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## THE RETURN OF THE POLITICAL: CARL SCHMITT'S CONTRIBUTION TO CRITICAL CRIMINOLOGIES

*EL RETORNO DE LO POLÍTICO: LA CONTRIBUCIÓN DE CARL SCHMITT A LAS CRIMINOLOGÍAS  
CRÍTICAS*

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### ABSTRACT

*This article postulates that the study of political violence and armed conflict contributes to critical criminological theory by suggesting to look into Carl Schmitt's concept of 'the political' as an alternative to the more typical conceptualisations of 'politics' (i.e. Weberian -power-, Marxist -class struggle- or Foucauldian -domination). It is my contention that the latter dilute politics into the economic, social, cultural sphere given that almost everything can be surmise to be an issue of power, domination or class struggle whereas the former highlights the boundaries of the political realm while still allowing for analytical connections and links to be established with the other spheres of society. The concept of 'the political' has opened up new avenues for those working on issues of state crimes, mass atrocities and social harm. Moreover, it can reinvigorate critical criminology's denunciation of the state, its social control apparatuses (such as the criminal justice system) as well as other modes of governance by articulating the destructive character of the criminal justice system and of similar forms of social control.*

**Keywords:** Carl Schmitt, the political, critical criminology, political violence, armed conflict, state crime.

### RESUMEN

*Este artículo postula que el estudio de la violencia política y el conflicto armado contribuye a la teoría de la criminología crítica al proponer el análisis del concepto de 'lo político' de Carl Schmitt, como una alternativa frente a conceptualizaciones más típicas de la política (i.e. -poder- Weberiano, la -lucha de clases- Marxista o la -dominación- Foucaultiana). En mi opinión estas últimas conceptualizaciones diluyen la política en la esfera económica,*

*social y cultural, dado que casi todo puede presumirse como un tema de poder, dominación o lucha de clases, mientras que el enfoque del autor escogido destaca los límites del ámbito político, permitiendo a la vez la creación de conexiones y enlaces interpretativos con otros ámbitos de la sociedad. El concepto de 'lo político' ha abierto nuevas vías para aquellos que investigan temas de crimen de Estado, atrocidades masivas y daño social. Es más, puede revigorizar la denuncia, propia de la criminología crítica, del Estado, sus aparatos de control social (como el sistema de justicia penal) así como otros modos de gobernanza subrayando el carácter destructivo del sistema de justicia penal y de otras formas similares de control social.*

**Palabras clave:** Carl Schmitt, lo político, criminología crítica, violencia política, conflicto armado, crimen de Estado.

## Introduction

The 1960s and 1970s have been thought of as the highpoint of conflict, critical, radical, new... criminology(ies)<sup>1</sup>. These theories and perspectives worked primarily to demonstrate and denounce the fact that western states produce, implant and use the criminal justice system as a political tool of control as well as how criminology itself has had a tendency to also be a political tool through the knowledge it produces (Felices-Luna, 2010, p. 250-251). It also expanded the criminological lens to consider not only law breaking behaviour but to reflect on broader issues of normativity and reactions to breaches of normativity (Jamieson, 1998, p. 488). As a result, these criminologies focused, at least part of their research activities, on the politicisation of deviance<sup>2</sup>, the criminalisation or deviantisation of politics<sup>3</sup> and the use of deviance in politics<sup>4</sup>. Evidently, politics was at the heart of an analysis that allowed to problematize the criminal justice system as well as other forms of social control<sup>5</sup> and to unveil them as problematic. However, the return of right wing politics with a law and order agenda accompanied by an administrative criminology focusing on knowledge production for policy development (Tierney, 2006, p. 170-171), de-politicised the discourses around crime and its control as well as the conceptualisation of the state and government.

The 'discovery' of state crimes and human rights violations in Asia and the Americas, the 'resurgence' of war and genocide in Eastern Europe and Africa as well as the 'return' of 'terrorism' and other forms of political contestation using varying degrees of violence in North America, Europe and the Middle East, forced the international community and nation states to deal with and speak of these issues. Although criminology has been slow to see these issues as part of its domain, since 2000 it has finally entered the conversation (Felices-Luna,

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<sup>1</sup> Although I acknowledge that these perspectives are far from homogeneous and are often at odds with one another, it is their commonalities and not their differences that are of interest in this article. Therefore, for purpose of brevity I will use the term critical criminologies to encompass all the theories and perspectives that produce a politicised analysis within the discipline. The plural form is used to emphasise multiplicity within the field.

<sup>2</sup> E.g. Taylor (1971).

<sup>3</sup> E.g. Hall (1974).

<sup>4</sup> E.g. Oppenheimer (1969).

<sup>5</sup> Prior to the sixties, criminology's attention was mainly turned on the criminal as the problem, as the source of crime (conceived as an entity) (Tierney, 2006, p. 128).

2012, p. 1). Following September 11, 2001 criminology has been particularly prolific in the production of knowledge regarding terrorism as well as national and international responses to this phenomenon (Parmentier & Weitekamp, 2007, p. 1-2). Although drawing from different and sometimes competing frames (rule, governance, law, legitimacy, normativity and technology) and theories, criminology has participated in the production of a grand or meta-narrative on security (national and/or international) and surveillance. Academics from different disciplines have turned to the writings of Carl Schmitt in an attempt to analyse, support or criticise current discourses and practices on security and surveillance<sup>6</sup>.

In the first section of this article I propose to look at how critical criminologies have expanded their analysis from unveiling the political battles underlying issues of crime and its control to analysing politics as inherently or at least potentially criminal. In the second section I present key elements of Carl Schmitt's theory and how it has been used (at least as a starting point) in the analysis of discourses and practices of political violence and armed conflict. Lastly the article points to ways in which Carl Schmitt can be relevant to critical criminologies. The ambitious nature of this article results in drawbacks regarding the depth and thoroughness of its analysis and ideas. The goal therefore is not to present a tight lid and nuanced thesis but to provide the broad strokes of the argument in order to initiate a discussion on the advantages and limitations that drawing from Schmitt's conceptualisation of 'the political' represents for critical criminologies.

