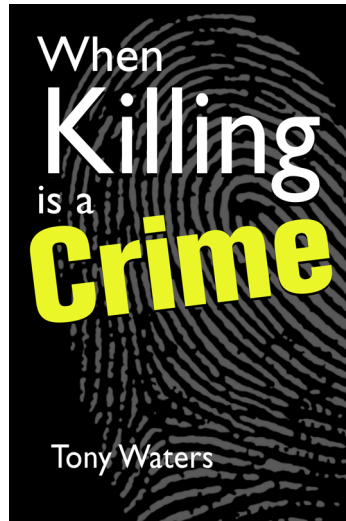


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# When Killing Is a Crime

Tony Waters

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# Introduction

MURDER IS THE MOST HEINOUS OF CRIMES, FOR WHICH SOCIETY reserves the strongest of punishments. Perhaps because of this strong reaction, most people think that they can recognize a murder when they see it. Indeed, within their own society and in their own time, they usually can. Even so, whether a killing is defined as a murder or not is a process specific to time and place. The process of defining a particular killing as murder involves not only a victim and a perpetrator, but also a social context established by others. In other words, murder is always a social act that involves not only killing, but also judgment and evaluation by society at large. Thus, if the phenomenon of murder is to be understood sociologically, analysis must venture beyond the finding of guilt or responsibility in a particular case. A deeper understanding of how society separates general killing from criminal killing needs to be developed. This sorting out of legitimate killing from illegitimate killing occurs in a process known as *criminalization*.

The subject of killing and murder seems familiar; most people have witnessed thousands of killings via film, television, newspapers, and literature. By applying social theories to their understanding of what does or does not constitute murder, undergraduates can learn to use these theories to explore the nature of crime. More broadly, the skill students will gain in applying the sociological perspective can in turn be applied to a range of intuitively familiar phenomena in the study of deviance, social problems, and other subfields of sociology.

## **How This Book Came to Be**

Each society has a process through which killings are described as legal justifiable homicide, illegal unjustified homicide (i.e., murder), or just plain

killing. The process varies not only with a technical or legal capacity to assign blame but also with the capacity of a particular society to respond in a manner it defines as decisive and appropriate. This *response* to killing is the process through which a particular killing is identified as a murder, and not as an accident, self-defense, act of war, or execution. When viewed through a sociological lens, this response to killing offers a window into how a society perceives broader issues of social status, fault and innocence, the nature of blame, and agency.

### *Murder and the Sociological Imagination*

In sociology, it is clear that crime (and all other social phenomena) is a “social construction.” This means that acts are “constructed” as crimes only when there is a consensus that the acts are wrong and that the broader society has the right and responsibility to respond. Without the context of such a judgment, a violent killing is just that—a killing. As a sociologist, I have taught criminology classes since 1997, and I have consistently focused on the importance of *social context* in crime. Both crime and criminals are defined as such only when the broader society judges them to be so. Crime is different from what is often presented in the popular media, wherein a particular individual is thought to have a psychological predisposition to crime, or a particular act is defined as clearly illegal.

Indeed, there is a wealth of data indicating that most acts that are criminal are never identified with a particular person. This fact becomes intuitively obvious to students when I point out that they themselves may have committed many illegal acts of drug use, theft, assault, and so on, for which they were never punished. Because they were never connected with their crimes, they can present themselves in class as “students” rather than “criminals.” Indeed, on the anonymous self-report surveys I administer in my classes, typically about 90 percent of students admit to committing an act that in a literal positivistic (and legal) sense is criminal. On a gut level, students understand that the main difference between themselves and someone who commits the same crime (but is caught) is that the ill-fated person has been somehow “criminalized,” while (to their own relief) they have not.

Nevertheless, murder is still an extreme crime that engenders a special horror. While many students can imagine being a petty thief, a drug dealer, a brawler, or a computer hacker, they assume that murder is inherently “criminal” and therefore different from more mundane criminal acts. Murder is not different, though. Similar rules apply to the criminalization of murder as to the criminalization of marijuana use, petty thefts, assaults, drug sales, robberies, burglaries, or drunk driving. I have found over the years that the best way to help students understand the social context of all

criminalization is to focus on the unexamined “taken for granted” that individuals have about the crime of murder. These include the presence of states, legislatures, police forces, prosecutors, and court systems that spend a great deal of time deciding which acts are worthy of a response and which are not.

