, 60), war, or the spontaneous action of a crowd against a criminal (ibid., 64). These cases »not recognizable with certainty« are also those in which the power Benjamin seeks to denounce commonly disguises and renews itself.

Agamben, then, draws his conclusion from the assumption that laws are subjected to a positing force. He reverses the relation between norm and exception. Political order does not begin with the imposition of law, but with its suspension; his founding fiction is the disruption of a *lex talionis*

19 Derrida sets up his own concept of decision against Schmitt's reasoning. The moment of blindness or openness that is part of the Derridian decision is not instinct, it derives from an absolute indecidability that presupposes a relation of simultaneous inclusion and exclusion between force and law (Derrida 1994, 85–87, 150–52).

(Agamben 1998, 22). However, if the production of bare life through the withdrawal of law is the birthmark of (any) sovereignty, what is the specificity of biopolitics, which Agamben describes as the »decisive event of modernity« (ibid., 10) His entire text is marked by the difficulty of defining a period for biopolitics. He fluctuates between making bare life and political existence »fundamental categorial pair of Western politics« and attributing it to the advent of the modern state marked by the French revolution (ibid., 12). Or, alternatively, the »modern state […] does nothing other than bring to light the secret tie uniting power and bare life« (ibid., 11), or, is defined by »the politization of bare life as such« (ibid., 10). What exactly is the difference, then, that »bare life as such« is supposed to designate?[20] A similar problem occurs in Agamben when it comes to defining acts of sovereign power. The fact that he comes to consider contemporary refugee policies, the treatment of coma patients and fascist extermination camps to be phenomena of the same kind should rather be seen as a failure, an inability to apply distinctions rather than a provocative strategy.

The establishment of force in terms of pure decision making as basis for the suspension of law, or the conception of a force ensuring justice beyond the law, or the specification of a time, a place and an impact of such a force—all of these pursuits suffer from the same deficiency. Once the moment of personal force is played off against the law, it becomes impossible to qualify it. Force is nothing but force. What was conceived as a decision or as justice becomes drive, eruption and outburst, is reduced to energetic qualities. What was intended to mark out a specific event comes to be an event of always the same kind, resulting from the same monotone determination. These enterprises turn into whatever they stood up against or intended to avoid.

20 Compare Derrida 2012, 315–34 for a discussion of this indeterminacy in Agamben.

Political implications

Of a more urgent concern than the theoretical fragilities are the perspectives which the critical sovereignty discourse opens up for empirical research and political action. I will list some trends in critical thought that seem to me at least encouraged by the conception of political power at issue here:

- Critics position themselves as the counterparts of sovereign power. The painstaking work by Foucault and others of his generation to develop forms of critique that acknowledge and take as their point of departure their own complicity with power is potentially disregarded. Critics reproduce the form of unquestionable self-legitimacy that they attack.
- Resistance under any and all circumstances sees itself as confronting the whole—the system, the regime, modernity and so on—and so is largely left to confirm its own powerlessness.
- Those in whose name the critics raise their voice are likely to be conceived as absolute victims, mirror-images of absolute power, or, in other words, »bare life.« Once again all the intricacies of representing others, to which post-colonial approaches, for example, unceasingly refer, are elided.
- To depart from the assumption of the possibility of sovereignty in a strict sense gives, as already pointed out, preference to a spatial understanding of power. This occurs not only because ever since sovereignty was fused with state power, rule has been conceived of as territorial, but also because total domination is imaginable only in a space (cf. Agamben: the camp as bio-political paradigm of modernity). The execution of power, however, and in particular emergency politics involves complicated decision-making processes and step-by-step procedures, and hence can only be properly understood in a temporal dimension (Feldman 2010, 138).
- Psychologization and de-economization are often in the tow-line of the sovereignty discourse. This is at work, for example, in Butler's *Pre-*