### **From the Politics of Crime to the Crime of Politics**

Karl Marx and Max Weber have been two influential authors for critical criminologies despite writing little about crime. Their influence comes from their understanding of politics, the state and the role each play in the production of the specific forms of social order in different societies. I start this section by cursorily presenting their conceptualisation of politics before briefly describing how these premises have been put into analytical action by critical criminologies during the 1960s and 1970s.

Marx analysis emphasises the primacy of the political: he was interested in power relationships and how to get inside of these through action in order to achieve a certain end (Balibar, 1985, p. 3). His analysis highlighted the need to focus on the interrelations between class<sup>7</sup> and political change (Lafferty 1996, p. 62) in order to transform society. In this sense, the primacy of politics meant the primacy of class struggle (Balibar 1985, p. 12). In fact, the State, political parties, modes of thought and ideological organs are all seen as: possessing a class character, expressing class interests and functioning on behalf of specific classes (Healy, 2008, p. 537)<sup>8</sup>. Although for Marx the economy is inherently political (Dow and Lafferty, 1990:26) the meaning of political is transformed into one that is centred on the economy because it unveils domination within capitalism by precisely focusing on capitalist practices (Balibar 1985, p. 16). As part of this project, Marx examines the development of society 'without the State' (Balibar, 1985, p. 12). He looks into the transformation of the State into "a rational instance of planning and collective normalisation of social relationships (...) into its 'legitimate functions'" (Balibar, 1985, p. 5). This represents a challenge given that the current

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<sup>6</sup>E.g. Odysseos & Petitto (2007), Slomp (2009) as well as Wilson (2012).

bourgeois State presents everything that opposes the mutual interests of its different groups as politics whereas “everything which leads back to the logic of accumulation, that is, to the command of capital (or money) over labour, is called 'economics'” (Balibar, 1985, p. 23).

In *Politics as a Vocation*, Weber (1968) defines politics as “striving to share power or striving to influence the distribution of power, either among states or among groups within a state” (p. 78). From Weber's perspective, conflict and power are the fundamental conditions of political activity (Bruun, 2007, p. 239). The essence of politics is the struggle for power between groups of interests, classes or individuals as well as in between states and not the well-being of the nation or of an interest group (Aron, 1972, p. 84-93). “In the one as in the other, it is a matter of knowing who is winning, who is in command, what share of available space or resources each class or each people will snatch for itself” (Aron, 1972, p. 93).

From a Marxist perspective politics is about class struggles related to the economic structure of a society and for Weber, politics is about power: obtaining it, maintaining it and distributing it. Despite being two very different conceptualisations on politics, they both contributed in the 1960s and 1970s to the (re)introduction of politics as a relevant if not essential analytical concept within criminology. Whether focusing on domination and power or class struggle, critical criminologists demonstrated that in order to understand the workings and the function of the criminal justice system, it was necessary to see them as being part of broader political processes. This has resulted in the production of multiple lines of inquiry, some running parallel, others crisscrossing, others merging in order to separate yet once again.

One line of inquiry resulted in crime no longer being seen as the result of individual or intrinsic factors but in fact the result of political processes (i.e. the result of class conflict, domination or struggles over the distribution of power)<sup>9</sup>. Running parallel this line was the exploration of criminal law as the result of political struggles between groups or classes striving to impose their norms and values but most importantly, attempting to set the rules of the game in order to ensure winning or at least having an advantage over others<sup>10</sup>. Crisscrossing this line, we can find studies focusing on how the police, courts and prisons participate in the process of criminalising and sanctioning certain type(s) of lawbreakers while ignoring or protecting others<sup>11</sup>. These organisations as well as the law were thus analysed as political tools used to preserve the social order in combination or juxtaposition with other social institutions such as education, welfare, social services, etc. This resulted in critical criminologists seeing the relevance of turning their gaze towards other normalising agents/actors/institutions/apparatuses/technologies in society and to reflect on how they influence one another<sup>12</sup>. Once the criminal justice system was seen as a tool there was a bifurcation between at least two camps: those who believed that it was a neutral tool (not one tailored only for the use of the ‘powerful’) which could also be used to challenge the status quo by criminalising the actions, omissions and behaviours of the ‘powerful’ (rich<sup>13</sup>, men<sup>14</sup>,

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<sup>9</sup> E.g. Taylor et al. (1973).

<sup>10</sup> E.g. Quinney (1970).

<sup>11</sup> E.g. Vold (1958) and Chambliss (1969).

<sup>12</sup> E.g. Foucault (1975).

<sup>13</sup> E.g. Young (1975).

<sup>14</sup> E.g. feminist research such as Hanmer (1978) on domestic violence and rape within the marriage.

and even the state<sup>15</sup>) while decriminalising or at least reducing the sentences of certain crimes and/or certain individuals<sup>16</sup>; and those who believed the system was rigged or set in a way that it could not work differently and therefore the only solution was to dismantle it<sup>17</sup>.

As the underlying politics of law creation, law breaking and law enforcement were unveiled, some ‘criminals’ and ‘deviants’ as well as some ‘academics’ became politicised and engaged in a variety of attempts to changing the structural conditions, laws and/or system<sup>18</sup>. Furthermore, the turmoil of the 1960s and 1970s in western and non-western countries led to an increase politicisation of minorities who came to see their individual situations or living conditions as a political not a personal issue precisely because it was shared by others in similar situations or with similar characteristics. The non-recognition of dissidents<sup>19</sup> as political actors and the criminalisation of political dissent gave way to an interesting result: the ‘academicisation’ of ‘dissidents’, ‘deviants’ and ‘criminals’<sup>20</sup> and the ‘criminalisation’ or at least surveillance of academics<sup>21</sup>. It was therefore by drawing from personal experiences as well as intellectual tools that the idea of politics as ‘criminal’ was able to emerge. Some of the arguments put forth in support of this analysis were: the state/government and those protecting the status quo engage in similar activities that those of dissidents, the only difference being that on one side it is legally sanctioned whereas on the other it is considered as criminal<sup>22</sup>; the state/government, its agents and those that support it engage in criminal activities in order to maintain the status quo in all impunity<sup>23</sup>; the state/government is responsible for or allows the systematic unequal distribution of resources and goods which results in permanent harms to individuals and groups given that it concretely affects their life and life chances<sup>24</sup>. Through these arguments we see that the state/government is thought of as the site of or at least a key player in politics resulting in a state centred analysis which as of the 1980s lost momentum.

