

Michigan Law Review

Volume 104 | Issue 6

2006

Facing Evil

Joseph E. Kennedy

University of North Carolina School of Law

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Criminal Law Commons](#), [Law and Society Commons](#), [Law Enforcement and Corrections Commons](#), and the [Legal History Commons](#)

Recommended Citation

Joseph E. Kennedy, *Facing Evil*, 104 MICH. L. REV. 1287 (2006).

Available at: <https://repository.law.umich.edu/mlr/vol104/iss6/3>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

FACING EVIL

*Joseph E. Kennedy**

HIGH-PROFILE CRIMES: WHEN LEGAL CASES BECOME SOCIAL CAUSES. By *Lynn S. Chancer*. Chicago and London: The University of Chicago Press. 2005. Pp. xv, 314. \$38.

NATURAL BORN CELEBRITIES: SERIAL KILLERS IN AMERICAN CULTURE. By *David Schmid*. Chicago and London: The University of Chicago Press. 2005. Pp. viii, 327. \$29.

It is no earthshaking news that the American public has become fascinated—some would say obsessed—with crime over the last few decades. Moreover, this fascination has translated into a potent political force that has remade the world of criminal justice. Up through the middle of the 1960s crime was not something about which politicians had much to say. What was there to say? “Crime is bad.” “We do what we can about crime.” “Crime will always be with us at one level or another.” Only a hermit could have missed the transformation of crime over the last couple of decades from a non-issue to a “hot button” that politicians from both parties have learned to push with the frenetic energy of video game players competing for the highest score. If the mantra of “tough on crime” has faded into the background of political discourse a bit since the 1980s and 1990s, it is only because the “tough on crime” philosophy has achieved the status of dogma—that which almost no politician would take issue with. How and why the American public became so fascinated with crime and so supportive of punitive policies remains something of a puzzle.¹

Perhaps punishment has increasingly become a communicative realm in which society wrestles with intractable issues of social identity, sometimes in a less-than-fully-conscious way. Seeing punishment as dramaturgy, as a drama that serves a morally instructive role, is nothing new, of course, but the idea here is that the dramaturgical dimension of punishment has grown in importance over the last few decades. The public attends to stories of crime and punishment as never before because they satisfy a felt need for

* Associate Professor of Law and Associate Dean for Academic Affairs, University of North Carolina School of Law. B.A. 1982, Stanford; J.D. 1987, University of California at Los Angeles. The author would like to thank Eric Muller and Hiroshi Motomura for thoughtful comments on this essay.

1. Even so, there has been no shortage of thoughtful attempts to fill in some of the missing pieces. See, e.g., KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* (1997); DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001); MICHAEL TONRY, *THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE* (2004); Jonathan Simon & Malcolm M. Feeley, *True Crime: The New Penology and Public Discourse on Crime*, in *PUNISHMENT AND SOCIAL CONTROL* 147 (Thomas G. Blomberg & Stanley Cohen eds., 1995).

morally instructive stories. Punishment has become, more than anything else, an ongoing national morality play.

Within the last year, the University of Chicago Press published two books that explore different dimensions of the public's current fascination with crime and punishment. *Natural Born Celebrities* explores the growing celebrity status of serial killers in American society since the nineteenth century. Exploring the treatment of serial murder in film, TV, books, and print media, the book ranges from the treatment of serial murder in nineteenth century true-crime pamphlets to contemporary websites devoted to Ted Bundy, Jeffrey Dahmer, and the like. The second book, *High Profile Crimes*, explores the public attention given to a series of cases that enjoyed sustained media treatment during the 1990s: the O.J. murder case, the Rodney King and Reginald Denny assault cases in Los Angeles, the Mike Tyson and William Kennedy Smith rape trials, the racially motivated slayings of African Americans in the Bensonhurst and Howard Beach cases, and the Central Park jogger case. Each of these books helps us better understand the dramaturgical dimension of contemporary punishment.

Exploring the roots of the public's interest in serial killers provides a case study of a long recognized but not sufficiently understood dimension of punishment: the way in which the public projects its fears about the health of society onto certain archetypal criminal offenders.² In *Natural Born Celebrities*, David Schmid³ argues that the public's fascination with serial killers is best understood as an attempt to work through fears that serial killers are products of some aspect of social change. That attempt involves a balance of sorts between indulgence of fears that serial killers are in some way representative of society and reassurance that they are ultimately uniquely monstrous.

Lynn Chancer's *High Profile Crimes*⁴ reveals how we "talk our politics" through punishment. Specifically, the book explores the ways in which celebrated cases become cultural and political battlegrounds involving various social causes. At the heart of this exploration are issues of race and gender. The enormous emotional energy that such causes mobilize gets channeled into the legal system's either/or, guilty or innocent, winner-take-all framework. Such one-sided resolutions always prove unsatisfying and leave one side—and sometimes both—looking for the next case to mobilize around. Ultimately, Chancer suggests that in "cause-ifying" our cases and in "case-ifying" our causes, we have done damage to both the resolution of the particular case and the progress of social causes.

After discussing each work in turn, I will briefly argue that all of the phenomena described depend upon a common feature of our cultural landscape: an abiding concern with moral relativism. We fear that we have lost

2. JOEL BEST, *RANDOM VIOLENCE: HOW WE TALK ABOUT NEW CRIMES AND NEW VICTIMS* (1999); Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 *HASTINGS L.J.* 829 (2000).