carious Life; she shifts with great ease between individual psychology and analysis of sovereign power, and indiscriminately applies concepts such as mourning, fear and anger to both levels. »President Bush,« Butler writes, »announced on September 21 that we have finished grieving and that *now* is the time for resolute action.« To this she objects: »when grieving is something to be feared, our fears can give rise to the impulse to dissolve it quickly« (Butler 2004, 29). Is this the level then on which the Afghanistan war can be best understood? And how come President Bush's »we« translates here so seamlessly into »our«? At the same time, and this holds true for Agamben's *Homo Sacer* as well, economy as an explanatory factor in the functioning of power either falls out of the picture entirely, or obtains a precarious status. That is, it becomes a strategy of sovereignty to be dropped or pursued at will.[21]

- Perhaps the most problematic implication of the critical sovereignty discourse is the utopia it proposes. Tracy MacNulty has rightly pointed out that it departs from unease with representation. Laws are seen as fundamentally deficient; they can never do justice to the individual case, represent the individual as such. In Benjamin's words, they have the status of fate for individuals, imposed by a sovereign and from the outside (Benjamin 1965, 58). There is »a gap in the law« (McNulty 2008, 1), allowing the sovereign to impose himself by means of the laws and to re-affirm his power in every instance of discretion. What is envisioned accordingly as the escape from sovereign force is in one form or another an end of representation. This is the function of divine violence in Benjamin, which ends the »dialectical rising and falling in the lawmaking and law-preserving forms of

21 The precarious status of the economic is evident in Carl Schmitt's critique of liberalism. He defines liberalism as a movement which seeks to hide its political nature by translating the political into supposedly neutral economic categories. »That way the political term ›struggle/fight‹ turns into competition […] within liberal thought« (Schmitt 2009, 62). Yet the political will finally catch up to the economy and re-politicize it (ibid., 71). Thus, it will be revealed as just one strategy within the political.

violence« (Benjamin 1996, 251) by a »law-destroying« act (*rechtsvernichtend*) (ibid., 249). This is also the defining feature of Agamben's envisioned community, where each thing is grounded in itself without relation to something else or without representation, because relation to something else always already means to be represented. Without relation, things happen as that which they immanently are (Agamben 2003, 19).[22] Every form of dissatisfaction can feel empowering when the truth of immediacy and expression is pitted against the corruption of discourse and representation, and every means is justified as long as it can pass itself off as an authentic manifestation.

Sovereign power broken down (two descriptive sketches)

What does it mean to make the ontological impossibility of sovereignty the point of departure for critical analysis? First, it means refusing to take claims of sovereignty for granted, tracing instead the historically specific conditions of the impossibility of a sovereign power »said to be indivisible« (Derrida 2009, 291).

With reference to Derrida, the assumption has to be brought into play that force is necessarily inscribed and constrained by the possibility of repetition, by the iterative, and derives from this possibility in the first place. Put differently, force is subject to laws, routines, habits, and so on, preconceives an other and is thus always caught up in divisions. The critical move, then, consists in reintroducing the iterative where it claims to be pure, or the moment of force at which procedure and law pretend to be self-sufficient. Reintroduction not in technical sense, as a repair on the spot, but in an analysis meant to show that wherever force or iteration are dismissed, they come to haunt the operation at hand in an uncontrollable way; in the very same way Kant's discourse or the critical sovereignty discourse à la Benjamin are haunted by what they exclude.

With reference to Foucault's concept of governmentality, it is not the context-specific form of this ontological impossibility which come into

22 Compare for a critique of this conception from the perspective of Adorno's negative dialectic, Bartonek 2011, 226–27.

view, but its overall logic or the frame within which the unique (force) and the iterative (law) unfold their interdependency as well as the materiality in which they are caught up—a materiality that simultaneously becomes defined and substantiated by this interplay. This perspective allows it, after all, to say that a state of exception indicates the failure of sovereignty and not its almightiness.