As of the mid 70s, Foucault’s work is going to challenge the state centered analysis by looking instead at the concrete instances of domination and the micro processes through which it takes place. Foucault introduced politics as an important line of inquiry he wished to explore in his seminal lecture at the *Collège de France Society Must be Defended* in 1976. Foucault thought of war “as a generative principle of force relations that account for modern political orders” (Reid, 2008, p. 81). Moreover, “war and politics, by Foucault’s accounts, therefore always seem to form a complex, mutually informing and strategically interactive, grids of intelligibility for one another.” (Dillon & Neal, 2008, p. 10). He was particularly interested in the process through which the idea that politics is the continuation of war through other means is inverted and transformed into the adage Clausewitz popularised: war

<sup>15</sup> E.g. Becker and Murray (1971).

<sup>16</sup> E.g. Greenwood and Young (1976).

<sup>17</sup> E.g. the work of abolitionists such as Thomas Mathiessen, Louk Hulsman and Nils Christie.

<sup>18</sup> E.g. Davis (1967) and Horowitz & Leibowitz (1969).

<sup>19</sup> I use dissidents to indicate those who were challenging the status quo through non-electoral politics.

<sup>20</sup> E.g. Angela Davis.

<sup>21</sup> E.g. Antonio Negri.

<sup>22</sup> Drawing from Weber’s conceptualisation of the state as having the monopoly of legitimate use of force and the power to define through the law what is force (legal-legitimate) and what is violence (criminal-illegitimate)

<sup>23</sup> The Irish conflict was but one example where the state was involved in the torture of suspects and collusion with paramilitary organisations either by providing them with information for attacks on nationalists and republicans or by turning a blind eye on their “criminal” activities.

<sup>24</sup> Schwendinger & Schwendinger (1975, p. 148) call for imperialism, sexism, racism and poverty to be called crimes.

is the continuation of politics through other means. Foucault unveiled how this transformation was due to the nation-state's need to see war expelled from everyday life and from the 'normal' functioning of society. For Foucault then, the advent of modernity required new ways of thinking about politics and these were tied to new problematisations of security and war (Dillon & Neal 2008, p. 3). In his next seminal lecture at the Collège de France *Securité, territoire, population (1977-1978)*, Foucault's attention is no longer explicitly on war and politics but veers into biopolitics, which leads him to explore power and power-knowledge cascading into an analysis of rule, government and a description of dynamics of oppression and domination<sup>25</sup>. Foucault (1999, p. 180) continues this exploration in *History of Sexuality*, where he concludes that in the modern nation-state, war is no longer waged in order to protect the sovereignty of the state but it is waged in order to protect the biological existence of a population. Foucault's analysis is therefore "a historical problematisation of the relation between emerging and contending forms of war, forms of politics, and forms of life, the latter alternatively understood as nation, race, population, bios and even class" (Dillon & Neal, 2008, p. 9). While Foucault's analysis of the prison had a big impact in the mid-seventies and onwards, it was his work on rule and government that has had a monumental influence since the 1990's as a major trend in critical criminologies became governmentality<sup>26</sup>.

As we have seen, these three perspectives have produced interesting and valuable insights for critical criminologies. However, paradoxically, they have also resulted in the blurring of politics to the point that it has caused it to disappear from the scene. Within Marxist perspective, politics is melted into the economy; within a Foucauldian perspective, the emphasis is more on the micro dynamics of domination<sup>27</sup>. Lastly a Weberian definition of politics as the struggle for power muddles the term in such a way that anything and everything can be political. This has been one of the hindrances for critical criminologies as politics becomes synonym, not with one sphere of life as in the case of Marxism, but with any and all forms of conflict. Politics as power results in the absorption by politics of all other spheres of society (economic, cultural, social...) to the extent that it is no longer a significant or meaningful concept. Although it allows us to see the interconnectedness of different processes within society, it merges them in a way that it is no longer possible to see the specificity of each process. This means that the political element has been drowned out. These analytical roadblocks combined with the right wing turn in western societies (including within academia) resulted in a certain 'loss' or at least an attenuation of political analysis in criminology. Furthermore, the nascent idea that politics (whether as class struggle, domination or conflict) could be somehow analysed from a criminological perspective lost its impetus.

The increased attention to issues of state crime, political violence, armed conflict, war etc. that came about as off the mid-1990s could have signalled the 'return of the political' but,

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<sup>25</sup> This is a very linear and schematic way of presenting the evolution of Foucault's thought which does not do him justice. It is useful though because it demonstrates the role politics and war played in his work on governmentality.

<sup>26</sup> I am by no means implying that Marxist or pluralist (Weber inspired) perspectives have not continued to produce significant contributions to critical criminologies, I am simply highlighting the role played by Foucauldian academics in the analysis of current criminal justice practices.

<sup>27</sup> In Foucault's analyses, the emphasis is not on "the State" but on particular practices of governing diluted in the social scene (families, churches, experts) erasing any clear demarcation between the public and private as well as the state and civil society (Garland 1997, p. 175).

unfortunately it has not been the case. There has been little discussion of what the concept means and how it can help us understand phenomena which is intrinsically politically. Instead, the literature has fallen into the same pitfalls of those working on 'traditional' criminological issues, which is the reliance on the concept of crime and the framing of these subjects in regards to the concept of crime instead of politics.

