Introduction

Transnational crime presents a new object for global governance with law. A key difficulty resides in the definitional ambit of the term. One perspective, legal positivism, suggests that transnational crime consists in those phenomena defined in law as such. That is not the perspective adopted in this chapter. Instead an interdisciplinary perspective is adopted which synthesizes different viewpoints including political, economic, sociological and legal ones. The reason for adopting an interdisciplinary perspective is the contestability of the concept 'transnational crime' and allied terms such as 'transnational organized crime'. These notions exist as components in a language game concerning certain phenomena that are in the process of being designated as objects for global governance. Many concepts are part of this discourse including, inter alia, human sex trafficking, human organ trafficking, cyber-crime, crimes against the environment, terrorism, intellectual property theft, piracy, cultural property theft, drug trafficking and so on. All of these terms are abstract analytical categories; they are essentially contested and warrant being placed in inverted commas.

According to Gallie, abstract analytical concepts are evaluative and have an internally complex character which appeals to us on both a psychological and a sociological level. They are open-ended terms, which can be differently applied to differing phenomena in different times and places and their application is, in the basic sense of the word, political. They are 'essentially contested concepts'. When it comes to discussions about the meaning of terms such as these, it is important that all parties to the debate recognize that their own peculiar instantiation of the words is disputed by others and, further, understand the criteria on which

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1 There are seemingly obvious albeit subtle differences in the terms ‘transnational crime’ and ‘transnational organized crime’, both at the connotative and denotative levels of meaning. In this chapter, these definitional subtleties are largely elided. Both terms are essentially contestable. Therefore what is important is to understand them as components in the language game of global governance through law.

others’ (perhaps repudiating) views are based. Much discussion about the problem of transnational crime and transnational organized crime risks becoming radically confused because the participants have trouble with the essential contestability of the terms and insist that their own definitions are neutral, self-evident, constant, and proper or commonsensical. This point is of particular importance for legal scholarship because recognizing the essential contestability of terms such as ‘transnational crime’ and (even more so) ‘transnational organized crime’ brings the politics of law to the fore. This chapter aims to help the reader give due consideration to a variety of approaches to defining the issues. In truth there are actually three problems with the term ‘transnational organized crime’. The term ‘transnational’, the term ‘organized’, and the term ‘crime’.

Beginnings

The etymology of relevant terms is revealing of their contestability. In a thoughtful essay by the Dutch criminologists Petrus van Duyne and Mark Nelemans titled “Transnational Organized Crime: Thinking in and out of Plato’s Cave”, the historical evolution of these words within the institutional context of the United Nations is described. On the basis of a content analysis of UN documents and position papers they show how the terminology shifted over a period of several decades beginning in the early 1970s. Initially, the term of art was ‘transnational crime’ and it signaled a concern about illicit activities or harmful effects of licit capitalist enterprise in countries of the Third World. Van Duyne and Nelemans trace the slow transformation of the policy language into a narrative about illicit markets in drugs and other commodities, signaled by the term ‘transnational organized crime’, and the attendant disappearance of crimes by transnational corporations, white-collar crime and the crimes of corruption participated in by social and political elites. In another essay titled ‘Transnational Organized Crime: The Strange Career of an American Concept’, Michael Woodiwiss traces the development of the concept of organized crime from its basis in the discourse of American law enforcement circles in the early part of the twentieth century until its mutation into ‘transnational organized crime’ in the aftermath of the Cold War during the 1990s. He shows how the discourse of organized crime was useful in building up the apparatus of US federal law enforcement, a project of institution-building that was rather antithetical to certain legal and political norms of American society suspicious of the encroachment of federal state power. In the post-Cold War period, the shift to a concern with transnational organized crime was again useful in legitimating the projection of US law enforcement power onto the global stage. Adam Edwards and Peter Gill have shown how, in the early twenty-first century, in addition to traditional law enforcement agency interest, western security, intelligence and defense agencies have also been reoriented around the trope of transnational organized crime (TOC).

According to Woodiwiss, the American conception of organized crime was an oversimplification making the term synonymous with ‘the Mafia’. The projection of this term into the discourse concerning transnational crime amounted to the ‘dumbing of global discourse’:

making the term ‘organized crime’ synonymous with gangster or Mafia-type organizations will not help in efforts to combat a problem that is increasingly damaging and destructive but is rarely so structured and never so separate from legitimate institutions as the common use of the term now implies.