3. Associate Professor of English at the State University of New York at Buffalo.

4. Associate Professor of Sociology and Anthropology at Fordham University.

the capacity to recognize, confront, and “face” evil. It is in response to this fear that the ongoing national morality play of monstrous offenders meeting harsh punishment has been staged.⁵ The public’s fascination with serial killers and with certain types of high profile cases illuminates important, although different, dimensions of this response.

I. THE CELEBRITY OF THE SERIAL KILLER IN AMERICAN CULTURE

One might be tempted to dismiss interest in serial killers as simply a morbid obsession with the grotesque. This interest ranges in its forms from the concentrated obsession of some who bid for serial killer memorabilia on websites purveying hair and other artifacts of notorious serial murderers, to the more general interest in fictional and factual accounts of serial killers in movie and book form. From Truman Capote’s critically acclaimed account of murder on the Great Plains, *In Cold Blood* (1965), to Ann Rule’s best-selling account of Ted Bundy’s crimes, *The Stranger Beside Me* (1980), to Hannibal Lecter’s popularity in the movie and book forms of *The Silence of the Lambs*⁶ along with its various prequels and sequels, interest in serial killers is undeniably wide-ranging and enduring. The strength of David Schmid’s exploration of the public attention given to serial killers is that it moves past simple explanations of morbid curiosity into a more penetrating inquiry about the nature of the public’s interest.

There has long been a somewhat standard account of why we are fascinated with certain types of criminals generally. Our fascination with criminals reflects contradictory impulses. We are simultaneously repelled by the deviance of their crimes, but we also experience a vicarious thrill at the freedom from social constraint that they experience.

Serial killers, to be sure, push the limits of such a theory. It is one thing to feel a sneaking sense of admiration for a Tony Soprano figure who combines charm and other attractive human qualities with a readiness to kill the people who get in his way, but in exactly what sense of the word can any normal person be “thrilled” by Ted Bundy’s ritual slaughter of numerous women? Yet Ted Bundy has had numerous books, websites, movies, and documentaries devoted to his exploits, and the next serial killer du jour will probably enjoy the same.

Schmid transcends the standard story about vicarious escape from social constraint by situating his account of the public’s interest in serial killers in a larger story about the evolution of celebrity in our society. He defines celebrity as being primarily about visibility and distinguishes it from fame, which he considers to be based in some way on merit. “[T]oday the famous are the visible, rather than the talented” (Schmid, p. 9). In support of this point, Schmid discusses a study that noted a striking change in the biographies appearing in popular magazines between 1901 and 1941. The earlier

5. See Kennedy, *supra* note 2.

6. THOMAS HARRIS, *THE SILENCE OF THE LAMBS* (1988); *THE SILENCE OF THE LAMBS* (MGM 1991).

biographies were all about “idols of production,” heroes from “the productive life, from industry, business and natural sciences.”⁷ Biographies during this period included no sports figures, and the few entertainers included were presented as “serious artists.” Almost all of the biographies from 1941, in contrast, were of “idols of consumption,” people related to spheres of leisure activity such as entertainment or sports (Schmid, p. 20). Schmid argues that this change in the objects of public attention opened up a space for the criminal celebrity. “Once fame is characterized *primarily* by visibility rather than achievement, however, it no longer makes sense to distinguish between good and bad forms of fame” (Schmid, p. 9).

Schmid is not saying that notions of merit or morality became entirely irrelevant to celebrity. Rather, Schmid argues that there was an acute need for both positive and negative role models for the millions of people who migrated from rural areas to the cities during this time. The public used celebrities to work through complicated and contradictory moral impulses during this period of transition. Celebrities, such as movie actors, channeled both negative and positive emotions. The same could certainly be said of certain types of “heroic criminals,” who alternately could be seen as either deviant or expressing widely shared rebellious feelings against authority.

It is an interesting point. Around the turn of the century, as millions of Americans embraced new ways of life, normative standards were undoubtedly in flux. Was a robber baron who amassed wealth through monopoly power a criminal or a super successful participant in the new economy? Was a hard-drinking silent-film star who pushed the boundaries of acceptable sexual behavior a deviant or someone who had freed himself from the oppressive mores of rural, churchgoing America? Closer to the point, was a stylish gangster who provided alcohol to the masses during Prohibition really a criminal or simply a different type of entrepreneur?

The moral ambivalence of celebrity status may have served a necessary function. As entire communities of newly arrived urban migrants were trying to figure out their own identities in a new social environment, it was convenient to be able to alternately admire and despise those whose success had made them visible enough to be common objects of discussion. What do you think of that Charlie Chaplin or that Al Capone? Your answer could change from day-to-day as you negotiated your own identity, as you figured out what set of social norms you were willing to abide by.

Villains and rogues have always been the subjects of ballads, legends, and other forms of public attention, but with the birth of the “celebrity,” a larger space in the public’s attention may have opened up for notorious criminals. It simply became more acceptable to be fascinated with people who were not exactly society’s most “productive” members.

Schmid acknowledges that “serial killers are not celebrated in the same way as heroic criminals such as Jesse James and Bonnie and Clyde” because we cannot empathize with them or their motives (Schmid, p. 19). So how

7. Schmid, p. 20 (quoting LEO LOWENTHAL, *The Triumph of Mass Idols, in LITERATURE, POPULAR CULTURE, AND SOCIETY* 109, 112–13 (1961)).

could we identify with someone who chops up numerous victims and buries them in his or her basement? Schmid answers this very question directly through his discussion of H.H. Holmes, the serial killer of the Chicago World's Fair.⁸

Arrested in 1894, Holmes was perhaps the first widely reported serial killer in the United States. His case attracted intense interest by the media and the public. In Schmid's view, Holmes raised profound questions of identity for many Americans—his horrible crimes notwithstanding—and these questions formed a big part of the public's interest. "Holmes's fame forced Americans to debate whether a murderer was an archetypal or aberrational American in a way they had not done before" (Schmid, p. 49).