The concept of crime is activated by referring to it in four different ways: actions that are already criminalised by some legal code<sup>28</sup>; actions that are of the same nature of those criminalised by a code but are not deemed as such because groups of interest are able to manipulate definitions or to create legal protections for their actions<sup>29</sup>, actions that are not considered criminal but normatively the author believes they should be<sup>30</sup>, actions that are harmful (from a zemiology perspective) and therefore the term crime is used not with an intent to criminalise but to highlight their harmfulness (Carrier and Park, 2013, p. 13). In this sense, critical criminologies have contributed to the reification of the concept of crime by indicating that it is either the wrong actions/omissions that are qualified as such or that new actions/omissions need to be incorporated into some form of criminal law (at the national or international level). This represents a serious limitation in the analysis not only because a key feature of the phenomena is ignored (politics) but because by appealing to the notion of crime we are imposing already a particular view, interpretation and solution to the problem (Hulsman, 1986, p.).

If we were to analyse these issues in terms of politics instead of crime, we would be forced to think of them differently and to problematizing them differently.

Many researchers within 'traditional' and 'non-traditional' topics have embarked on this journey with the goal not of expanding the criminological enterprise<sup>31</sup> but of dialoguing with other disciplines in order to see how a 'criminology mind'<sup>32</sup> with non-criminology tools<sup>33</sup> can give as a new twist in the understanding of the topic. Just like many others, it is through this process that I have come across the writings of Arendt and Schmitt as two opposing views on politics, or more accurately 'the political'. It is interesting that although Arendt would seem to be more in tune with the broad normative project (if we can call it that way) of critical criminologies it is Schmitt's work that, at this point seems to me to be more useful to exposing and denouncing the destructive effects of the criminal justice system as an issue of politics.

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<sup>28</sup> E.g. Chambliss (1990, 1995).

<sup>29</sup> E.g. Cohen (1990).

<sup>30</sup> E.g. Ruggiero (2007).

<sup>31</sup> In the way Carrier and Park (2013) analyse criminologists' efforts in the study of what they call mass political violence.

<sup>32</sup> Even though there is a debate on whether criminology as a discipline exists or not, there are certain things criminologists see and do not see, as well as particular ways in which we see what we see, and how we make sense of it.

<sup>33</sup> Again, although it might be questionable to say that criminology has its own unique tools, we can say that there are some tools that have become part of the trademark of a criminologist.

## Carl Schmitt's Thoughts on the Political, the Sovereign and the Partisan

Carl Schmitt is a controversial figure in political science and international relations partly because of his ideas but most importantly because of his own political stances which he integrated into his writings (Freund, 1962, p. 14-15). Prior to WWII Schmitt deplored the lack of authority of the Weimar Republic calling for a stronger government supporting Hitler and the Nazi regime when it came to power (McCormick 2004, p. xiii-xiv). He was a staunch nationalist and an outspoken anti-Semite and anti-liberal (Nunan, 2011, p.1-2). Following the end of the WWII Schmitt spent time in prison and was exiled from the scientific community until the 1950's when he started to publish again (Strong, 2007, p.x). Schmitt is one of Europe's most influential political and legal theorists in the 20<sup>th</sup> century (Scheuerman, 1991, p. 1) and therefore his contribution to the field cannot be dismissed on the basis of his political stances. His theory is relevant precisely because it challenges liberal, humanistic and pluralist theories of politics and the state by looking at the connection between liberalism and democracy, politics and ethics as well as the importance of the 'enemy' in domestic and international politics (Strong, 2007, p. xiii). His writings are particularly useful to understanding the current international situation whether it is "the rise of global terrorism, the crisis of international legality, the emergence of US 'imperial' hegemony, and the prevalence of a global interventionist liberal cosmopolitanism" (Odysseos & Petito, 2007, p. 3).

In *The Concept of the Political* Schmitt attempts to describe what the modern European state is as well as the forces which, at the time of his writings, were destroying it (Schwab, 2007, p. 6). Schmitt begins by exploring what 'the political' is, given that "the concept of the state presupposes the concept of the political" (2007a, p. 19). However, instead of providing us with a definition of 'the political'<sup>34</sup> he looks for a way to determine whether something is political or not (Schmitt, 2007a, p. 25-26). Drawing on the realisation that realms such as the moral, aesthetic and economic can be surmised into distinctions that are exclusive to them (good and evil, beautiful and ugly, profitable and non-profitable), he identifies the friend-enemy distinction as being the essence of 'the political' (Schmitt, 2007a, p. 26-27). These realms are autonomous from each other meaning that the morally evil is not necessarily aesthetically ugly and that it might be economically advantageous to engage in a business transaction with the political enemy (Schmitt, 2007a, p. 27). Similarly, the aesthetically beautiful, morally good and economically profitable do not necessarily translate into the political friend nor are any of these distinctions constant or permanent (Schmitt, 2007a, p. 34).

The fact that he considers these realms or systems as autonomous does not render them on equal footing (the political simply being one system among many), on the contrary Schmitt calls for the primacy of the political (Rasch, 2004, p. 5). However, this does not mean either that the political must somehow "cancel, direct or attempt to control the codes organising the other social systems" (Rasch, 2004, p. 10). Schmitt's position is to acknowledge that there are antagonisms in all systems but he argues that these antitheses cease to be aesthetical, moral, religious or economic and become political when "it is sufficiently strong to group human beings effectively according to friend enemy" (Schmitt, 2007a, p. 37). Therefore 'the political' does not have a pre-determined field, it comes to be whenever an antagonism in a system or field comes to point of the friend-enemy distinction (Marder, 2010, p. 68). These

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<sup>34</sup> Schmitt addresses the difficulties in defining the political and points to the tendency to juxtapose the political and the state (2007, p. 20-25).

friend-enemy concepts are not metaphors or symbols, they refer to concrete and existential formations which belong to the public sphere and not the private realm. The enemy is “not a private adversary whom one hates” (Schmitt 2007a, p. 28). The political enemy is “...the other, the stranger; (...) he is, in a specially intense way, existentially something different and alien, so that in the extreme case conflicts with him are possible” (Schmitt 2007a, p. 27). ‘The political’ refers to the reality that human existence can be rendered political precisely through the intensities of antagonistic affect, not hatred. (Marder, 2010, p. 33). As a result, ‘the political’ is “the most intense and extreme antagonism” (Rasch, 2004, p. 10). Politics then is a purely human experience and humanity is defined by the possibility of undergoing it (Marder, 2010, p. 4).