As social historians are well aware, the phenomena of organized crime were familiar to citizens of the big American cities from at least the early nineteenth century. Daniel Bell explained organized crime as integral to the American ‘way of life’. According to him the pattern of organized criminality in the big American cities emerged from a confluence of factors involving the changing character of the urban ‘political machines’, the aspirations of immigrant groups to attain the ‘American Dream’ and ‘queer ladders of social mobility’ provided by certain vice industries, notably gambling. His narrative account of Big City Crime in America during the twentieth century was aimed at explaining a ‘ritual drama’ wherein a deep-seated pattern of corruption involving players in the illegal ‘rackets’, police and politicians is uncovered by reformers who rise to prominence and positions of political power only to be again ‘swallowed up in the insatiable maw of corruption’. ‘Obviously’, he concluded, ‘the simple moralistic distinction between “good guys” and “bad guys” so deep at the root of the reform impulse, bears little relation to the role of organized crime in American society.’ For Mark Haller, the organization of crime was really about illegal entrepreneurship, and central to the functioning of the illicit economy were systemic relationships between illegal business, police and politicians.

Frequently cited work by Alan Block and William Chambliss gives a sense of why and how the Mafia image came to dominate conceptions of organized crime in America. Social historians had uncovered the functional symbiosis between the illicit ‘underworld’ and the ‘upper world’ populated by social, political and business elites. In an essay titled ‘History and the Study of Organized Crime’, Block argued that the Mafia conspiracy theory condenses a highly complex phenomenon into a narrative format that hides some things while projecting other convenient ‘truths’. Picturing organized crime as a bureaucracy and the organized criminals as ‘protobureaucrats’ is ‘the lawyer’s favorite: the ladder of conspiracy with each rung integrated in a series leading to the master conspirator’. Seeing organized crime as a hierarchy is not merely a projection of the lawman’s institutional world (although it certainly is that). The portrait of Mr Big is also, conveniently, the picture of a cultural outsider. Bereft of an awareness of the social embeddedness of informal patron–client networks, and the interconnections between the corrupt denizens of the ‘upper world’ and the criminality of

8 Ibid., p. 4.
11 Ibid.
13 Ibid., p. 466.
the ‘under world’ that are part-and-parcel of organization of crime in big American cities, the term ‘organized crime’ becomes a kind of cover-up. In his classic work On the Take: From Petty Crooks to Presidents, Chambliss observed that ‘organized crime really consists of a coalition of politicians, law enforcement people, businessmen, union leaders and (in some ways least important of all) racketeers’.14 According to him, of these groups it was actually ‘the politicians who . . . have had the ultimate and most important practical control of organized crime’.15 Chambliss revealed that it is not an accident that the topic of corruption is left out whenever the subject of organized crime becomes a matter of public attention and public policy in America. Rather than acknowledging the connections between national elites, local political machines and law enforcement to the organization of crime in America, the Mafia-conspiracy conception of organized crime makes corruption invisible. Chambliss showed that the mythology of the Mafia is not fictive; it is merely misleading.

Why is this important? The answer lies in a sociological analysis provided by Dwight Smith, Jr in an essay titled ‘Mafia: The Prototypical Alien Conspiracy’ originally published in 1976.16 On the basis of a socio-historical analysis of three cases of ‘alien conspiracy’ – the first two being the ‘Illuminati Conspiracy’ and the ‘Red Scare’, the third being the ‘Mafia conspiracy’ – Smith suggested that there was a reoccurring cultural fixation of great significance for American public policy: the ‘recurring apprehension that somewhere “out there” is an organized, secret, alien group that is poised to infiltrate our society and to undermine our fundamental democratic beliefs’.17 At a general level, Smith’s analysis suggests that threatening alien conspiracy theories exhibit three common characteristics or conditions. First, there has to arise a widespread sense of social unease and anxiety threatening to a given community’s traditions, institutions and boundaries. This ontological precariousness is fertile soil for psychological projection and moralizing that is all too easily pronounced against cultural outsiders. Importantly, it also provides the basis for justifying the building of social institutions, or the buttressing of already existing ones. Enter the second element in the equation: the moral entrepreneur. A moral entrepreneur, or several of them, must act to focus public attention onto a perceived threat that can be plausibly linked with these anxieties and fears. Such entrepreneurship is undertaken because it upholds the interests of those who espouse it. These crusaders act in the way that they do because it allows them to manufacture the institutional basis of their own power. A third factor is critical to successfully doing so. There must be available to the moral entrepreneur a set of facts, or presumed facts, usable as supporting evidence concerning the conspiracy claims.

When it comes to the Mafia conspiracy myth, Smith’s theory holds that the valorization of the term ‘Mafia’ provided the pretext for building up the national apparatus of US federal law enforcement. This included, but was not limited to, the Federal Bureau of Investigation and Federal Bureau of Narcotics (now the Drug Enforcement Agency). Federal institution-building in the United States was, according to Smith, problematic for two reasons. First, it ‘led to a group of strategies that do not effectively address the problems of illicit enterprise’.18 Second, and more importantly,

15 Ibid., p. 9.
17 Ibid., p. 76.
18 Ibid., p. 87.
though ostensibly aimed at destroying organized crime, those strategies have themselves been more threatening to this country than the illicit behavior they were supposed to control. They have been threatening on two counts. First, they have affected law enforcement beyond the confines of organized crime control; second they have had a significant impact on the corruption of justice in the United States.\textsuperscript{19}

Thus established, and continuing thereby to live through the myth, America had to endure the reality it supposed.