Public fascination with the case began with discoveries made after a search of Holmes's "Murder Castle."

Designed to be a combination home, business venture, and lodging house, the building, when police began investigating it in July 1895, was found to be a concentrated example of every gothic cliché imaginable, with concealed closets, secret staircases, sealed rooms, corridors that led nowhere, and a basement filled with dissecting equipment, acid baths, and what appeared to be torture devices. Despite intensive investigation . . . it proved impossible to determine how many people had met their deaths in it or precisely how they had died. (Schmid, pp. 53–54)

While most thought Holmes clearly mad, others argued that his crimes were products of greed. Almost all of Holmes's victims were either people on whom he had taken out insurance policies or people who had threatened to tell the police about various moneymaking swindles in which Holmes was involved (Schmid, p. 55). Furthermore, on at least two occasions he even sold the skeletons of his victims to medical schools (Schmid, p. 55).

While Holmes was clearly deviant and aberrational, the economic dimension of his crime tapped into an ongoing identity crisis about the nature of economic activity in the new urban economy, in Schmid's view. Schmid aptly points out that the Holmes case gave a new and uncomfortable meaning to the phrase "making a killing" (Schmid, p. 54). If one views Holmes as a "wholly amoral businessman rather than a death-obsessed psychopath,"⁹ then he becomes "the nightmarish, perhaps inevitable, literalization of an economic culture that increasingly viewed people as one more kind of raw material," with the differences between him and the captains of industry "one of degree rather than kind" (Schmid, p. 55). This identity crisis was rooted in the fuzziness of the distinction between the positive archetype of the self-made man and the negative archetype of the confidence man.

Over time, anxieties about how young men could do business in the "world of strangers" that constituted the modern American city without resorting

8. Holmes was recently brought to public attention in Erik Larson's bestselling book. ERIK LARSON, *THE DEVIL IN THE WHITE CITY* (2004).

9. Schmid, p. 56 (quoting William T. Brannon, *The Anatomical Practice of Dr. H. H. Holmes*, in *THE QUALITY OF MURDER: THREE HUNDRED YEARS OF TRUE CRIME COMPILED BY MEMBERS OF THE MYSTERY WRITERS OF AMERICA* 66, 71–72 (Anthony Boucher ed., 1962)).

to hypocrisy dovetailed with concerns about how “self-making” was being defined in increasingly financial and morally relativistic terms. What united both kinds of anxiety was the usually unspoken perception that, like it or not, hypocrisy worked in modern America. In other words, unscrupulous business practices tended to be the most profitable, and, inevitably, profitability took precedence over scruples. (Schmid, p. 64)

It was not that the American public approved of outright deceit in business dealings. It was that “late-nineteenth-century Americans recognized that he [Holmes] was motivated by desires they all shared to some extent” and that there was “growing acceptance of the idea that the young American on the make had to become a kind of confidence man himself in order to succeed.”¹⁰

The more comforting view of Holmes was that he was not simply greedy but simply mad. “Thinking of Holmes as a perverted monster places him safely outside the bounds of normality, reinforcing both our own sense of ordinariness and the ordinariness of the community, making that community a much safer and more desirable place to live” (Schmid, p. 55). While monsters may provoke potentially destabilizing fear, “ultimately that fear acts as a force for social cohesion” (Schmid, p. 55).

These alternate visions of Holmes as greedy or insane mirror two different views of serial killers more generally. Under one view, the serial killer is simply an aberration whose existence tells us nothing about the society that produced him. Under the alternative view, the serial killer is in some sense a product of his society. His criminality was created or formed by some aspect of how we all live together.

Schmid places these alternate visions of the serial killer within the larger context of true-crime narratives generally. In reviewing the literature on true-crime narratives from the Puritan era to the present, Schmid notes a “preoccupation with the representativeness of the criminal; that is, whether the criminal is more appropriately placed inside or outside of the community” (Schmid, p. 177). The Puritan doctrine of original sin and its emphasis on the innate depravity of man “undercut any notion of the murderer’s moral peculiarity.”¹¹ The Puritans instead used execution sermons to emphasize the sinfulness of all (Schmid, pp. 179–80). During the eighteenth century, however, criminal narratives became more secular. As enlightenment notions of man’s innate rationality and goodness replaced the doctrine of original sin in the public mind, true-crime narratives came to emphasize the monstrosity of offenders (Schmid, p. 181). Although crimes occasionally were described as “exemplifying current social and cultural trends,” more typically they were described in terms of gothic horror (Schmid, p. 183). This was particularly evident in the nineteenth century “penny dreadful” press. “In each case the relevant pamphlet stressed the manner in which the criminal was over-

10. Schmid, pp. 64–65 (quoting KAREN HALTTUNEN, *CONFIDENCE MEN AND PAINTED WOMEN: A STUDY OF MIDDLE-CLASS CULTURE IN AMERICA, 1830–1870*, at 205 (1982)).

11. Schmid, p. 179 (quoting KAREN HALTTUNEN, *MURDER MOST FOUL: THE KILLER AND THE AMERICAN GOTHIC IMAGINATION* 14 (1998)).

whelmed by rage; the pamphlet cast him as berserk, violent, evil—in a word, as a fiend.”¹² Schmid points out that the “fiend” of the nineteenth century “yellow” press is the direct antecedent of the serial killer of today’s true-crime narratives, a monstrous outsider “soothingly different from the genre’s implicitly normal readers” (Schmid, p. 196).