The primacy of the political over other spheres or realms is based on the idea that “there is an ever present possibility for combat” (Schmitt 2007a, p. 32) not in a symbolic but existential sense.

It does not mean competition, nor does it mean pure intellectual controversy nor symbolic wrestling in which, after all, every human being is somehow always involved, for it is a fact that the entire life of human being is a struggle and every human being symbolically a combatant. The friend, enemy and combat concepts receive their real meaning precisely because they refer to the real possibility of physically killing. War follows enmity. War is the existential negation of the enemy. It is the most extreme consequence of enmity. It does not have to be common, normal something ideal or desirable. But it must nevertheless remain a real possibility for as long as the concept of the enemy remains valid. (...) War is neither the aim nor the purpose nor even the very content of politics. But as an ever present possibility it is the leading presupposition which determines in a characteristic way human action and thinking and thereby creates a specifically political behaviour (Schmitt 2007a, p. 33-34).

The friend-enemy distinction cannot be carried out using a pre-determined general norm or by a disinterested third party (Schmitt 2007a, p. 27). It must be carried out by a political entity such as the state (Schmitt 2007a, p. 29-30). For Schmitt, the state is an institution (Odysseos & Petito, 2007, p. 22-23) which can take many different forms: nation state, a theocratic, mercantile, soldier state, a civil service state or even a proletarian state (Schmitt 2007a, p. 37-38). Whichever form it takes, the state has the *jus belli*, the authority, the right, in any given situation to decide who the enemy is and to fight him (Wilson, 2012, p. 5) and therefore it is one potential embodiment of ‘the political’<sup>35</sup>. This does not mean that Schmitt equates the state with ‘the political’ as he opposes the idea that there is an end-form to it (Slomp, 2009, p. 130). It simply means that as long as the state decides on the friend-enemy distinction and on waging war, it can be considered a political entity. If the state refuses to or is unable to make the friend-enemy distinction and potentially wage war, then the state as a political entity is destroyed (Schmitt 2007a, p. 38).

A political entity must be a decisive entity (Schmitt 2007a, p. 43-44). This means that a political entity is sovereign precisely because it can decide on the friend-enemy distinction and the possibility of war and, conversely, in order to be sovereign, it must retain the possibility of making that decision or else it ceases to be political (Schmitt 2007, p. 39). Consequently, the essence of sovereignty is to decide on the friend-enemy distinction,

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<sup>35</sup> Schmitt does not consider the political to be the same as the state even if it has been the most common form of the concretisation or embodiment of politics in modern times (Strong 2005, p. xv).

determine whether or not the extreme point has been reached (Marder, 2010, p. 32) and to make the appropriate decision with regards to that exception (Strong, 2005, p. xii). So the political is not constituted by some order (legalistic or other) but is revealed as a constituent power in the moment of exception; “if the political system is normalcy, the political is the exception that establishes the norm” (Rasch, 2004, p. 10). Sovereignty is thus conceptualised as “the locus and nature of the agency that constitutes a political system” (Strong, 2005, p. xi).

The sovereign produces the situation in its totality. (...) Therein resides the essence of the state's sovereignty, which must be juristically defined correctly, not as the monopoly to coerce or rule, but as the monopoly to decide. The exception reveals most clearly the essence of the state's authority (Schmitt 2005, p.13).

Although a lot of attention has been given to the sovereign, the entity as such is not relevant to Schmitt, that is why he provides a concrete yet vague definition of who the sovereign is: “he who decides on the exception” (Schmitt, 2005, p. 5). What is important for Schmitt is that in order for the political to exist the friend-enemy distinction and the possibility of war are needed. Whoever (individual, institution, group....) is capable and willing to do it is the sovereign. Schmitt is therefore more preoccupied with sovereignty, with the capacity and willingness to do, rather than on the entity, the specific actor that personifies it. Given that history has resulted in the state being the current embodiment of the political and therefore being vested with sovereignty, what threatens the European state is the threat to its sovereignty and this threat, for Schmitt, comes in the form of the modern liberal state.

One of the ways in which liberalism threatens the sovereignty of the state is through its emphasis on the rule of law which liberals seen as producing the sovereign whereas Schmitt considers it as being constituted by the sovereign (Strong, 2005, p. xix-xx). “Establishing norms does not precede politics and evade sovereignty; it is politics, sovereign politics” (Rasch, 2004, p. 92). For Schmitt, political action is necessarily and irreducibly a human quality and liberalism takes human life out of politics when it elaborates a set of rules which predetermine the decisions that will be taken (Strong, 2005, p. xix). Through this process, liberalism takes the ‘decision’ out of the hands of the sovereign and renders it invisible (Rasch, 2004, p. 2). Consequently, the rule of law attempts to take away from the state (the current embodiment of the political entity) the capacity to be sovereign, to decide when and how to act outside of the law. It is an attempt to subjugate the state and hence ‘the political’ to the rule of law, and if successful would mean the end of ‘the political’.