The crucial year in the constitution of ‘that strange American concept’, to use Michael Woodiwiss’ turn of phrase, was 1967, which saw the publication of the results of the United States President’s Task Force on Organized Crime. A well-known academic criminologist named Donald Cressey was one of its most influential members. Based on his experience with the Task Force, he was the first academic criminologist to attempt a systematic study of organized crime in his seminal book \textit{Theft of a Nation}.\textsuperscript{20} Cressey elaborated on the division of labor in the American Mafia by making metaphorical use of military ranks alongside Italian terminology and references to familial ties.\textsuperscript{21} As those who have watched the 1972 American drama \textit{The Godfather} know well, Cosa Nostra families are each headed by a boss, or \textit{il capo} (literally ‘the head’), and beneath each boss is a \textit{sotto capo} (literally ‘under the head’). Neither is involved in direct criminal activity. To communicate to the working level of the illicit enterprise, bosses work through channels of communication by way of a \textit{capporegima} – the ‘head of the régime’, in effect a lieutenant. Beneath the ‘lieutenant’ are ‘deputy lieutenants’, and the ‘rank-and-file’ ‘soldiers’ at the bottom of the hierarchy do most of the hands-on dirty work. This language was largely popularized through works of fiction, but academic criminology gave it an added degree of verisimilitude.\textsuperscript{22} Cressey concluded that although such a sketch of the organization of the Mafia is a gross oversimplification of the complex inferences which can be made about La Cosa Nostra norms from observation of one structural position, it does show that the social scientist can create data on organized crime by reasoning from the known to the inaccessible, just as the archeologist creates data . . . the social scientist . . . can comfortably make the assumption that ‘in the long run’ the action scene which he has created by inference can be directly observed.\textsuperscript{23}

In this way, the English language gained scientific affirmation for a particular way of talking about organized crime as Mafia-type crime. From Cressey’s work onward the criminological literature concerning organized crime is enveloped in this conceptualization and, according

\begin{itemize}
  \item \textsuperscript{19} Ibid., pp. 87–88.
  \item \textsuperscript{22} Mario Puzo, author of \textit{The Godfather}, learned the tales upon which it is based during his prior career as a writer of pulp fiction for men’s magazines with titles like \textit{True Action} and \textit{Swank}. He drew heavily on his family heritage in Campania, Italy and his youth in gritty mid-town Manhattan in the 1930s and 1940s. E. Homberger, ‘Mario Puzo: Author of the Godfather, the Book the Mafia Loved’, \textit{The Guardian}, Monday, 5 July 1999.
\end{itemize}
to Alan Block, it tends to suffer from ‘historical naïveté’.  
Too much writing on the subject amounts to a naïve propagation of the Mafia Myth in which ‘the connection between the term organized crime and the supposed alien conspiracy . . . runs so deep . . . that employment of it [the term organized crime] increasingly implies acceptance of a conspiracy’. Obviously there is some real substance underlying organized crime discourse. It does not have to imply that all organized crime is Italian Mafia-type organized crime. ‘Unfortunately’, Block argues, ‘it is not enough to point out examples of historical naïveté and insensitivity with the admonishment for care and attention to historical methods.’

Understanding historical change in the terminology concerning the organization of crime gives a good sense of the contestability of the terms involved. There is more to this historical evolution than can be conveyed in this short essay. However, the reader can begin to appreciate that the labeling of something as ‘organized crime’ or ‘transnational crime’ or ‘transnational organized crime’ is not a neutral or scientific decision. All concepts are somebody’s concepts, and the historical record shows that these particular abstract analytical categories are harnessed to particular institutional interests.

This point is nicely summed up by Jude McCulloch in an essay somewhat provocatively titled ‘Transnational Crime as a Productive Fiction’. McCulloch argues that discourses concerning the threat of transnational organized crime and the threat of global terrorism function as rhetorical justifications for the transformation and extension of the coercive capacities of states. They are a ‘productive fiction’. She points out that the countermeasures common to TOC talk and to counter-terrorism discourse are ineffective and counter-productive, and goes on to systematically show how the language concerning organized crime and terrorism has served the development, maintenance and extension of social, political and economic hierarchies between and within states. It is not just that the concept of transnational organized crime and like terms are social constructions; they are political constructions. The security paradigm arising from the fear and anxiety created around TOC talk provides the mechanisms for political elites to ‘deal’ with their enemies while neutralizing the censure of human rights discourse and it has allowed stronger actors within the global system to pursue political and economic agendas unimpeded.