Society’s tendencies to brand offenders as aberrational monsters are a staple of punishment theory. Punishment as scapegoating—the process of resolving one’s anxieties about one’s own society by constructing the offender as a monstrous other—is nothing new. Schmid, however, adds a novel twist in his account. He argues that our abiding interest in serial killers comes from a tension between their normality and monstrosity (Schmid, pp. 200–05). There is an official narrative about the monstrosity of serial killers and also a “hidden, disavowed narrative,” and the public attends with interest to the stories of serial killers in order to see how this “unstable combination” of narratives is managed. In Schmid’s view of the evolution of the true-crime narrative generally, “monstrosity did not simply replace the concept of representativeness” (Schmid, p. 182). Each “coexisted in an ambivalent, dialectical relationship that became the defining feature of true-crime narratives from the early nineteenth century onward” (Schmid, p. 182).

More specifically, Schmid notes that the hunger to emphasize monstrosity was nourished by fears of representativeness. “[I]t is precisely the intuition that the criminal indeed represents his/her community that requires the attribution of monstrosity to stabilize the uncomfortable blurring of normal and abnormal that fascination with the criminal inspires” (Schmid, p. 182).

This dialectical relationship between representativeness and monstrosity is evident in many of the contemporary serial killer narratives that Schmid discusses. First, the outward “normality” of the killer is emphasized. Ted Bundy, for example, was a “successful, ambitious, handsome, white, straight, Republican, male” who was a respectful child and a college honor student (Schmid, p. 212). He had once rescued a child from drowning and on another occasion had chased down and captured a purse-snatcher (Schmid, p. 212). Then, the seeds of the killer’s innate monstrosity are found in childhood events that might be strange but not necessarily evidence of a homicidal disposition. An aunt recalls a three-year-old Bundy playing with knives in the middle of the night; Jeffrey Dahmer’s father recalls him being fascinated with fish guts when they went fishing (Schmid, p. 206). In each case, these childhood signs are there to offset the seeming normality of the serial killer’s adult life.

Ultimately, Schmid seems to believe that this tension between the outer normalcy and inner monstrosity of the serial killer is what fascinates the public. The public enjoys being frightened by the “just like us” quality of the serial killer because it is understood that the otherness and monstrosity

12. Schmid, p. 181 (quoting DAVID RAY PAPKE, *FRAMING THE CRIMINAL: CRIME, CULTURAL WORK, AND THE LOSS OF CRITICAL PERSPECTIVE, 1830–1900*, at 28 (1987)).

of the serial killer will ultimately be affirmed. Understood this way, the telling of the serial killer's tale takes on the significance of an obsessive ritual that the public repeats over and over again, a ritual in which self-doubt is entertained only so that it can be assuaged. Like the obsessive compulsive who washes his hands over and over again, the public just never gets tired of washing its collective hands of the serial killer.

Interestingly, the representativeness story is carefully managed so as not to be too threatening. Schmid considers arguments that the straightness, whiteness, and maleness of most serial killers are "representative" in a way that goes beyond mere demography. The vast majority of serial killers are middle class, straight, white men, and the vast majority of their victims are women. Might the sociopathology of serial killers be simply a hyper-exaggerated manifestation of their gender, race, and sexual orientation? Schmid explores this provocative question in a chapter aptly titled "The Unbearable Straightness of Violence" (Schmid, p. 209). He quotes Gloria Steinem on this point to good effect:

[T]hese "senseless" killings begin to seem less mysterious when you consider that they were committed disproportionately by white, non-poor males, the group most likely to become hooked on the drug of superiority. It's a drug pushed by a male-dominant culture that presents dominance as a natural right; a racist hierarchy that falsely elevates whiteness . . . and a homophobic one that empowers only one form of sexuality.¹³

Schmid's overall point here is that the gender, heterosexuality, and race of straight white men "goes without saying" in most true-crime media and literature. Being straight and white and male is simply not a topic of interest because being straight and white and male is simply "normal." Schmid tries to break through this sense of normalcy with a thought experiment he borrows from a study of the relationship between masculinity and violence overall:

Imagine the reaction if close to 90 per cent of all violent crimes were committed by women! If tabloid headlines carried stories, with some regularity, of man-hating women leaving behind them cross-country trails of murdered men's bodies; of ex-wives, driven by fits of jealousy, killing their former husbands and their children; of groups of women killing each other in rival gang fights. Imagine the scorn that would be heaped on women for killing *each other* off at such high rates! How quickly such behavior would be perceived as an aberration, a deviation from the norm of male behavior, a "women's problem" to be dealt with urgently!¹⁴

This point deserves attention. We live in a society in which violence by men against women is far from uncommon and violence by men generally is very common. To see the violence of serial killers against women as an ex-

13. Schmid, p. 210 (quoting Gloria Steinem, *Supremacy Crimes*, Ms. MAGAZINE ONLINE, Aug. 1, 1999, <http://www.afsc.org/pqork/0106/010618.htm>).

14. Schmid, p. 237 (quoting MYRIAM MIEDZIAN, *BOYS WILL BE BOYS: BREAKING THE LINK BETWEEN MASCULINITY AND VIOLENCE* 11-12 (1991)).

treme manifestation of those larger social currents would make serial killers a “product” of our society in the same sense that some saw the avaricious Holmes as a product of the wide-open capitalism of his time. Yet these straightforward connections are not drawn, perhaps because they are not so easily dismissed. If one equates being white and male and straight not with being law-abiding but with feeling privileged to dominate others, then the idea follows quickly that the pathological violence of serial killers against women is influenced at some level by the privilege that straight white males enjoy. So perhaps the story of white male privilege cannot be told in our ongoing morality tale because it does not lead to an unambiguous rejection of the representativeness of the serial killer. It is a spot that we cannot easily wash out.