Individualism, another central characteristic of liberalism is also a threat to the state as the embodiment of ‘the political’. For Schmitt, “underlying the state is a community of people – necessarily not universal – a ‘we’ that, as it defends itself necessarily is in opposition to that which is not, presupposes and is defined by conflict” (Strong 2005, p. xv). In fact, the sovereign state renders possible the creation of a social collective by providing it with an identity, norms and rules (Bishai & Behnke, 2007, p. 109). However these are not fixed or predetermined but produced through our identification of friends and enemies which constantly shift and change (Slomp, 2009, p. 120). Therefore by promoting individualism, the liberal state is attacking the unity of the state, it is attacking what makes possible the constitution of a collectivity sharing an identity and, furthermore, fosters the formation of friend-enemy groupings within its borders which creates the threat of civil war (Slomp, 2009, p. 16).

As long as the state is a political entity this requirement for internal peace compels it in critical situations to decide also upon the domestic enemy. Every state provides, therefore, some kind of formula for the declaration of the internal enemy. (Schmitt 2007a, p. 46-47).

Moreover, through pluralism and universalism, liberalism attempts to take away the possibility of enmity which is not only a requirement for the constitution of the 'us' but for the existence of 'the political': "a world in which the possibility of war is utterly eliminated, a pacified globe, would be a world without the distinction of friend and enemy and hence a world without politics" (Schmitt 2007a, p. 35). For Schmitt it is important to limit hostility in order to restrain the reliance on war but more importantly the reasons for going to war should always be political and never moral (Slomp, 2009, p. 17).

War, the readiness of combatants to die, the physical killing of human beings who belong on the side of the enemy – all this has no normative meaning, but an existential meaning only, particularly in a real combat situation with a real enemy. There exists no rational purpose, no norm no matter how true, no program no matter how exemplary, no social ideal no matter how beautiful, no legitimacy nor legality which could justify men in killing each other for this reason. If such physical destruction of human life is not motivated by an existential threat to one's own way of life, then it cannot be justified. Just as little can war be justified by ethical and juristic norms. If there really are enemies in the existential sense as meant here, then it is justified, but only politically, to repel and fight them physically. (Schmitt 2007a, p. 49).

According to Schmitt then, war for moral reasons leads to a perpetual war, unbound by time and space as well as to the creation of the absolute enemy who is no longer a 'legitimate enemy' but a 'criminal' (Slomp, 2009, p. 86). The moment that the enemy is considered a 'criminal', it is no longer possible to see a peace treaty as a possibility or as the normal and self-evident end of war (Schmitt, 2007b, p. 9). Liberalism leads then to the "hatred of rather than the opposition to, the Other" (Strong, 2007, p. xix).

Liberalism through cosmopolitanism and a moralistic universalism represent a threat to 'the political' not only because it dreams of a world where there is no possibility of war but because, precisely for this reason, it refuses to justify war through 'raison d'état' and instead uses euphemisms such as those used by the League of Nations:

War is condemned but executions, sanctions, punitive expeditions, pacifications, protections of treaties, international police, and measure to assure peace remain. The adversary is thus no longer called an enemy but a disturber of peace and is thereby designated to be an outlaw of humanity (Schmitt 2007a, p. 79).

For Schmitt a war fought for political reasons is less dangerous than one fought in the name of humanity.

Humanity as such cannot wage war because it has no enemy, at least not on this planet. The concept of humanity excludes the concept of the enemy because the enemy does not cease to be a human being – and hence there is no specific differentiation in that concept. That wars are waged in the name of humanity is not a contradiction of this simple truth; quite the contrary, it has an especially intensive political meaning. When a state fights its political enemy in the name of humanity, it is not a war for the sake of humanity, but a war wherein a particular state seeks to usurp a universal concept against its military opponent. At the

expense of its opponent, it tries to identify itself with humanity in the same way as one can misuse peace, justice, progress and civilisation in order to claim these as one's own and to deny the same to the enemy. (...) To confiscate the word humanity, to invoke and monopolise such a term probably has certain incalculable effects, such as denying the enemy the quality of being human and declaring him to be an outlaw of humanity; and a war can thereby be driven to the most extreme inhumanity (Schmitt 2007a, p. 54).

The liberal constitutional state is therefore the antithesis of Schmitt's conceptualisation of 'the political' as it advocates for individualism (and thus pluralism), cosmopolitanism (resulting in pacifism) and a universalism that requires any national or international order to be morally based (Slomp, 2009, p. 78). Liberalism attempts to limit 'the political' by tying it to the ethical and subjugating it to economics and struggles against the power of the state in order to protect individual freedom and private property (Schmitt 2007a, p. 61;70).

Schmitt considered the Westphalian state as the "the most favourable historical incarnation of the state as a political form: its absolutism ensured domestic unity and protection from civil war, it was related to an enclosed territory, and *jus publicum europaeum* regulated its relationship with other states and imposed limit on hostility" (Slomp, 2009, p. 57). The crisis of the modern state brought about by the liberal state forced Schmitt to reconsider his position on 'the political' as being embodied in the state and to consider the partisan as a nascent embodiment of 'the political' (Schmitt 2007b, p. 95). According to Schmitt, during four centuries the state represented the normal form of 'the political' and therefore when the modern partisan emerges after WWI, it does so as an exceptional form resulting in a crisis and the search for a new form to 'the political' (Slomp, 2009, p. 15). The modern partisan appears when the state is no longer able or willing to protect certain groups who then name the state as their enemy and engage in civil war (Slomp, 2009, p. 59). The partisan not only challenges the legitimacy of the state and claims legitimacy for his group, he creates a new political identity or defends an endangered identity and by doing so, undermines the state's monopoly of 'the political' (Slomp, 2009, p. 66-72). As such, the partisan is an irregular combatant who does not have the rights and privileges of combatants and is considered as a criminal by ordinary law (Schmitt 2007b, p. 25). As such, the partisan

...expects neither law nor mercy from the enemy. He has moved away from the conventional enmity<sup>36</sup> of controlled and bracketed war, and into the realm of another, real enmity, which intensifies through terror and counter-terror until it ends in extermination (Schmitt 2007b, p. 11).