Realism

The probably, too brief, discussion of the previous section served to establish that abstract concepts like ‘transnational crime’ and ‘transnational organized crime’ are always components in language games in which power relations between players shape outcomes. The conclusion from this is that observable facts are formulated discursively as social and political constructs. For some people organized criminality is self-evidently a real problem and any theoretical discussion about the meaning of terms is an unwelcome side-show. Yet careful observers are alive to the difficulties in operationalizing a term like ‘transnational crime’ even if they remain comfortable in the assumption that, in the final analysis, it is a real thing. In short, most criminological discussion concerning transnational crime and transnational

25 Ibid., p. 470.
26 Ibid., p. 464.
organized crime adopts a tacitly ‘realist’ position. Realists, whether they refer to themselves as such or not, aim to draw accurate pictures of the phenomena they problematize. Realists aim to produce coherent explanations of these phenomena and they also, although not always, aim to produce pragmatic policy recommendations about what is to be done. Criminologists do not often emphasize their ontological assumptions because it is as if that were to state the obvious. When it hits you, transnational organized crime is as real as a falling rock. And yet, there are many debates, influences and approaches to the realistic understanding of what constitutes transnational crime or transnational organized crime and quite a bit of disagreement. Any survey of the literature on organized and transnational organized crime confronts a somewhat bewildering array of interests and concerns. Observing this, there is at least some room for questioning the epistemological status of the terminology. Like ‘crime’, the moon may be a real object but astronomers, astronauts and astrophysicists describe it differently. Likewise, economists, political scientists, sociologists, social-policy experts and (of course) lawyers describe the reality of transnational crime differently.

Let us look briefly at some examples of criminological realism concerning transnational organized crime. 29 Louise Shelley’s ‘Unraveling the New Criminal Nexus’ 30 and ‘Anticipating Organized and Transnational Crime’ by Roy Godson and Phil Williams 31 can be usefully read in tandem. These essays are good contemporary examples of typical criminological realist thinking concerning the problem of transnational organized crime. Shelley mounts a powerful case for transnational organized crime to be a central problem for global governance. She argues for a multi-pronged approach involving, among other things, coordinated international intelligence and law enforcement campaigns, development of legal tools to aid in combating organized crime, journalistic efforts to expose the activities of transnational criminals, and the integration of economic development strategies into efforts to prevent transnational organized crime. 32 According to her, the problem is not ‘that of a single, monolithic, international organized crime network’, but rather one of a ‘multiplicity of politically and economically powerful crime groups operating both regionally and globally’. 33 These ‘interlinked networks’ 34 include the possibility of a ‘nexus between transnational crime and terrorism’. These groups ‘benefit from weak law enforcement in their home countries’ while at the same time they ‘depend on the structures of established states to move their commodities, launder their funds, and create a market for their goods’. 35

Godson and Williams consider a number of models for describing the nature of the problem. The first of these are a group of ‘political models’. 36 The weak states model suggests that opportunities for crime arise because of poor state capacity and lack of legitimacy. 37 Connectedly, there are many instances of ‘strong states becoming weak’, which provide

33 Ibid., p. 12.
34 Ibid., p. 8.
37 Ibid., p. 316.
incubators of organized crime. This happens when strong authoritarian regimes move through a period of ‘dual transition’ – from authoritarianism to democracy and from a centrally controlled economy to freer markets. They illustrate this model by reference to the dissolution of the USSR and the case of Mexico after the breakdown of one-party rule in the 1980s.\(^{38}\) In both instances there was organized crime during the authoritarian period which became much more virulent as the strong states became weak. Political modeling along these lines is taken to suggest that democratic states with functioning governmental capacity and high levels of political legitimacy are ‘crime resistant states’.\(^{39}\) They also describe two closely related economic models in relation to organized crime.\(^{40}\) On the one hand are markets for illicit goods and services which are subject to the laws of supply and demand and are governed by the profit motive. On the other are models of economic organization for capitalizing on factors such as new product opportunities, product dominance in the market, profit margins, competition, risk management and so on.\(^{41}\) These economic models provide the basis on which to speculate about the nature of business opportunities and the strategies that different groups of criminal entrepreneurs adopt to maximize profit.\(^{42}\)

Williams and Godson go on to outline three social models that depict the transnational organization of crime. First, cultural models concern patron–client relations, family and kinship ties. Second, ethnic models look at group loyalty based on shared language and other ethnic characteristics. They speculate that ‘ethnically-based criminal networks are . . . difficult to penetrate since they have inbuilt defense mechanisms provided by their language and culture’.\(^{43}\) Third, social network models describe ‘webs of influence linking criminals’.\(^{44}\) Williams and Godson argue that ‘networks are sophisticated organizational structures that are well suited for criminal activities’, because they are ‘flexible and adaptable’, ‘resistant to disruption’, ‘capable of expansion’, and they can extend across boundaries, for example ‘between licit and illicit sectors of the economy’. Networks can also draw in ‘politicians, bureaucrats, judges and law enforcement agents who are susceptible to bribery’.\(^{45}\) These models can be hybridized and combined in various ways. Williams and Godson do so in order to open up a discussion about ‘appropriate preventive, defensive or mitigating strategies’.\(^{46}\)

