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On Andy Warhol's *Electric Chair*

Bennett Capers†

[T]he room conveys a hypnotic stillness. The chair itself is luminous, bathed in a clear wash of light that seems to come from a skylight overhead. The still space is framed right and left by three shadowy black doorways, functioning like ominous sentinels guarding the scene. The horizontal geometry created by the sprinklers, the wall, and the floor is calm. The austere, isolated chair sits on a rectangular floorplate. The famous "silence" sign is framed against a black door. The image is silent and expectant.¹

I

INTRODUCTION

In June 2003, the Andy Warhol Museum in Pittsburgh mounted an exhibition of Warhol's iconic *Electric Chair* print series—ten large-scale prints along with several smaller prints and paintings—as a catalyst to generate discourse on the issue of capital punishment.² The project, *Andy Warhol's Electric Chairs: Reflecting on Capital Punishment in America*, which came two years after the execution of Timothy McVeigh and shortly after the decision by Illinois Governor George Ryan to commute all death sentences in that state,³ raised significant questions about the social utility and morality of the death penalty.

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1. Peter Halley, *Fifteen Little Electric Chairs*, in ANDY WARHOL: LITTLE ELECTRIC CHAIR PAINTINGS 39, 41 (2001).

2. A description of the exhibition is available on the Andy Warhol Museum website at http://www.warhol.org/education/electric_chair.html.

3. Ryan completely pardoned four death row inmates. He commuted another 164 death sentences to life imprisonment. See Maurice Possley & Steve Mills, *Clemency for All; Ryan Commutes 164 Death Sentences to Life in Prison Without Parole*, CHI. TRIB., Jan. 12, 2003, at 1.

That Andy Warhol's paintings could spark such debate is in itself noteworthy, given his predilection for playing the naïf.⁴ Warhol, who predicted that "[i]n the future everyone will be famous for fifteen minutes,"⁵ did not earn his own fame by creating art with overt social commentary but by painting Campbell's soup cans, Brillo boxes, and portraits of celebrities such as Marilyn Monroe and Elizabeth Taylor. When asked about social criticism in his work in general and in his *Electric Chair* series in particular, Warhol denied that he engaged in any social critique, insisting, "No meaning, no meaning."⁶ Those who knew him, however, disagreed. His friend Emile de Antonio, for example, stated that "Andy's politics are on the surface. I mean Andy pretends he has no politics . . . Andy denies it. But he does have politics. I think it's very hard to be a son of Czech immigrants, when your father was a manual worker, living in Pittsburgh, and not to develop political ideas."⁷ Or, as Warhol's collaborator Gerard Malanga put it, "Basically he's a liar when he's being interviewed."⁸

In this brief Essay, I do not plan to resolve the debate about Warhol's social engagement. I will argue, however, that an examination of his *Electric Chair* series—and of our collective response to the series—broadens the legal discourse on capital punishment in this country. My hope, of course, is grander: my goal is to generate discussion about the dialogic relationship between art and law.⁹

For the moment, however, I begin modestly with a single image, a single body of work: Andy Warhol's *Electric Chair* series.

4. The art critic Hal Foster, for example, identifies Warhol as "the great idiot savant of our time." Hal Foster, *Death in America*, in *ANDY WARHOL* 69 (Annette Michelson ed., 2001). Kelly Cresap has recently written an entire book about Warhol's coyness when it came to revealing his thought processes. See KELLY M. CRESAP, *POP TRICKSTER FOOL: WARHOL PERFORMS NAIVETE* (2004). Many of Warhol's critics have adopted this view, arguing that his art reflected nothing more than mass media at its most banal.

5. *ANDY WARHOL, THE ANDY WARHOL DIARIES* 156 (Pat Hackett ed., 1989).

6. See RAINER CRONE, *ANDY WARHOL* 11 (1970) (quoting Andy Warhol's response to journalists who inquired into the meaning of his work).