In short: With Derrida it becomes possible to explore the inside of sovereign power in operation and with Foucault to describe it from the outside, to frame it. Yet their approaches have in common that they show sovereignty in its necessary and historically-specific divisions and dismiss a point of reference that is usually taken for granted: the state, Bodin's and Hobbes's famous abstraction. These moves can, at the very least, encourage resistance by localizing a problem without making it a local problem. If historically-specific conditions of impossibility represent weak points and possible targets for interventions, these operations make institutions and practices visible through the contingencies of their becoming, and thus evoke alternatives.

By way of conclusion then, I will sketch out an application of Foucault's and Derrida's insights to the analysis of two particularities of the US criminal justice system: prosecutorial discretion and mandatory sentencing guidelines. These elements can be seen as representing the very dangers of *and* to sovereign power that I have previously identified: the overemphasis of force, the lack of its integration into rules and routines, and thus checks and balances, on the one hand, and a reduction of the moment of force to routine, an automation, on the other. Critical theory, then, should not take for granted that these elements represent sovereignty at the height of its capacities, working with full force and thereby reconfirming and reproducing its claims. Foucault's and Derrida's insights suggest that sovereign power has to be undone from within.

Prosecutorial discretion

Prosecutorial discretion is de facto unlimited in the US criminal justice system. It is up to the prosecution to decide to charge or not to charge as well as to decide on the kind of charges. The prosecution can offer plea

bargains, revisit charges, and dismiss or alter them. Dismissing charges is possible even in view of sufficient evidence; decisions to charge are informed only by the vague and weak criterion of »probable cause,« which is very easy to meet.[23]

This is accompanied by largely non-existent accountability. No personal liability exists, for example, for violations of the Brady rules—after the 1963 landmark case *Brady v. Maryland*—which oblige the prosecution to disclose all evidence pertinent to guilt or innocence of a defendant in a criminal trial. The criminal prosecution of a violation is in theory possible, but does not happen in practice. For the first time in 1999, a case of prosecutorial misconduct reached verdict stage (and ended with the acquittal of everybody involved). The authors of a 2011 study of the efficacy of existing disciplinary mechanisms claim that a misconduct or a violation is most likely classified as a »technical error« since willfulness is difficult to substantiate in the absence of rules and criteria (Keenan et al. 2011, 217–18). The path of municipal liability was likewise and very recently foreclosed by a 2011 Supreme Court decision. This ruling puts the burden on the defendant to prove that the violation in question is part of coherent patterns of misconduct in the office concerned.[24] Finally, bar

23 A comparison with the German criminal justice system might help to highlight the American peculiarities: The so-called *Legalitätsprinzip* legally obliges the prosecution of any crime in the face of sufficient evidence. To be sure, the notion of sufficient evidence itself as well as the so-called *Opportunitätsprinzip* determining the threshold of triviality allow for some discretion. There is nevertheless more supervision in place; the definition of what counts as sufficient evidence is stricter, the kind of charges are not determined by the prosecution alone, and defendants can enforce prosecution through a *Klageerzwingungsverfahren* (proceeding to force criminal prosecution) (Damaska 1981).

24 In 2011 the Supreme Court overturned a decision that had granted $14 million in compensation to John Thompson, who was on death row for fourteen years, because the attorney's office had willfully withheld exculpatory blood evidence. Even though it could be shown that the prosecutors involved were largely inexperienced and had never received additional training as required, the Supreme Court decided that a single

discipline, that is, an internal discipline mechanism, is guided by weak ethical criteria only, suffering from the same lack of accountability, and is thus similarly rare and inefficient (ibid., 205–6).

The scope of prosecutorial misconduct therefore is difficult to verify. It usually comes to light only in retrials, and the common practice of plea-bargaining (inciting defendants to plead guilty even though they are innocent)[25] further diminishes the already weak chances of a retrial. There are nevertheless some indications of the extent of prosecutorial violations. Keenan et al. cite surveys that show 381 homicide cases involving prosecutorial misconduct in 1999 alone, and 2012 appellate cases between 1970 and 2003 that led to dismissals, sentence alterations, or complete reversals (220–21). From time to time, cases surface that manifest racial biases among prosecution offices or display the self-serving nature of charging practices and so highlight the consequences of a lack of accountability. The trial against the government agents who intervened in the Attica Prison riot in 1971 and killed 32 inmates, for example, gained worldwide attention. All charges were dismissed. This happened more recently with torture cases in Abu Ghraib that led to the death of Gul Rahman and Manadel Al Jamida (Yin 2012).