Petrus van Duyne and Maarten van Dijck are less easily impressed by the knowledge base upon which these realist accounts rest. The knowledge base is what is known in police circles as ‘organized crime threat assessments’, and in their essay ‘Assessing Organised Crime: The Sad State of an Impossible Art’ they examine in close detail how these kinds of survey attempt to measure, assess and otherwise account for organized crime.\(^{47}\) The threat assessments and other policy papers circulating in various policy arenas and European governmental arenas reveal ‘little scientific and methodological discipline and much art’\(^{48}\) and they go on to

38 Ibid., p. 317.
39 Ibid., p. 320.
40 Ibid., p. 320.
41 Ibid., pp. 324–325.
42 Ibid., p. 328.
43 Ibid., p. 331.
44 Ibid., p. 331.
46 Ibid., p. 311.
48 Ibid., p. 101.
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caricature them as exhibiting, *inter alia*, impressionist, expressionist, magical realist and pop art styles. The literature ‘is very extensive and has a complex appearance, [but] the centre of the debate simply circulates around a few imprecise words’.\(^{49}\) Thus, in law enforcement ‘threat assessments’ there is a ‘curtain of smoke’ behind which there is very little real substance.\(^{50}\) The problem is not that transnational crime phenomena cannot be studied with scientific rigour. It is just that the work is not done by disinterested scientific observers:

Assessing ‘organised crime’ is not a neutral undertaking carried out by detached researchers. Most of the time, it is carried out by law enforcement agencies, which have an interest in its outcome. Particularly when these agencies are also tasked to fight organised crime, they have an understandable incentive to report (what they think are) serious threats. After all, they are doing a serious job. It is certainly not far fetched to state that the agency’s own ranking correlates with the seriousness of its reported threats. Between agencies we even observed a kind of ‘threat competition’: who has the biggest threat?\(^{51}\)

That is why so much of the available literature, which purports to present a pragmatic view of the transnational crime problem and what needs to be done about it, ‘will not function as support tools for strategic decision making, but as justifying texts for decisions taken in other settings’.\(^{32}\) When it comes to ‘serious organised crime’ and similar terms, the best thing to do is ‘delete for research purposes’ since ‘this word string will merely serve conversational and political purposes.’\(^{53}\) Van Duyne and van Dijck advocate thinking scientifically about the organization of crime. Essentially they think that by looking at the way social actors interact with their environment in the manufacture of specific types of criminal opportunity is the way forward for a scientifically engaged, empirical and realistic approach to the issues. The economics of protection rackets differ from the economic provision of prohibited substances, organized prostitution is different from organized theft of ‘high end’ vehicles, art and antiques theft has unique organizational features, as does match-fixing of sporting and racing events, and the economic and political crimes of the ‘upper world’ are different again. The forms and principles of criminal cooperation, the differing manifestations of criminal entrepreneurial conduct, the shape and functioning of different kinds of criminal division of labour suggest heterogeneity. Understanding this leads to sensible researchers ‘declaring the organized crime concept redundant’, thus saving ‘time and energy for more fruitful intellectual endeavors’.\(^{54}\)

The categories of ‘transnational crime’, ‘transnational organized crime’, ‘serious organized crime’ and so on form a family of resemblance. The core constituent term in this familial set is the concept of ‘crime’ but they are subject to intense political activity, especially under conditions of transnationalization when many different institutional interests vie for primacy in defining them. It is therefore difficult for social scientists to strictly adopt van Duyne’s and van Dijck’s recommendation. A couple of classic essays, one from a political science and one an economic point of view, give clues as to why this is the case. Charles Tilly’s famous essay

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49 Ibid., p. 106.
51 Ibid., pp. 104–105.
52 Ibid., p. 108.
53 Ibid., p. 115.
54 Ibid., p. 121.
entitled ‘War Making and State Making as Organized Crime’ advances the analogy that the modern state is akin to a ‘protection racket’. On the basis of a historical analysis of European state-making, he argues that

a portrait of war makers and state makers as coercive and self-seeking entrepreneurs bears a far greater resemblance to the facts than do its chief alternatives: the idea of a social contract, the idea of an open market in which operators of armies and states offer services to willing consumers, the idea of a society whose shared norms and expectations call forth a certain kind of government.