7. See *id.* at 11. Warhol's sexuality also influenced his sensibilities. For an exploration of the role of Warhol's queerness in the production and reception of his art, see Eve Kosofsky Sedgwick, *Queer Performativity: Warhol's Shyness/Warhol's Whiteness*, in *POP OUT: QUEER WARHOL* 134-43 (Jennifer Doyle, Jonathan Flatley, & José Estaban Muñoz eds., 1996) and other essays in the same volume.

8. See JOHN WILCOCK, *THE AUTOBIOGRAPHY AND SEX LIFE OF ANDY WARHOL*, unnumbered page (1971).

9. This is not to suggest that I am the first to propose such an examination. See, e.g., *LAW AND THE IMAGE: THE AUTHORITY OF ART AND THE AESTHETICS OF LAW* (Costas Douzinas & Lynda Nead eds., 1999). I do suggest, however, that such examination is in the nascent stage.

II

THE *Electric Chair* SERIES

Pictures legitimize and concretize in a way language does not. As Roland Barthes has noted, one who views a photograph *knows* that "someone has seen the referent . . . *in flesh and blood*, or again *in person*. . . . From a real body, which was there, proceed radiations which ultimately touch me, who am here."¹⁰ For example, we know Neil Armstrong landed on the moon because a photograph says so.

Pictures become the Real, at least in our collective imagination, and prompt tangible responses to whatever truth they reveal.¹¹ High-altitude photographs taken from U-2 planes flying over Cuba showing Soviet soldiers setting up nuclear-armed missiles revealed that Soviet Premier Khrushchev had lied to the United States about his country's nuclear abilities, prompting the Cuban Missile Crisis. Likewise, satellite photographs of chemical munitions bunkers and cargo trucks in Iraq "made true," however false, the United States' claim that Saddam Hussein possessed weapons of mass destruction and, for awhile, legitimized Operation Shock and Awe. More recently, it required photographs to make real the U.S. abuse of Iraqi prisoners at Abu Ghraib, to prompt something akin to outrage, something akin to an investigation, and something akin to trials.

Photographic images wield no less power in the courtroom. Imagine a murder trial without photographs, either of the crime scene, the deceased, or both. It is difficult, because few substitutions can "speak" to jurors so powerfully. We see this repeatedly in prosecutions. In the trial of O.J. Simpson, for example, it is the projected image of Nicole Simpson's bruised face that lingers.

Precisely because such photographs tap into something that is often stronger evidence than language,¹² lawyers frequently contest their

10. ROLAND BARTHES, *CAMERA LUCIDA: REFLECTIONS ON PHOTOGRAPHY* 79-80 (Richard Howard trans., 1981). This is not to suggest that photographs do not have other meanings or functions. Indeed, theories about photographic meaning are richly varied, and they incorporate semiotics, linguistics, and cultural theory. For a primer on theories of photographic meaning and their relation to the "real," see David Sternbach, Note, *Hanging Pictures: Photographic Theory and the Framing of Images of Execution*, 70 N.Y.U. L. REV. 1100, 1104-22 (1995).

11. See SUSAN SONTAG, *ON PHOTOGRAPHY* 5-6 (1977) ("Photographs furnish evidence. Something we hear about, but doubt, seems proven when we're shown a photograph of it . . . [There exists a] presumption of veracity that gives all photographs authority."). Significantly, this presumption continues today, even in the face of technology, such as Photoshop, that manipulates such images to make them untrue. See WILLIAM J. MITCHELL, *THE RECONFIGURED EYE: VISUAL TRUTH IN THE POST-PHOTOGRAPHIC ERA* (1992).

12. Richard Leppert states that "images are less visual translations of what might otherwise be *said* (in words) than they are visual transformations of a certain awareness of the world." RICHARD D. LEPPERT, *ART AND THE COMMITTED EYE: THE CULTURAL FUNCTIONS OF IMAGERY* 6 (1996). It should be noted that historically, courts admitted photographs into evidence for precisely the opposite reason: rather than independent proof, photographs were deemed evidence offered by an eyewitness in visual form. See, e.g., 1 JOHN HENRY WIGMORE, *A TREATISE ON THE SYSTEM OF EVIDENCE* § 790, at