According to Schmitt (2007b, p. 14-15), the partisan fights a political front and it is this political element that makes possible his total inclusion in a way that is not possible by other groups and associations including the modern state. However, the future of the partisan is undetermined:

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<sup>36</sup> In fact, for Schmitt there are three forms of hostility that can be differentiated not in regards to the intensity of the enmity but of its target: conventional enmity is regulated by international law and therefore sees the other as a legitimate enemy not as a criminal; real enmity resists and challenges regulations and legislation therefore is seen as a criminal not a legitimate enemy; and absolute enmity is not regulated in any way and is unbound by time and space consequently the enemy is not only criminal but he is dehumanised, a monster and source of all evil (Slomp, 2009, p. 80-93).

The telluric partisan<sup>37</sup> may take over an existing state and hence prolong the life of the state as political form or he may turn into a global partisan thereby challenging the state as a political form. Or he may bring about a new political form. Or he may be defeated and disappear forever from the face of the earth (Slomp, 2009, p. 16).

Schmitt's conceptualisation of the political seemed at first to be directed at international relations but this changed after WWII. As the constitutional liberal state with its intrinsic pluralism became the norm in Europe, Schmitt came to acknowledge that the friend-enemy distinction could be produced intrastate through the partisan. The existence of the partisan did not indicate that the state was unwilling or unable to engage in politics, it simply demonstrated the weakening and potentially crumbling of the state due to liberalism.

### **Schmitt an ugly, immoral and reluctant friend for critical criminology**

Schmitt's work represents an interesting avenue on two broad fronts. The first one is that since "Foucault's cutting of the king's head of sovereignty" (Neal, 2008, p. 47) the state has been lost and replaced with plural and dispersed techniques of power. Although this has certainly been an interesting avenue there is also rich analytical potential in re-instituting the state as a social actor, as one of the potential embodiments of rule, power, sovereignty both for neo-liberal society (even though neo-liberalism argues that it is not and in fact wants to eradicate the state or reduce it to its minimum) and even more so for non-neo-liberal societies. That the state is no longer an almighty coherent entity (which I am not even sure it ever was), granted, but to consider that it is no longer conceptually relevant, can be a hindrance to criminological analysis. The second front where Schmitt's works can be of significant contribution is in the conceptualisation of 'the political'. I have argued throughout this article that in the 1970s 'politics' somehow lost its meaning and consequently, at least partially, its analytical usefulness. Schmitt's conceptualisation of 'the political' as an empty sphere<sup>38</sup> occupied only by antagonisms that reach the friend-enemy distinction gives us the flexibility of not being limited to only one potential substance (social, economic, cultural, religious...) while avoiding the conflation of any other sphere (such as the economy) with politics. This means that antagonisms are still recognised throughout different spheres of society allowing then for 'the political' to be reserved for those conflicts that might lead to an actual physical confrontation.

Schmitt's theory on sovereignty "sovereign is he who decides on the exception" has drawn a lot of attention particularly since the 'war on terror' as means to analyse policies, laws and practices of the state. The academic debate is based on exceptionalism, whether it is justifiable or not whether it is an accurate description or not of current situation in western states. However, the insights into the dynamic between the state and pluralism, universalism and cosmopolitanism are either underutilised or lost. Furthermore, the use of Schmitt's sovereign is limited to the state as the political entity and fails to look at other actors that might in fact "decide on the exception". This might give us a renewed lens through which we

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<sup>37</sup> Telluric partisan is tied to a geographic area and seeks to replace existing state with a new political entity or a reconfigured state whereas the global partisan strives to replace the state as a political form drawing from an all-encompassing category (humanity, social class...) and is therefore both constituted as an constitutes the other in an absolute enmity with whom he is engaged in just war is (Schmitt, 2007b).

<sup>38</sup> See Marder (2010 p. 32-35).

might be able to analyse so called “failed states” which are often in fact ex-colonial states which have been arbitrarily created by colonial powers. In this regard, the problem might be not that the sovereign state is confronted to one or multiple partisans resulting in civil war (as it is usually analysed) but that, regardless of what international politics might recognise and what the nation state might claim, there are multiple sovereign states within the confines of the same territory instead of the traditional single sovereign state. If that is the case, within the nation-state we would find several sovereign states declaring the others as the enemy and fighting them to the death as the supremacy of one within the overall territory of the nation state signifies the annihilation or potential disappearance of the rest.

There has also been little use of his theory of the partisan in the analyses of those who are being combatted by the state (the ‘terrorists’, ‘illegal combatants’, etc.). It would appear as if the academic interest from ‘critical’ scholars is more focused on the state and the way it is handling the current situation and less in those who are challenging the status quo or the social order. This can be partly due because it is actually a lot easier to empirically access policies and practices of the state/government than it is to access those of the ‘irregular’, ‘illegal’, ‘criminal’ or ‘terrorist’ organisations. But, it cannot be denied that part of this limited interest is due to the political significance of analysing and describing the Schmittian ‘enemy’ without being associated and incorporated to it. Taking on Schmitt’s partisan to analyse the ‘terrorist’ is necessarily to politicise, to recognise as political, the conflict and the actors involved which can thus be construed as a political act in and of itself. As a result, the analytical potential of concepts such as the telluric and global partisan and their relation to the state and the international community is lost. Exploring the partisan seems a necessity in the field of political violence, particularly when dealing with anti-establishment armed groups<sup>39</sup> as they are intrinsically political actors: they create a new political identity different from the one provided by the state as well as (and more importantly) they constitute themselves as sovereigns through being willing to assign the friend/enemy distinction. In doing so, the telluric partisan undermines the state’s monopoly of the political and opens up the possibility for the development of new configurations of the triad state-sovereignty-politics. However this possibility does not seem to have been exploited up to now as partisans appear to be simply attempting to take the place of the current state not replace it with another political form. On the other hand the state’s refusal to recognise the partisan as a conventional enemy and instead opting for that of the criminal, is an attempt to maintain its hold on the monopoly of politics. As a result, regardless of who has won up until now, the nation state has not been dethroned as the site of sovereignty and the political. Conversely, the global partisan (i.e. the so called international terrorist) seems to have been more successful in its challenge or attack on the nation state as a political form given that as a response, nation states have accepted to put forth the idea of the existence of the cosmopolitan and liberal ‘global state’ which prevents the global partisan from being acknowledged or recognised as a legitimate enemy (despite its exteriority to the nation-state it has attacked) and is instead treated as an internal criminal. The fact that there is no materiality to this ‘global state’ means that the confrontation actually takes place with and within nation-states. The reality of the nation-state therefore goes unchanged, however the fact that some nation states are able to act as representatives of the ‘global state’ grants them a sovereignty that goes beyond the nation-state as they are able to designate the friend enemy of the ‘global state’. The question is then, does this mean that there is reconfiguration of the