To a political realist, banditry, piracy, gangland rivalry, policing and war-making all belong on the same continuum; the line between extortion and taxation, between protection racket and police force is blurred and the legitimacy of state government is a question of democratic accountability won but never granted. The economist Frederick Lane largely concurs in his brilliant essay concerning the ‘Economic Consequences of Organized Violence’. Quoting St Augustine – ‘without justice, what is government but a great robbery?’ – Lane argued that, being monopoly providers, states exert powerful effects on the economic order of human relations, with consequences for social order as a whole. Police and extortionists should, in theory, be distinguishable from each other because, while the latter promise to render a benefit to none but themselves, the former promise the benefit of protection and to protect the rights of people – even against police. Economic realist thinking about the role of force in the maintenance of markets gives rise to paradoxes because the protection on offer is often protection against violence threatened by the protector in the securitization of a monopoly of violence against rival protectors. Confronting this paradox de-centers the criminological predispositions in thinking about the ‘reality of organized crime’ and both Lane and Tilly, albeit in very different ways, raise questions about the role of the state.

The state is a central pivot in the conjunction of criminal opportunity and this is especially evident in the context of the global system. Under transnational conditions awareness of the role of systemic corruption in enabling transnational crime became difficult to avoid. According to Manuel Castells, as world capitalism entered the new phase of ‘informational capitalism’, new planetary-wide patterns of organization – the global ‘networked society’ – made possible new institutional connections between actors in legitimate social, political and economic institutions including secretive interlinkages with illicit activity. Hence transnational crime is the natural efflux of the global social system.

56 Ibid.
58 Ibid., p. 416.
While globalization opens up new vistas for criminology, the complexity of the transnational condition entails that a strictly criminological lens is insufficient to bring everything into adequate focus. David Nelken’s and Michael Levi’s essay ‘The Corruption of Politics and the Politics of Corruption’ makes this abundantly clear. Corruption has been simply defined by Transparency International as ‘the abuse of entrusted power for private gain’, but things are more complicated than this allows. As Nelken and Levi point out, both corruption and anti-corruption ‘can serve to undermine (or extend) the legitimacy of politicians, [political] parties and the State’. Further, perceptions of what constitutes ‘corruption’ are culturally relative, and there can even be ‘noble cause corruption’. Thus, ‘corruption creates its own “normative” patterns, [and] anti-corruption campaigns may even function as a “lawless” force destroying existing order’. Appreciating corruption as a ‘force destroying social order’ taps into a fundamental connotative meaning of the word, since the term derives from the Latin corruptus, from a verb meaning to abuse or destroy. Corruption is a deviation from orthodox belief or practice and often signals the dying off of a social institution; the fall of the Roman Empire has been attributed to the corruption of Roman virtue. Antithetical and contradictory as it may seem, Nelken and Levi regard the manifestation of corruption and anti-corruption as co-dependent:

The deterioration in political and administrative service which results from the privileged access offered to their clients leads others to seek their own privileged routes, and so the cycle of corruption spirals. In the same way, a cycle of mutual dependence between politicians and organized criminals can develop.

The expansion of corruption and the knee-jerk implementation of anti-corruption programs are part of an interlinked cycle in which law features as a tool in the hands of the relatively powerful, implicating the governmental apparatus in the ongoing problem:

The enforcement of laws involving corruption and white-collar crime, often enacted on a tide of popular resentment in harness with a need for political élites to re-legitimate the State, often involves major intrusions into civil liberties, which may have broader social consequences. Precisely because there are seldom any complainants, even where the corrupt extort money from business people or the public, corruption may be seen as an opportunity for policing agencies to develop proactive strategies: but this gives powerful élites the opportunity to target selectively their political opponents (or those who refuse to pay bribes/make political ‘donations’ to the ‘right’ party) for ‘sting’ operations or intensive tax reviews, while leaving ‘friendly’ parties alone.

Ultimately it is on issues of power inequalities that debates about the use of law for controlling corruption twist and turn. Nelken and Levi’s thesis can be condensed into a number of solid

65 Ibid., p. 3.
66 Ibid., p. 3.
67 Ibid., p. 4.
68 Ibid., p. 9.
points. Law can be used by the relatively powerful in a given social order to protect corrupt practice. Law can be deliberately designed so as to make it impossible to prosecute even obviously malign power holders. Substantive law may only target the most crude and obvious exchanges of money for favors, while remaining blind to more subtle and pervasive forms of corruption. The rules of procedural law may make it difficult to mount prosecutions against élite persons; for example rules to protect privacy may be used to mask nefarious acts from legal purview. Political élites can act to ensure that the functional resourcing for policing against crimes of the powerful is inadequate to the task, perhaps by diverting those resources onto policing those in a weaker class position, hence the nifty title of Jeffrey Reiman’s classic book *The Rich Get Richer, the Poor Get Prison*. Finally there is the political control route, which ‘refers to the ability of élites to frustrate investigations that threaten them and their allies or, alternatively, to press prosecutions against their political opponents’.  