### *The Criminalization of Killing*

There are two advantages to using killing to explain processes of criminalization. The first has to do with the inherent interest of murder in all societies and times. Murder figures more prominently in novels, film, and television than, say, drug use, domestic battery, influence peddling, shoplifting, or check fraud—no doubt due to the irrevocable consequences for the victim.

The second advantage (and my reason for writing this book) is that this focus on murder provides a meaningful alternative to traditional criminology texts and their explanations of crime and criminalization. Over the past thirty to forty years, the US federal government has invested billions of dollars to evaluate techniques for preventing crime, reforming neighborhoods, and rehabilitating criminals. Much of this money was well spent, and some programs have prevented violent and criminal acts that otherwise would have occurred. But such research, which sees crime as a problem to be solved, inevitably assumes that there is a specific and identifiable criminal population that can be treated, and a set of discrete acts that can be prevented.

Consequently, the standard criminology text moves crime a step away from important questions about when, how, and why laws are created to define illegal acts. Typically, such books assume a “psycho-legal” approach to crime, as does the popular culture.<sup>1</sup> The psycho-legal approach focuses on the individual thoughts of people who commit crime, which is particularly interesting in a society that emphasizes individual intent when assigning legal culpability. But it also pushes aside questions about how patterns of enforcement develop, perhaps because many of these texts spring from a police subculture that assumes certain people are by nature “criminal” while the rest of us are not, and the process of criminalization gets overlooked (or at best reduced to a sidebar or subchapter).

My interest in the process of criminalization, combined with the dearth of relevant undergraduate texts, led me to develop my own teaching materials about killing. This book is a summary of the arguments I have used to describe criminalization in my classes, and reverses the traditional order found in most criminology textbooks. I do not start with a description of the criminal as a special case, but instead focus on the nature of one crime: murder. Murder is conceptualized as an *action* and a *reaction*. Both the act

and the reaction to murder are defined in the context of other related actions, both criminal and noncriminal.

Nevertheless, I do agree that conventional statistics about murder and violence are important, particularly in defining specific issues, teaching about killing and killers, and offering insight into how the influential people who collect statistics think about killing. But these statistics are not central to the study of the criminalization of killing; therefore, statistical tables and graphs are mainly found at the end of this book (see Appendix 1). Murder must be understood as a social phenomenon and a social construction. It is not simply a statistical fact generated by government bureaucracies.

### Organization of the Book

Chapter 1 establishes the theoretical basis for the study of murder and delineates between the act itself and the reaction of a broader society. In order to focus sociological thinking, this chapter explores how certain acts become defined as murder while others are defined as violent death—by assessing killing and murder from three different perspectives:

1. *Third-party theories*, or the process by which a society comes to define particular types of killing as criminal, and other types as not.
2. *Social ecology theories*, which describe how most murder is an unintended consequence of interpersonal conflict or combat gone awry.
3. *Durkheimian labeling theories*, or the argument that social reactions to killing occur in a manner that reaffirms the integrity, mores, and continuing existence of a society.

Chapter 2 explores the ways in which different societies define killing as justifiable or not, and how they seek to control illegitimate killing. This chapter discusses the nature of killing in stateless societies that do not have a legitimated and all-powerful third party to make judgments of guilt, fault, and compensation—and it describes the tendency toward violent feuding in such societies as victims seek righteous justice through revenge attacks. Such feuding happens in a wide range of circumstances, including among the hunting and gathering Ju/'Hoansi of Namibia; the upper-class planters in the pre-Civil War US South; the forest-dwelling Ache tribe of Paraguay; the modern-day mountain-dwelling Albanians; and the street gangs of some modern US inner cities. The chapter also explores what the comparison between such stateless societies and modern states tells us about the rule of law in the control of killing and the definition of murder.

Three case studies illustrate how feuds and revenge killings escalate in the absence of a powerful third party: Albanian feuding and blood revenge; the killing of Ken McElroy on the streets of Skidmore, Missouri, in 1981; and a story about death and witchcraft from Cameroon.

Chapter 3 examines the fact that killing is not typically the result of careful complex planning but is rather one consequence (and a rare one at that) of interpersonal violence. This chapter introduces social ecology theorists who point out that, in the modern United States, most murders occur in the context of an argument or fight. The fatal event is often the result of a conflict in which one or both protagonists engaged many times before, the difference being that in the final instance, the victim ends up dead instead of only scared or hurt. Social ecology theorists assert that the only difference between an assault and a murder may be the trajectory of a fist or the availability (or accuracy) of a gun, knife, or even a blunt object. The perpetrator's intent to hurt or maim the victim is the same. Ecological theorists point out that the difference between murder and assault can even reflect conditions outside the immediate control of the perpetrator. For example, the speed of an ambulance or the willingness of a witness to intervene can mean the difference between an assault and a murder.