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<sup>39</sup> This term denotes a group opposing the establishment through the use of, although not exclusively, the armed struggle. It replaces “terrorist organisation” given the moral and political connotations associated with that term.

triad state-sovereignty-politics that is taking place or is it simply a reconstitution of it but to a larger scale with some nation-states being able to establish the political identity to be attributed to members of the 'global state' (humanity) and those external to it (inhumane)? This is once again a very dangerous path as atrocities such as genocide have been possible through the explicit or implicit de-humanisation of the enemy.

The concept of the political allows us to think of the criminal justice system and other forms of repressive social control (whether state centred or not) as belonging to the realm of politics precisely because what it does is to allow us to see the conflict between the entity law-abiding (us) with the entity law-breaking (them) as a profound antagonism that cannot be ignored or escaped without causing 'our' annihilation. It unveils how behind the 'other' is not simply difference but enmity (label which sanctions its destruction) but precisely due to the fact that the initial identification was that of the criminal, it voids any possibility for a peace treaty. We are then caught in a perpetual war until the demise of either us or them. The processes of 'othering' are processes of radicalisation as much as processes of self-definition that sets the stage or prepares us to an eventual physical confrontation or war. This means that discourses on the 'war on terror', 'the war on drugs', the 'war on crime' and even the 'war on poverty' are not mere rhetorical devices. They are part of the construction of the 'us' as a universal being representing a set of values and characteristics that are rendered synonymous with humanity and with valuable life. By claiming a war on an abstract phenomenon or a situation, instead of a concrete enemy, these discourses lead us to the logic of the just war. In this process it dehumanises those that are being fought as they are no longer recognised as human beings but as part of an undesirable phenomenon. This undesirable phenomena as an abstract entity can be fought through inhumane means precisely because the strategies are not targeted at human beings. However, as concrete individuals become amalgamated with threats, they become the vectors of those threats; the threats become tangible through concrete human bodies. This means that the strategies used to combat the abstract enmity are in fact deployed against very real human bodies. The war being waged against the abstract ephemeral enemy means the attack on and destruction of concrete physical bodies. The war on crime<sup>40</sup>, on terror<sup>41</sup>, on drugs<sup>42</sup>, even on poverty<sup>43</sup> results then in policies that harm, restrict and destroy human beings that are though off as a unity but whose only unifying principle is their imputed difference and even inhumanity. This means then that the universalising discourses used to justify on moral grounds these wars on... in fact destroy pluralism, destroy difference.

In fact proclaiming these values of pluralism and universalism while at the same time promoting policies and practices that undermine them is possible not out of absolute irrationality but as a very logical step when the policies are aimed at a threat to the existence of a particular community or to those values. As an example, immigration policies aiming to limit or stop immigration (particularly from certain countries) and/or the arrival of refugees are produced and defended by the right and the left, including certain notable critical criminologists when the issue is thought of as being a matter of protecting the traits, the essence, the values of the local community (even the value of tolerance) against a horde (real or imagined) of difference (particularly when that difference includes intolerance) that

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<sup>40</sup>E.g. three strikes policy or sex offender laws.

<sup>41</sup> E.g. the use of torture or 'extreme' interrogation techniques or security certificates.

<sup>42</sup> E.g. closing down needle exchange programmes and/or safe injection sites.

<sup>43</sup> E.g. the transition from welfare to workfare.

threatens the continued existence of the local community simply by their sheer numbers. The fact that we see many Scandinavian countries boasting very progressive penal policies (aimed at us) enacting extremely harsh immigration policies (aimed at them) is no longer surprising thanks to Schmitt. Furthermore, the indifference of many democracies and the individuals within them towards instances of mass murder and genocide can also be understood when those suffering are not necessarily thought of as the enemy but simply not as the friend towards whom we might have a responsibility to help, as their existence is somehow perceived as connected to our own survival.

Schmitt's analyses have unveiled how through claims of pacification, just war, national and international security, etc. the constitutional liberal state can in fact engage in problematic and harmful behaviours that undermine the principles and values it invokes as protecting and defending. How to overcome this impasse? Is it possible to adopt Schmitt's analysis without adopting his values? One solution might be offered by Mouffe (2009, p. 131) who draws from Schmitt when she states:

Politics aims at the creation of unity in a context of conflict and diversity; it is always concerned with the creation of an 'us' by a determination of a 'them'. The novelty of democratic politics is not the overcoming of this us/them opposition – which is an impossibility - but the different ways in which it is established. The crucial issue is to establish this us/them discrimination in a way that is compatible with pluralist democracy (Mouffe, 2009, p. 101).

The challenge for critical criminologies is then to understand the foundations and processes through which friend-enemy constructions are produced (interstate and intrastate) as means of dismantling potentially problematic antagonism; analyse the strategies or lines of action that can prevent antagonisms from developing into an actual physical confrontation or war; and explore the discursive practices and actions through which states and/or partisans transform war into 'just war'.

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