For the same reason, the public is not fascinated by the mundane violence against women that occurs every day somewhere in this society. “No one ever became famous by beating his wife to death in an alley.”¹⁵ While domestic violence has achieved greater prominence in the public mind, it does not fascinate the public in the absence of truly lurid details. The crime needs to be monstrous, not mundane, so that it can be easily disavowed. The fact that domestic violence on its own terms is seen as mundane or ordinary is, of course, part of the problem that is being finessed.

There is, however, yet another story one could entertain about serial killers that Schmid does not touch upon. This story emphasizes not privilege or power but the lack thereof. Perhaps serial killing comes not from a powerful person but a powerless one, a person who lacks basic capacities that most people enjoy: the capacity to empathize with others, to enjoy emotional and sexual connection with others. The dissatisfaction one might experience at the inability to experience such connections might be aggravated or given shape by a sense of entitlement that white male privilege creates, but it would not be an extension of that sense of privilege in the straightforward sort of way that Schmid and Steinem seem to envision.

Such a lack of power, whether it is the product of nature or nurture, plays little or no part in popular narratives about serial killers for a reason. As I will argue in the concluding section of this review, such an alternate story about serial killers would not lend itself to the morally instructive purposes which these stories serve in contemporary society. We need powerful—not pathetic—monsters to keep the national morality play of punishment going.

II. SOCIAL COMMUNICATION THROUGH HIGH PROFILE CASES

High Profile Crimes explores the political and cultural dynamics swirling around cases such as the O.J. Simpson murder case, the Rodney King and Reginald Denny assault cases in Los Angeles, the Mike Tyson and William Kennedy Smith rape trials, the racially motivated slayings of African

15. Schmid, p. 23 (quoting ELLIOTT LEYTON, *HUNTING HUMANS: THE RISE OF THE MODERN MULTIPLE MURDERER* 21 (1989)).

Americans in the *Bensonhurst* and *Howard Beach* cases in New York, and the *Central Park jogger* case. Chancer calls these cases “provoking assaults.” A provoking assault, as she defines it, has four characteristics:

First, they are highly profiled incidents of violent crime that become symbolic of perceived social problems in a given time and place, engaging a broad range of participants. Second, as they become symbolic, these incidents frequently merge legal cases and social causes. . . . Third, as cases and causes become enmeshed, provoking assaults generate controversies about whether responsibility for a given crime rests with individuals or social forces, and whether apparent perpetrators were actually victimized, or apparent victims were culpable to some extent. Fourth, because only a single incident is decided by an “either/or” verdict (and then only for one side or the other), dissatisfactions tend to remain even after verdicts are handed down. (Chancer, p. 7)

Essentially, a provoking assault is a high profile case that becomes a cause, and its cause-like nature affects how the case is received by the public.

The most noteworthy aspect of provoking assaults in Chancer’s account is the reduction of complex social issues into a two-sided, either/or, winner-take-all framework. Provoking assaults “are processed by participants through a two-sided mode of argumentation . . . that structures and limits debate around a framework of ‘sides’” (Chancer, p. 7). This process, which Chancer terms “partialization,” flows from the structure of the legal system and from traditional media practices (Chancer, p. 247). Legal cases by their nature result in verdicts that declare one side the winner and one side the loser (Chancer, pp. 9–12). Journalism, too, tends in favor of “the appeal of stories that involve seemingly stark antagonisms between issues and spokespersons” (Chancer, p. 38). Chancer does concede “that while the legal system has good reason to maintain a dualistic framework to adjudicate matters of guilt or innocence, the press has less analogous justification for doing so” (Chancer, p. 262).

In essence, Chancer argues, in provoking assaults, cases become causes and causes become cases. The interesting work of the book is the exploration of the reasons for and the results of this phenomenon.

Chancer argues that these high profile cases became more common in the 1990s for specific social and historical reasons. In particular, she identifies three factors: “(1) rising public concerns about violent crime as a social problem, (2) controversies surrounding issues of ‘identity politics’ concerning gender, sexuality, and race, and (3) a larger-than-ever explosion of inner- and intramedia competition” (Chancer, p. 254). So in the midst of continuing controversy about race, gender, and other social issues, the public grows more concerned about crime just as the media turns more tabloid—a “perfect storm” that created a spate of “crimes of the century” in Chancer’s telling.

A different book might have parsed the links between these three seemingly distinct developments. To what degree was public sensitivity to the historic increase in violent crime during the 1970s a function of the larger insecurities about social stability that were themselves products of changes

in race and gender relations? Was white middle-class America more afraid of crime because blacks were no longer confined to their place and because social values in general seemed more up for grabs in an environment in which family life was being redefined by the changing status of women? Even more interesting perhaps, was the “tabloidization” of the mainstream press during this time just a historical coincidence driven by institutional changes in the corporate structure of Big Media? Or were those institutional changes a response to a new hunger amongst the public for a different type of storytelling, one that disdained a detached expert perspective and demanded instead a passionate involvement in the dramatic events of life, death, and sex?

Chancer’s focus ultimately is less on the whys of provoking assaults than on the hows. She explores in detail how they work. At the center of what she finds is an appreciation for the way in which stories about individual crimes invest rational arguments about social justice with emotional content. Provoking assaults become a “medium of politicized American debate” by “concretizing social issues through single cases that permit emotions to be vented and reasoned arguments to be made” (Chancer, p. 17). “[T]he cases provide an everyday conversational vehicle for debating social issues in a way that marries emotion and logic in lively argumentation” (Chancer, pp. 212–13). And they have the added authority of being “real.”