admissibility. In the trial of terrorists connected to the 1993 bombing of the World Trade Center, which killed six people and injured over a thousand, the defense fought to keep out photographs of victims, especially that of a pregnant woman.¹³ In the recent prosecution of civil-rights attorney Lynne Stewart—for allegedly aiding terrorism—the admissibility of images in a videotape was likewise hotly contested¹⁴ and arguably played a large role in her conviction. As Stewart herself put it following the guilty verdict, “When you put [an image of] Osama bin Laden in a courtroom and ask the jury to ignore it, you’re asking a lot.”¹⁵ Even in the recent Scott Peterson trial, photographs helped the prosecution secure, in California no less, a death sentence. Uncertain about whether to vote for death, the jurors decided to look at autopsy photos of Peterson’s slain wife and unborn son. Those photos sealed Peterson’s fate.¹⁶

Which brings us back to Andy Warhol’s *Electric Chair* series. Warhol began this series with *Lavender Disaster* in 1963, the same year Sing Sing State Penitentiary in New York carried out the state’s last execution, that of Eddie Lee Mays on August 15.¹⁷ The basis for the *Lavender Disaster*

893 (1st ed. 1904); Jennifer L. Mnookin & Nancy West, *Theaters of Proof: Visual Evidence and the Law* in Call Northside 777, 13 YALE J.L. & HUMAN. 329, 369 (2001) (“The doctrine meant that in order to use a photograph, it first had to be ‘authenticated’ by someone who had first-hand personal knowledge of that which was represented in the image. A witness had, in essence, to claim the photograph as his or her own testimony in visual form.”).

13. See *United States v. Salameh*, 152 F.3d 88, 122-23 (2d Cir. 1998) (holding that photographs were properly admitted notwithstanding defendants’ offer to stipulate that the explosion caused injury and death). Courts routinely permit the introduction of such photographs in criminal trials. See, e.g., *United States v. Allen*, 247 F.3d 741, 793 (8th Cir. 2001) (affirming the admission of autopsy photos as an aid to the jury); *United States v. Lopez*, 271 F.3d 472, 482 (3d Cir. 2001) (affirming the admission of photos of disfigurement); *United States v. Cruz-Kuilan*, 75 F.3d 59, 61 (1st Cir. 1996) (holding that although defendant was charged with carjacking and not murder, photographs of the wounds of a murder victim and testimony of a forensics expert were admissible because, in addition to showing the element of force and violence, they corroborated the Government’s theory of the case); *United States v. Moore*, 38 F.3d 977, 980 (8th Cir. 1994) (upholding the admissibility of autopsy photographs on the ground that they added “little, if anything” to the Government’s case but provided evidence of the trajectory of a bullet defendant claimed he had fired in the air); *United States v. De Parias*, 805 F.2d 1447, 1453 (11th Cir. 1986) (upholding the admissibility of photographs of a badly decomposed corpse because the photos identified the victim, demonstrated the means of death, and corroborated the testimony of Government witness); *United States v. Sides*, 944 F.2d 1554, 1563 (10th Cir. 1991) (holding that photographs of the deceased are probative of the method of murder, the identity of the victims, and the setup of the crime scene); *United States v. Brady*, 595 F.2d 359, 361 (6th Cir. 1979) (admitting photographs of dead victims’ bodies as found at the crime scene even though defendants stipulated that four deaths occurred when the Government had to prove the deaths occurred in the course of the robbery to prevail on a felony murder charge).

14. Julia Preston, *Tape Ties bin Laden to Call to Aid Sheik*, N.Y. TIMES, Sept. 8, 2004, at B3; Julia Preston, *2 Declarations by bin Laden May Be Used in Terror Trial*, N.Y. TIMES, June 12, 2004, at B3.

15. Michael Powell & Michelle Garcia, *Sheik’s U.S. Lawyer Convicted of Aiding Terrorist Activity*, WASH. POST., Feb. 11, 2005, at A1.