It is very tempting to see the state here as positing power through right, exerting sovereign force in a strict sense. Yet each sovereign decision has a becoming. Prosecutors are publicly elected and prosecutorial positions are important career stages. Thus there is always political influence, especially since crime and criminal justice have become widely mediatized (Garland 2001a, 85–87; Mathiesen 2001, 28–34). Furthermore, many state attorneys' offices employ an internal division of labor. Melilli calls the system of labor division a »horizontal-case-assignment-system« (Melilli 1992, 688).

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violation does not prove that the lack of training was a decisive factor in the misconduct (Keenan et al. 2011, 217–18).

25 Prosecutors, in order to obtain a conviction, often strategically overcharge in order to bring the defendant to admit to minor guilt (Melilli 1992, 700–701).

> Certain line assistants may be assigned, for a period of time, exclusively to the presentation of cases to the grand jury for indictment, while other line assistants may be assigned exclusively to the trials of those same cases. (Ibid.)

Not only can a decision be made with less care under these circumstances—this mostly concerns the decision to charge—because everybody involved knows that the case will still be seen by others, but, what is more, information that could have raised doubts at one stage might not be available anymore at a later one, or is simply used differently from the perspective of the new tasks. Another moment prone to influence the decision-making process is the fact that prosecutors deal directly almost exclusively with police and victims, not, however, with defendants, and often develop quite personal relations with the police officers assigned to their cases (Melilli 1992, 689). Last, initial decisions to charge usually have to be made on the spot under considerable time pressure and often by inexperienced junior attorneys.

What I call *influences* here are specific conditions of the impossibility of sovereign decisions in a strict sense and—put into a Derridian perspective—they are visitations of the excluded: the iterative, beyond control. This is not to say that the dynamic of force and law is controllable—that attempt would be itself a sovereign act doomed to fail—but the uncontrollable is not necessarily as beyond control as it is here. Already at base level, sovereignty is exerted rather in the form of a »strategy without a strategist« (Foucault 2001b, 308). The concept of governmentality could then highlight the rationality of the irrational, and it can be applied on very different levels and help to recognize the logic or rationale which these influences nevertheless follow.

Firstly, all the elements mentioned, for example, work within a system that is driven towards conviction. Prosecutors are absorbed by and caught up in an adversarial and competitive justice system, where conviction defines success. »Law schools generally emphasize litigation, creating a focus on victory as a professional goal« (Melilli 1992, 688). Additionally, there are economic constraints that shape every decision from the beginning. Selective charging is less a pure and arbitrary act than a

necessity in the face of limited resources, and as such a sign of impotence. Put differently, it is embedded in an economic logic, which could be worked out by adapting a Foucauldian perspective.

The Foucauldian notion of governmentality can significantly broaden the picture and make the institution within the field of other institutions the subject of exploration. This could include not only the identification of an overall government rationality, but also a revisiting of the moments that define the becoming of the institution (a genealogy), a becoming that is always marked by a rationality of government. To reconstruct the contexts in which prosecutorial accountability was diminished and to work out the constellations of forces involved, for example, makes the results appear as what they are: provisional; battle lines that can be reactivated.[26]

Mandatory sentences

Mandatory sentencing guidelines might appear to be counterparts to unchecked prosecutorial power. They reduce discretion significantly. According to these guidelines, sentences have to be calculated by factoring in the criminal history of a defendant and the gravity of the offense. Differences in each category are translated into points, and the number of points decide on the sentence, conveniently provided in the form of a table or a manual. The sentencing guidelines—operative on federal as well as on state level—determine minimum sentences and state reasons for departures.[27] The consideration of mitigating factors such as age, mental, emotional and physical condition, and individual life history are largely excluded; either prohibited outright or discouraged by the policy