The first case Chancer discusses in detail nicely illustrates a number of these points. The Central Park jogger case of 1989 involved a brutal rape and assault of a white female who was jogging in Central Park in New York City. She was beaten so badly that she almost died and had no memory of the assault. That night, a group of African American teenagers who had reportedly been harassing park-goers were taken into custody on suspicion of having attacked her as a group. During the course of the evening some of them confessed, although they subsequently recanted their confessions.

Almost all of the media outlets withheld the victim’s name, so the case became known as “the Central Park jogger” case. From the beginning the case enjoyed an enormous amount of media coverage and public attention. The basic elements of the case seemed almost tailor-made to tap into potent social concerns.

[T]he story of the Central Park jogger—a young, successful white woman brutally raped and attacked by a group of minority male teens—provided a narrative framework for debating a wide range of social problems from inner-city crime to racial discrimination, violence against women, and the role of the media itself. (Chancer, p. 60)

At the center of these controversies were questions about the guilt or innocence of the accused. “[E]arly media coverage had constructed stark oppositions between the ‘evil’ of the accused and the ‘goodness’ of the victim” (Chancer, p. 51). Some media accounts depicting the youth as a “wolf pack” were decried by representatives of the African American community as incendiary, as prejudging the guilt of the accused, and as racially based.

The case also became a focal point for white concerns that liberal attitudes concerning crime and race had made New York City a dangerous place to live. These latter sentiments were given their most extreme public expression in a full-page advertisement taken out by Donald Trump. What is most notable about the ad is the way that it exults in a one-sided emotionalism:

What has happened to our City over the past ten years? . . . What has happened to the respect for authority, the fear of retribution by the courts, society and the police for those who break the law, who wantonly trespass on the rights of others? What has happened is the complete breakdown of life as we knew it . . . [R]oving bands of wild criminals roam our neighborhoods. . . . Mayor Koch has stated that hate and rancor should be removed from our hearts. I do not think so. I want to hate these muggers and murderers. They should be forced to suffer and, when they kill, they should be executed for their crimes. . . . Yes, Mayor Koch, I want to hate these murderers and I always will. I am not looking to psychoanalyze or understand them, I am looking to punish them. . . . BRING BACK THE DEATH PENALTY AND BRING BACK OUR POLICE!¹⁶

This exultant emotionalism obviously spoke to issues well beyond this case. It did not matter, for example, that no one was murdered in the Central Park jogger case or that the death penalty was not at issue. "Once the 'Central Park' case was endowed with symbolic significance, different parties looked to the mass media to publicize their larger concerns and to express passionate feelings—from resentment to rage—evoked by the crime and its representation."¹⁷

With respect to race, the shoe was on the other foot in the next case that Chancer describes, the murder of Yusef Hawkins in the Bensonhurst neighborhood of Brooklyn, New York, later that same year. Hawkins, an African American sixteen-year-old went to the predominantly white neighborhood with three African American friends to look at a used car that was for sale. They were attacked without provocation by a group of white teenagers with baseball bats. Hawkins was shot in the chest by one of the whites and killed (Chancer, p. 61). While further facts remain murky, media reports at the time suggested that the white teenagers were lying in wait "for black or Hispanic youths whom they thought were dating a white neighborhood girl."¹⁸

For African Americans, the case was about basic freedoms. A hard working African American youth who did nothing more than walk into a white neighborhood had been murdered. For Bensonhurst residents, however, the case was about community. Some claimed that the white woman in question had threatened her former boyfriend that "'she was going to bring as many

16. Chancer, pp. 48–49 (quoting Donald Trump, Advertisement, N.Y. TIMES, May 1, 1989, at A3).

17. Chancer, pp. 58–59. Chancer notes that years later another man confessed to the rape and assault. Chancer, p. 29.

18. Chancer, p. 65 (quoting Ralph Blumenthal, *Black Youth Is Killed by Whites; Brooklyn Racial Attack*, N.Y. TIMES, Aug. 25, 1989, at A1).

as 30 youths to beat him and his friends.’”¹⁹ “The problem was ‘turf. . . [and] territory;’ by implication, violence would have erupted even if Irish or German teenagers had entered the neighborhood for the purposes of challenging local Bensonhurst youths.”²⁰

The dominant response from Bensonhurst residents, however, seems to have been not to defend the accused but to complain that the entire neighborhood was being branded as racist based on a single incident. Residents complained, in particular, that the case was being referred to simply as “Bensonhurst,” which they felt to be a way of slurring their neighborhood. “[W]idespread in the community was the feeling that high-profile coverage of the ‘Bensonhurst’ case had demeaned people in the neighborhood, and made them feel ‘put down’” (Chancer, p. 95). This “tapped the defensiveness on the parts of many residents about their lack of socioeconomic status and their Italian American ethnicity” (Chancer, p. 95). Complaining of reverse racism, Bensonhurst residents maintained that the media were treating the incident more harshly because the accused were white and so was the neighborhood in which they lived.

Chancer argues that race did influence how Bensonhurst and other provoking assaults are covered by the media but in a far more complicated way than simple charges of racism or reverse racism would suggest. Chancer describes an almost dialectical relationship between succeeding high profile cases. “[O]nce prior cases have been given extraordinary media attention, they in turn influence which future stories are selected for attention” (Chancer, p. 185). These “journalistic precedents” influence journalistic choices in ways that journalists themselves do not appreciate. Most of the journalists Chancer interviewed thought for the most part that interest in each case was the result of “unique features about those cases” (Chancer, p. 185). Chancer makes a convincing case, however, that “rather than selecting a case for its uniqueness, journalists often make cultural associations between past and present events, assessing new developments against the backdrop of cases already established” (Chancer, p. 37).