Three case studies are included in Chapter 3: how murders escalated in a neighborhood near the US Capitol in the 1990s, a story of death and justice on the rural California frontier in the late 1880s, and a murder among Sacramento's small Mien community in 1991.

Chapter 4 explores the range of responses societies have to acts they define as murder. Not all killing is deemed equal. For example, in the United States the intent and context of the person holding the knife or gun matter a great deal. So do the social status of victims and perpetrator. Indeed, contemporary court trials focus a great deal on "looking into the head" of defendants and parsing issues like intent and malice to determine appropriate sentences. The punishment for first-degree murder (killing with forethought and malice), second-degree murder (killing without forethought but with malice), and manslaughter (killing without forethought or malice) varies, irrespective of the fact that the victim suffered the same consequence: death.

The world's societies have developed a wide range of official and unofficial responses to killing, such as ignoring the death, labeling the death accidental, celebrating the death, gossiping about the death and perpetrator, sentencing an accused perpetrator to prison, torturing the perpetrator, or executing the perpetrator. These responses reflect, among other things, status distinctions of the murderer and victim, imputed motives, and the capacity of a society to punish perceived wrongs. The common thread in these responses, though, is a need to reassert a moral order that has been damaged by the killing. Likewise, the response is administered in a manner that

ensures that the victim's kin will not seek retribution on their own, for this would lead to a potential escalation of unsanctioned violence.

Three case studies are included in Chapter 4: a description of a vigilante killing in western Tanzania in the 1990s, the story of a rural Chinese settlement in which ten people were killed in 1928, and discussion of attempts by an Indiana prosecutor to try the Ford Motor Company for manufacturing a defective vehicle that led to the death of three girls in a fiery automobile accident.

Chapter 5 examines how states themselves are involved in killing, and the prospects for the long-term control of state-sanctioned violence in different countries, as well as attempts to control genocide and war crimes by the international community. States are among the most prolific killers; this reflects the fact that assertions of state power are necessary factors in the establishment of social order. The elites holding power in a state often use killing to maintain their political authority and use the lethal power of the state to do so. The range of killing undertaken by states includes execution, war, massacres, and genocide. Such killings occur in a unique context in which killing may become bureaucratized. Salient sociological issues include the nature of nationalism, the capacity of the state to legitimate killing, and the creation of command killers.

Three case studies illustrate the range of state-sanctioned killing. The first is the Rwanda genocide of 1994, in which 500,000 to 800,000 people were killed during a span of three months. The second focuses on the 5 to 8 million deaths in the Congo Free State from 1890 to 1910 that occurred as part of the industrial policy of Belgium's King Leopold II. The third case describes the famous Milgram obedience experiments, wherein normal people obeyed orders to torture and even kill fellow citizens.

Chapter 6 points out that while private violence has decreased substantially during the past 500 years, there is an increasing risk of state-sponsored lethal violence as states become more powerful. Sociological theory is effective for highlighting this trend in ways often missed by the legal and psychological theories used by modern law enforcement. The surprising conclusion from this analysis means that future long-term attempts to restrain violence significantly will focus on how to restrain states from using violence to subdue potential opponents.

My assessment of how killing becomes criminalized is primarily qualitative. However, the conclusions I draw depend on a wide range of studies using statistical techniques. Thus, many of the tables on which the arguments in this book are based are included in Appendix 1. A second appendix presents legal definitions of murder and homicide, including definitions of the legal codes of California and Texas. These codes provide a window into the values of a particular society, including issues of how its members evaluate life, childhood, sexuality, crime, deviance, abortion, and other issues.



Together, these six chapters and two appendixes introduce students of criminology to the nature of criminalization. By focusing on the criminalization of killing from a sociological perspective, it is hoped that students will begin seeing crime not only as an individual act but as one best understood in a social context. In the process, students will become discerning consumers both of scientific data from the criminal justice system and of popular entertainment. This is important because, as will be clear by the end of the book, both scientific and popular views continue to shape public policies about deviance, law development and enforcement, and social control.

### **Note**

1. Indeed, Cooney (1997a:153–154) questions whether “crime,” embedded as it is in culture, is even useful as a theoretical concept.