26 The expansion of absolute judicial immunity to prosecutors, for example, goes back to a relatively recent ruling (*Imbler v. Pachtman*, 1976) that at the time was highly contentious (Keenan et al. 2011, 2014–15). Compare also the detailed presentation of the battles surrounding this ruling by Public.Ressource.Org, a nonprofit organization: https://bulk.resource.org/courts.gov/c/US/424/424.US.409.74-5435.html, accessed February 24, 2013.

27 The term *departure* is taken here and in the following from legal language.

papers ruling the application of the guidelines (Baron-Evans and Coffin 2010, i). The guidelines are supposed to already reflect these mitigating factors. The commission charged with producing them »calculated the average time served for each class of crime, analyzing data from over 10,000 sentencing reports and 100,000 federal convictions« (Boone 2007, 1084). The application itself is subject to strict review by a higher authority. The so-called three-strikes law is part of the mandatory sentencing rational. It requires judges in many states to impose sentences of twenty-five years to life for the third serious felony, whereby the understanding of »serious« ranges widely: it can cover shoplifting or possession of drugs as well as rape and murder. The results are destructive. Many critics see mandatory sentencing guidelines as the most decisive factor leading to the phenomenon of mass imprisonment in the US,[28] which threatens the social fabric of communities and imposes a heavy economic burden, to say the least (Garland 2001a, 105; Haley 2006, 149–50; Mauer 2001, 4–15).

Is the state machinery set to sure-fire success and the law entirely automated here? The moment of force in law does not disappear, it is not dissolved, as little as iteration could be removed from prosecutorial discretion; it is only pushed into the uncontrollable. It returns, for example, when it comes to determine the gravity of the offense in advance. This category remains fundamentally unstable, ranging within the federal guidelines system from previously 360 to currently 43 different levels of gravity. The authoritarian role that the sentencing commission inherits—its policy papers obtain the status of decrees—can be understood as a highly dysfunctional moment. More importantly, discretionary power resorts to departures instead of playing out through variances.[29] Judges

28 According to 2010 figures, the imprisonment rate is 500 prisoners per 100,000 residents. In total numbers there are 1.6 million prisoners in the US. Blacks, and especially young black males (18 to 34) are incarcerated disproportionally: one in three black men go to prison. The US incarceration rate is the highest in the world (Tsai and Scommegna 2012; Guerino, Harrison, and Sabol 2010; Halley 2006).

29 Departures add to or subtract from the guideline sentence according to fixed criteria; variances are traditional discretionary changes, depending

typically go on independent fact-finding missions about the defendant's conduct in order to compensate for the lack of precision (Boone 2007, 1086–87). These departures are—because mitigating factors cannot easily be brought into consideration—overwhelmingly upward departures (Boone 2007; Baron-Evans and Coffin 2010; Glass 2001).

It is still possible then to see desired goals of sovereign power in the effects of an automated law—such as mass incarceration or sentences that contradict any sense of justice, including that of the judges (Tierney 2012). With Foucault, however, these effects would be largely unintended, or, again, the results of »strategies without strategists« (Foucault 2001b, 308), and remain vulnerable to interventions. The chances for resistance are currently not bad. A battlefield has been reopened, for example, by a Supreme Court ruling that deprives the federal sentencing guidelines of their mandatory status (*United States v. Booker*, 2005).[30] The court agreed on their unconstitutionality pointing to the discrepancy between sentences potentially deriving from the jury's verdict and sentences passed by judges using upward departures. This discrepancy, the court explained, limits a defendant's right to a jury trial. Yet this ruling has not yet arrived on the ground. Baron-Evans and Coffin (2011) show in their analysis of recent policy papers that traditional discretion in forms of variances is still far from encouraged, relegated instead to the status of an »afterthought« (ibid., 10). Although the policy papers of the sentencing commission are no longer obligating, they still traditionally guide judges' decisions. Hence, there is a need to support alternative

on the point of view of the judge. Both entail not only different review processes, but also imply a different use of the evidence involved. Compare the discussion on http://circuit3.blogspot.de/2009/08/departure-or-variance-that-is-question.html, accessed February 12, 2013.