Chancer terms this process “journalistic relativism.” For example, Chancer suggests that journalists may have selected the Bensonhurst case (in which the victim was black and the accused white) for high profile treatment because they had been criticized for the amount of attention they lavished on the Central Park jogger case—in which the races and roles were reversed (Chancer, p. 76). Those criticisms included complaints about the relatively scanty coverage given to the rape of an African American woman in Central Park a short time before the jogger attack. “Subtly, reporters and editors may have reacted to community criticisms of them in ‘Central Park’ by shifting the sociological contents, if not the forms, of the stories they next reported” (Chancer, p. 75). The Simpson case “also continued a pattern of debating racism, and ‘reverse’ racism though high-profile crime cases of the 1990s” (Chancer, p. 183).

19. Chancer, p. 67 (quoting Blumenthal, *supra* note 18).

20. Chancer, p. 68 (quoting Blumenthal, *supra* note 18).

Ultimately, Chancer concludes that provoking assaults such as the O.J. Simpson case, the Central Park jogger case, and the Bensonhurst case perform a communicative function in our society. "Because provoking assaults are at once legal cases and social causes, they offer a way of "talking politics" (Chancer, p. 213). Cases are selected for attention—by both the media and the public—because they are apt vehicles for the continuation of an ongoing conversation of larger social issues. "These highly profiled crime cases may have risen to prominence, receiving extraordinary coverage, precisely because they engaged passions of a distinctly political kind; the cases provided an opportunity for people more and less involved to debate controversial social issues of the day and place" (Chancer, p. 252).

Chancer vividly illustrates this communicative dimension in describing a confrontation between whites and blacks during a demonstration in Bensonhurst. Quoting from a *New York Times* account, she describes a confrontation in which blacks and whites used past cases as a sort of shorthand for challenging and accusing one another:

The marchers, shouting "Whose streets, Our streets"

The whites chanted, "Central Park, Central Park" The black demonstrators in Bensonhurst chanted back, "Howard Beach, Howard Beach."

Later, the blacks' chants changed to "Yusef, Yusef." Yusef Hawkins is the 16-year-old black youth whose death sparked the protest. The whites yelled back, "We want Tawana, we want Tawana."²¹

Should we "talk our politics" through high profile cases? Chancer sees both sides of this question. "Do high-profile crime cases of the provoking assault variety bode a new and important form of politics . . . ? Or . . . do these cases distract us from underlying problems in the media and the legal system that are structural in character?" (Chancer, p. 251). Ultimately, Chancer concludes that these "provoking assaults are intrinsically ambivalent phenomena that have socially advantageous and disadvantageous aspects at the same time" (Chancer, p. 251).

For the most part, however, Chancer seems to dwell on the dysfunctional aspects of merging cases with causes. She points out that the polarizing effects of these cases pressure people to "take sides" (Chancer, p. 13) and that the complexity and sophistication of our political discourse will potentially be impoverished as a result. (Chancer, p. 215). Chancer illustrates this point with a revealing quote from a respondent discussing the Simpson case. "Do you know what? Sometimes I think that whether or not O.J. is guilty, I can't

21. Chancer, p. 82 (quoting Nick Ravo, *250 Whites Jeer Markers in Brooklyn Youth's Death*, N.Y. TIMES, Aug. 28, 1989, at B3). "Howard Beach" refers to an earlier racially motivated killing of a Jamaican immigrant by a white crowd in a different Brooklyn neighborhood. See Chancer, pp. 35–36. "Tawana" refers to Tawana Brawley, an African American woman who made an elaborate rape accusation against a number of white government officials that was later demonstrated to be a hoax. See Chancer, pp. 36, 244, 286 n.26.

afford for him to be guilty. Where would that leave me given everything else that's happened?" (Chancer, pp. 242–43).

For this (presumably) African American respondent, admitting the guilt of O.J. Simpson would seem to be "letting down his side" in a way that seems unacceptable given the overall state of race justice. Chancer also points out that crossing sides in these controversies can also implicate your relations with other members of your social group. "[M]any people expressed figurative as well as literal fears of what would happen if they failed to partialize, that is failed to take the side they were 'supposed' to" (Chancer, p. 247). "[T]he dualistic structure framing such cases diminishes the likelihood that people will be able to acknowledge what is valid in each side; more likely, they will remain partial to the side they already favor" (Chancer, p. 215).

Chancer also concludes that the attention given high profile cases diverts attention from the larger issues in a way that ultimately lets society "off the hook" (Chancer, p. 257). "[S]ystemic analyses do not usually result from discussion of these cases and the questions of economic, racial, and gendered discrimination, and/or the character of the media, they raise" (Chancer, p. 258). Ultimately, these cases raise complex issues that cannot be resolved in a simple two-sided way. They bite off more than they can chew.