Viewing ‘the State’ as the defender of legitimate social and political order and political élites as subservient to an abstraction like ‘rule of law’ becomes debatable when faced with the possibility of ‘inner political power holders’ mounting ‘symbolic displays of action’ in order to mask secretive, corrupt and criminal ‘business as usual’. Criminality and political economy can become intertwined in coalitions of power interests through corruption, fraud and racketeering, and this can happen in democracies just as it can in autocracies and totalitarian states. Ultimately, Nelken and Levi show that, when corruption becomes functional for social power, the politics of corruption can be played out through attempts to suppress scandal and it can also form part of the routines involved in the circulation of élite power.

Law

The genesis and application of the terminology in which the language game of ‘transnational crime’ is played out raises interesting points of discussion in the sociology of law. Insofar as this language game is pursued within the discourse of law it is one that is constituted as a set of legal power tools. That is to say, as the phenomenon ‘transnational crime’ and its various sub-categories – such as human sex trafficking, human organ trafficking, cyber-crime, transnational crimes against the environment, terrorism, intellectual property theft, piracy, cultural property theft, drug trafficking and so on – are conceptualized in legal terms they become objects of governance. Objectification in terms of legal discourse turns these phenomena into particular kinds of objects subject to the disciplinary control of particular kinds of institution in particular ways.

The transnational crime of ‘intellectual property theft’ (IPT) is a telling illustration of this. The new concept of ‘seed piracy’ was made possible by an innovation in US patent law, in a decision of the United States Supreme Court in *Diamond v Chakrabarty*.[72] Historically patents were only granted to things that were useful, novel and non-obvious and that could not be found in nature. *Diamond v Chakrabarty* found that ‘anything under the sun that is made by man’, including genetically altered microorganisms, could be patentable. The ability to patent

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71 Ibid., p. 11.  
genes produced new forms of property, which in principle could be stolen. In order to preserve their intellectual property rights (IPRs), the large corporations who own the patents have moved to forbid the practice of seed saving; that is, keeping back a portion of the harvest for next year’s planting. Seed saving has been transformed into seed piracy. Policing seed piracy has been documented in a variety of jurisdictions around the world, notably India. Private detectives gather information, intelligence and evidence while lawyers undertake prosecutions and also monitor farmers’ fields once they have been convicted of seed piracy in the courts. A hybrid of both public and private forms of policing controls the activities of farmers and enforces the privatization of nature. Intellectual property rights are a form of ruling with law. The example of seed piracy shows how these new legal tools challenge, and ultimately undermine, ancient agricultural practices like seed saving, seed cleaning and seed trading between independent producers.

The idea of intellectual property theft is manifest in other spheres where, interestingly, the term ‘piracy’ has again been brought into the language. Another manifestation of this is so-called ‘movie piracy’ or ‘music piracy’. Majid Yar’s essay ‘The Global “Epidemic” of Movie “Piracy”: Crime-wave or Social Construction?’ offers a telling perspective on a transnational crime unique to the ‘information age’. With movie and music ‘piracy’, publically funded law enforcement agencies around the world have been drafted into policing a new kind of private property. Yar asks if this ‘epidemic’ of crime is a ‘crime wave’ or if it is ‘socially constructed’ as such. He observes that ‘globalization, socio-economic “development” and innovation in information technology help to establish the conditions for expanded production and consumption of “pirate” audio-visual goods’, but the ‘epidemic’ is the ‘product of shifting legal regimes, lobbying activities, rhetorical maneuvers, criminal justice agendas, and “interested” or “partial” processes of statistical inference’.

It is not an accident that the term ‘piracy’ has been attached to these phenomena as they are articulated in popular legalese. Legalese is normally thought of as an obfuscating form of legal writing which, although precise, has the effect of preventing easy comprehension by laypersons. In this instance intellectual property law is given urgency and familiar ease in popular parlance by designating IPT as piracy. The IPT case is made more easily in a climate predisposed to skepticism when dramatic connotations are grafted onto the terminology. Designating the free acquisition of digitally recorded entertainment through systems of user trading ‘piracy’ turns a mundane act into a sensational one. Similarly, turning the ancient practice of seed saving into ‘seed piracy’ allows for the criminalization of relatively powerless farmers and creates an apparatus for policing the interests of transnational agribusiness corporations. These examples show how the designation of forms of transnational crime in legal terms allows for a form of ruling with law. Law is a double-edged sword, however, and the seeds of resistance to the powerful interests encoded in the terms of intellectual property law can be seen in the concept of ‘bio–piracy’ – a quasi-legal term which refers to the harvesting and patenting of natural remedies by the pharmaceutical industry. This too might be...
considered a crime and efforts to suggest that it is further illustrated the contestability of the umbrella notion of ‘transnational crimes’.  