16. See Stacy Finz & Diana Walsh, *Peterson Jury: Death*, S.F. CHRON., Dec. 14, 2004, at A1.

17. WILLIAM J. BOWERS, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982*, at 471 (1984); see also *The Last Electrocutation*, N.Y. TIMES, Mar. 7, 1995, at B5 (describing Mays’s crime

series, and the several series that followed through 1985, was a single snapshot—a black and white photograph of an empty electric chair, its leather restraining strap dangling ominously to the floor, in the center of an execution chamber.¹⁸ The photograph shows two closed doors to the left of the chair; to the right, a closed door with a SILENCE sign above it. As a consistent referent in Warhol's *Electric Chair* series, the photograph anchors each painting, ties each to a particular chair, to actual executions. And by using a photo-silkscreen process¹⁹ to transfer the photograph onto a canvas and then suffuse the canvas with color, Warhol was also able to remain “true” to the photograph.²⁰ Indeed, part of the power of the print series can be attributed to the fact that it is a (re)presentation of a (re)presentation, based on the Real—a real electric chair, a real execution chamber, a real photograph. As an image, it has the weight of fact.

On first inspection, however, the series does not seem partisan. Critic Steven Kurtz has argued that looking at Warhol's *Electric Chair* paintings permits the viewer to find reflected his or her own views on the death penalty:

[The series] happily embraces any political interpretation, and can rest comfortably within any ideological environment. The chair simultaneously reads as the means to punish those who radically transgress the natural moral order, or as a medieval instrument of torture that monumentalizes the cruelty of a corrupt justice system. The chair itself is so steeped in cultural representation, as layer upon layer of meaning rest upon it, that any association with a material referent dissolves in a frenzied exchange of signs Each participant is asked to take part in a poll that marches forever onward. Read the meaning of the image and decide if you are for it or against it. Are you for or against capital punishment? Are you for the liberals or the conservatives? This piece only asks to be read.²¹

and execution). This was also a period of growing agitation against the death penalty. See ROGER E. SCHWED, *ABOLITION AND CAPITAL PUNISHMENT: THE UNITED STATES' JUDICIAL, POLITICAL, AND MORAL BAROMETER* 68-104 (1983).

18. See Neil Printz, *Painting Death in America*, in ANDY WARHOL: DEATH AND DISASTERS 16 (1988).

19. In *POPism*, his recollection of his life in the 1960s, Warhol described the photo-silkscreen process: “With silkscreening, you pick a photograph, blow it up, transfer it in glue onto silk, and then roll ink across it so the ink goes through the silk but not through the glue. That way you get the same image, slightly different each time.” ANDY WARHOL & PAT HACKETT, *POPISM: THE WARHOL '60s*, at 22 (1980).

20. Of course, every alteration—even an enlargement—is transformative to some extent. “The enlargement of a snapshot does not simply render more precise what in any case was visible, though unclear: it reveals entirely new structural formations of the subject.” Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, in *ILLUMINATIONS* 217, 236 (Hannah Arendt ed., Harry Zohn trans., Schocken Books 1968) (1955).

21. Steven Kurtz, *Uneasy Flirtations: The Critical Reaction to Warhol's Concept of the Celebrity and of Glamour*, in *THE CRITICAL RESPONSE TO ANDY WARHOL* 254 (Alan R. Pratt ed., 1997); see also

In this asking, the *Electric Chair* series invites disparate readings and interpretation. This invitation can be likened to the judicial process of imposing death, which in itself requires a series of interpretive acts—first from the prosecution in deciding whether to seek the death penalty and then from the jurist during deliberations. Did the defendant commit the crime? Does a balancing of the aggravating and mitigating factors, mandated since *Gregg v. Georgia*,²² warrant death? How should one weigh the stories of the victim and her survivors?²³

The series of interpretive acts continues through the review process, culminating, though not ending, with either a court or an executive having the “final word,” thus exercising what Robert Cover has described as the most terrifying of law’s powers—the power of finality.²⁴ Culminating without necessarily ending because the act of interpretation occasionally continues beyond an execution. Newly discovered evidence may point to innocence, for example.²⁵ Alternatively, upon reflection, there may be community acceptance and validation of the judgment. As James Boyd White has argued, it is community approval or disapproval that often renders judgments complete.²⁶

Printz, *supra* note 18, at 17 (“The conventional wisdom about Warhol . . . has been that the content of his images is rendered neutral by their repetition, corresponding to the undifferentiated flow of images and information proliferated by the mass-media. According to such an interpretation, Warhol’s art makes no judgements and assumes no positions, because none are possible in a world of interchangeable images.”).