III. THE CATCH-22 OF CONTEMPORARY PUNISHMENT

The two works discussed each explore a different facet of the public's current fascination with crime. That fascination is, however, part of a larger story about the role that the punishment of crime plays in the contemporary public mind. Stories of crime and punishment have always served as morality plays for society at large. The dramaturgical dimension of punishment has grown more powerful during the last few decades. Important changes in the substantive and procedural criminal law have been crafted and enacted in the wake of particularly gripping stories of particular crimes. The Willie Horton case may have helped decide the 1988 presidential election. The death of Polly Klaas in California ushered in a wave of three-strikes legislation. The death of Megan Kanka in New Jersey led to a spate of laws requiring community notification of the release of sex offenders, a type of law that is colloquially referred to as "Megan's Law." More generally, the politics of crime has been dominated by emotional populist appeals to a "common sense" punitiveness that dismisses the larger social context of crime in favor of a relentless focus on the most evocative aspects of the suffering of victims. Such a focus permits politicians supporting punitive measures to simply frame the issue as one of good versus evil.

Fully describing how this populist punitivism came to be is the work of a book, not a review essay. The two works reviewed illuminate an important piece of this larger story, however. Each demonstrates the role that anxieties about moral relativism play in the way the public thinks about crime and

punishment, although that role differs markedly in the two phenomena discussed.

The reason that the public has an endless appetite for the serial killer tale that Schmid describes—a tale in which the public is tantalized by the idea that serial killers are products of some social ill but ultimately reassured that they are simply monstrous aberrations—is that a “seemingly normal” monster brings the public face-to-face with the difficulties of defining evil in an age in which simple accounts of human behavior are no longer convincing.

What was it about Ted Bundy that would allow him to save a drowning child and pursue a purse-snatcher but not feel repelled by the enormous fear and pain he was inflicting on his victims? A deterministic biological explanation would suggest that he might simply be missing some neurological pathway in his brain that the rest of us take for granted. A purely environmental explanation might posit that the baseline capacity of empathy that nurture and culture imbue in the vast majority of people was never inculcated in him. A mixed approach might suggest that he lacked something neurologically but that this deficit was aggravated by the right combination of environmental circumstances. An even more nuanced view might admit some combination of environmental and neurological factors but also maintain that some measure of choice remains. Under this latter view, there may be a number of people in society with brain chemistry like Bundy’s and with similar environmental triggers or deficits, but these people simply choose to empathize with others to a degree that prevents them from inflicting such random violence—a choice that Bundy could have made but did not.

The modern sensibility admits the possibility of each of these views of evil. The essential unknowability of how nature, nurture, and choice combine to produce the acts of any particular individual poses a catch-22 for society. We want people to be good, but we recognize that there are factors that make it easier for some and harder for others to do so. The catch-22 is that one of the environmental factors affecting choice is the determinacy and authority of the law. If our practices of punishment admit that sometimes the evil of an individual’s crime is relative, then it seems logical to expect that more people may commit crimes out of a sense that committing a crime is not fully their fault. Conversely, the more unambiguously we punish, the more likely that people in general will choose the moral path when they are capable of doing so.

In Joseph Heller’s novel, *Catch-22*, only people who were crazy did not have to go into combat, but anyone who did not want to go into combat was by definition not crazy.²² In a similar fashion, the more people recognize that environment influences culpability, the more we must pretend that it does not.

It is this paradox that lies at the heart of the compulsive attention that the public accords serial killers. The serial killer is the perfect means of working through anxieties about the catch-22 of contemporary punishment because we already know the end of the story. There is no doubt in society’s mind

22. See JOSEPH HELLER, *CATCH-22* (1955).

that people who kill people again and again simply for the experience of killing are evil. The ultimate monstrosity of serial killers allows society to safely entertain its fears that our social environment has in some way produced them, a fear that draws its cathartic power from the killers' seeming normality.

Ultimately, however, serial killers are only a freakish side show in the circus of American punishment. The main event is race. Race permeates the white fear of violent crime. African Americans in particular are sources of such fear. It is surely not coincidental that race figures prominently in all but one of the cases that Chancer considers in her study of high profile cases. The dilemma of how to account for environmental conditions in punishment without weakening the authority of the penal law is felt most acutely in American society when the offender is African American, particularly an African American male from the inner city. Conversely, violent crimes against African Americans raise the specter of racial fear converted into hatred.

The public's fascination with the high profile cases that Chancer calls provoking assaults is rooted in a very different fear than the one that powers the celebrity of serial killers. The punishment of a serial killer is a morality play in which consensus is relatively easy to achieve. We know how the story ends. The serial killer is a monster and deserves the harshest punishment. Provoking assaults represent the other end of the spectrum. There is no consensus. The fight played out in the trial and in the media over guilt and innocence is real, but the fight is not just about the individual case. It is more about the causes that have mobilized around the case.

Whereas serial killers involve the fear that we are too caught up in moral relativism to confront obvious evil, the interest in provoking assaults is born of a fear that we are too prejudiced by race or gender to judge evil correctly. The groups rallying around the different sides of these cases accused one another of being racist or sexist. Sometimes the charge was "reverse racism" or "reverse sexism" when the defendants were white or male. Sometimes the charge was simple racism when they were black.

Similarly, the race or gender of the victim played into charges that the crime was not being taken seriously enough.

Two different senses of facing evil are at play here. In the case of serial killers, the fear driving the public's interest is that moral relativism disables us from recognizing and condemning obvious evil. The fear is that we lack the moral will to confront or face evil when we see it clearly—the requisite moral clarity to call a monster a monster. In the racially and sexually charged high profile cases of the 1980s and 1990s, the fear is that we are too blinded by prejudice to even agree on who is evil—that we are condemned by our legacy of race-based or gender-based thinking to put the wrong face on evil.

By obsessing about serial killers and high profile cases in which race and gender are implicated, society works through the difficulties of facing evil in both senses of the phrase. These are not healthy obsessions. Both distort our priorities and divert us from the larger issues that truly ail us.

Perhaps understanding these obsessions more clearly, however, is a first step to letting them go.