Sea piracy offers another example of how the designation of transnational crime in the terms of legal discourse is essentially contestable. In 2008 and 2009 a crime panic emerged in the western media about the activities of Somali ‘pirates’ off the Aden peninsula on the east coast of Africa. Coastal fishermen whose livelihoods were disappearing quickly due to commercial exploitation by factory fishing vessels flying foreign flags sought redress. They did so by attempting to ‘tax’ oil tankers sailing through their waters in what was interpreted by the flag-states of those vessels as piracy and kidnap. In their defense, Somalis pointed to the effects of toxic waste dumping and factory fishing off their shores, effectively arguing that they were extending their sovereignty within the 200-mile offshore limit. In this instance the power of western media to define what was transpiring as ‘sea piracy’ papered over the conflict. This act of labeling unambiguously designated one party as a criminal aggressor and another as victim in a twenty-first-century manifestation of transnational crime discourse. Among other things, this meant that the naval vessels policing the pirates protected not only oil tankers, but also vessels illegally dumping toxic waste and overfishing the waters.

The interdisciplinary study of transnational crime offers many more examples of the essential contestability of its terms. The so-called ‘war on drugs’ is the most historically well-known case. Human organ trafficking is an even more dramatic example. Cyber-crime produces yet another case study. White-collar crime, money laundering and other forms of economic crime also present a rich vein of evidence concerning the essential contestability of


the terms of transnational crime. The advent of ‘green criminology’ and the discovery of ‘crimes against the environment’ is yet another. Human trafficking, human smuggling, sex trafficking and sex tourism are all categories of transnational crime with highly emotive levels of connotative meaning and they too denote issues areas of great complexity and conflict – and the language is, again, made up of abstract analytical categories which are essentially contestable.

These issue areas in transnational criminology, as well as others, present occasions to test the claims to analytical neutrality of our terms which we ignore at great cost. Unfortunately all of the possible issue areas cannot be fully discussed in a short essay. Transnational crime presents an important object for global governance with law. Legal positivism suggests that transnational crime consists simply in those phenomena defined in law as such. The interdisciplinary criminological perspective adopted here has served to highlight the essential contestability of the ‘transnational crime’ concept and all others with which it shares a family resemblance. As stated at the outset of this chapter, these terms exist as components in a language game concerning certain phenomena that are in the process of being designated as objects for global governance, and, as has been shown here, that this process is political, conflictual and contested.

Conclusion

Looking at the discourse concerning transnational crime and transnational organized crime from a critical and interdisciplinary perspective has shown why it is that the official language systematized in international legal instruments such as the Palermo Convention is, despite


any superficial appearance of definitional exactitude, essentially contestable. Few observers doubt that there are human activities that are harmful and thereby may be rightly labeled criminal, and that some of these activities may be transnational and/or organized in their manifestation. However, following the now classic proposition established by the labeling theorists — that the category of ‘the criminal’ is that which people so label\(^88\) — defining something as ‘transnational crime’ or ‘transnational organized crime’ is not an altogether neutral and scientific decision. Formal designation as such is seldom a scientific exercise. More probably it comes as part of a policy process in which certain institutional interests are at play, which suggests that the coming into being of ‘transnational crime’ as an object of study has not been a disinterestedly academic matter of purely scientific inquiry. It is the phenomenological tension between realist and social-constructionist points of view which makes the study of transnational crime and its sister concepts so perturbing and ultimately underlies the contestability inherent in the terminology. For some people organized criminality is self-evidently a real problem and any theoretical discussion about the parameters of the term’s meaning is unwelcome. As the analysis pursued here has shown, there are inherent difficulties in operationalizing terms like ‘transnational crime’ and (even worse) ‘transnational organized crime’, and this is especially so when it is done in legal discourse because such designations have practical consequences. Critical theorists point out that abstract concepts are always components in language games in which power relations between players shape outcomes and, therefore, that all observable facts are social and political constructs. The language for talking about ‘transnational crime’ and allied terms is not a neutral medium that conveys ideas independently formed. It is an institutionalized structure of meanings that channels thought and action in certain directions. It is also frequently camouflaged by its co-articulation with other concepts — security, human rights, and other emotive terms bearing moral meanings that bespeak protective action and noble motive. Before legal practitioners accept the central categories that constitute the language of transnational crime, they would do well to critically evaluate those terms. Otherwise the implementation of transnational criminal law in the effort to suppress transnational crime is likely to have paradoxical effects in terms of justice, fairness and so on. But abstract analytical categories like justice and fairness are themselves essentially contested, so perhaps the clearest lesson here is that, when it comes to terms like ‘transnational crime’, legal theory confronts the politics of law in a raw form.