30 The Attorney General Eric Holder recently announced his intention the overhaul the criminal justices system. He especially targeted mandatory minimum sentences, evoking their »destabilizing effect on particular communities, largely poor and of color.« (Eric Holder quoted in: *Huffington Post*, August 14, 2013, http://www.huffingtonpost.com/2013/08/12/eric-holder-mandatory-minimum_n_3744575.html, accessed August 14, 2013).

policies by renewing old frontlines and recruiting allies. Genealogies or the perspective of governmentality can be very useful tools for such an enterprise.

It might be worth, for example, revising the contexts of the introduction of the federal mandatory sentencing guideline in 1984, rediscovering it as a bipartisan effort, supported both by many activists on the left as well as critical criminologists, out of concern for a lack of fairness and transparency attached to the indeterminate sentencing system (Boone 2007, 1084–85; Garland 2001a, 61). The history of the sentencing commission's appointments and workings will unavoidably reveal struggle, compromise, and dissatisfaction (Breyer 1988). The method of survey and analysis of cases that provided the basis for the sentence calculation can become an object of investigation: the first sentencing commission characterized its empirical approach as »imperfect« and »impressionistic« and proceeded under the assumption that the results were provisional and would be corrected through further monitoring (Baron-Evans and Coffins 2011, 32–33) and so on.

Yet again it is also possible to broaden the view by considering the situation in terms of governmentality. David Garland, for example, subscribing to Foucault's approach, analyzes the overall change that the US criminal justice system has gone through since the early 1970s. He defines it as a shift away from a penal welfarism oriented towards education and reintegration of the individual towards a management of crime guided by the goals of control and containment (Garland 2001a). Within this context, rehabilitation obtains the status of a targeted intervention, like hot spot policing. Yet Garland described these transitions as adaptive responses (or as failures of adaption): sovereign power is confronted with a society in which the possibilities of control are de facto limited. With the dissolution of traditional family structures and neighborhoods (suburban developments) social control is largely non-existent. At the same time, individual mobility (cars), the overall availability of valuable goods (consumption opportunities), and the existence of mass media allowing for continual comparisons provide incentives to criminal behavior, especially in times of rising poverty levels. Thus outsourcing of

control tasks in the form of public-private partnerships or a purely administrative approach as represented by mandatory sentencing come to appear as self-restraints (ibid., 82–89). By employing criteria such as adaption or denial, Garland cannot help but restore what he claims has long ceased to exist (ibid., 205): sovereign state agency, potentially even in control of the uncontrollable.

With Foucault, by contrast, the conditions, or rather the identification of socio-economic conditions that demand adaption, are—as well as the logic of adaption itself—already part of a governmentality and not a given. They are also effects of self-reflections and proceedings. Put differently, governmentalities can be distinguished through the kind of uncontrollability that they presuppose, affect, and sustain as well as through their attempts to control it. Uncontrollability itself has a history—and is unavoidable. This, after all, is what deprives the exercise of sovereignty of its claimed naturalness. If sovereignty is identified through governmentality in the latter sense, that is, as singular and historically contingent, it becomes conceivable that it can be otherwise. That it must be otherwise, however, is not something that academic theory can prescribe; it is rather prescribed by what Foucault called »the knowledge of the people« (Foucault 1997, 8), that is, by what prisoners, judges, lawyers, defendants, or prosecutors, what everybody involved in juridical proceedings knows. And the ultimate norm or drive thereby could well be justice in a Derridian sense: a critique of every calculation in the name of the particularity of the other (Derrida 1991, 41), or, put differently, a concern for keeping the interplay of force and iteration continuous and open, and therefore completely unpredictable.

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