22. 428 U.S. 153 (1976).

23. See *Payne v. Tennessee*, 501 U.S. 808 (1991) (sanctioning the admissibility of victim-impact statements in capital trials and overturning *Booth v. Maryland*, 482 U.S. 496 (1987), which had banned such evidence on Eighth Amendment grounds). For a critique of the use of victim-impact statements, see Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996). Moreover, as Samuel Gross and Phoebe Ellsworth have noted, for many, there is also the issue of interpreting the fairly recent stories of “capital defense lawyers who hardly spoke to their clients before trial, who were later suspended or disbarred, who dozed through the trial” and “of a system full of blunders and deception, a bureaucracy hustling people toward death row without proper concern for whether the right person has been condemned.” Samuel R. Gross & Phoebe C. Ellsworth, *Second Thoughts: Americans’ Views on the Death Penalty at the Turn of the Century*, in *BEYOND REPAIR? AMERICA’S DEATH PENALTY* 28 (Stephen P. Garvey ed., 2003); see also Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994) (detailing the woefully inadequate representation many capital defendants receive).

24. See generally Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

25. For example, in 1987, Professors Bedau and Radelet published a law article marshalling substantial evidence to establish that between 1900 and 1986, 139 people were wrongfully sentenced to death, and that of these, 23 had in fact been executed. Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 36 tbl.2 (1988). Radelet subsequently updated this study and found 416 wrongful convictions. MICHAEL L. RADELET ET AL., IN *SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES* 17, 360 (1992).

26. See JAMES BOYD WHITE, *HERACLES’ BOW* 185-86, 191 (1985) (“[A legal] judgment is always incomplete, for it always depends upon what happens in the other world of ordinary narrative and private life in which it must work and which it cannot control It is not that the legal judgment has no authority, but that its authority is not absolute and should always be defensible in other terms, in the language of the community itself”).

But Kurtz's interpretation of Warhol's *Electric Chair* paintings as a mirror of the viewer's own ideology is only half true. The paintings, at once specular and discursive—at once irenic and agonistic—also focus the conversation in subtle ways, in part precisely because the series is predicated on a photograph. The original photograph Warhol used, now kept in the archives of the Warhol Museum, bears a label dated January 13, 1953 that reads “Sing Sing's Death Chamber.” The label also identifies the chair as the same one in which Julius and Ethel Rosenberg were slated to be electrocuted.²⁷ As such, each painting, with its three doors—one thinks of *The Price Is Right*, pick one: heaven, purgatory, or hell; or is the choice between three purported goals of criminal justice: retribution, incapacitation, deterrence?—also incorporates the controversy surrounding that particular execution.

Recall that anti-Semitism and McCarthy-era hysteria tainted the trial of the Rosenbergs, who were charged with conspiring to commit espionage by passing information to the Soviets.²⁸ Recall also that the sole evidence against Ethel Rosenberg came from a cooperating witness; her prosecution was largely a ploy to induce her husband to plead guilty and name Communist sympathizers.²⁹ Nonetheless, on June 19, 1953, as a crowd estimated at 5000 protested in New York's Union Square³⁰ and the FBI stood nearby hoping for a last-minute confession,³¹ the State of New York executed the Rosenbergs—Julius Rosenberg quickly, Ethel Rosenberg less quickly. (The first three successive jolts did not kill Ethel. So the executioners applied two more jolts. Only then did they pronounce her dead.)³² Warhol's use of this particular execution as a referent in his *Electric Chair* paintings thus asks the viewer to contemplate who is sentenced to death in this country. And how.

By manipulating the size of the photo along a rectilinear grid, Warhol also focuses the viewer on the mechanics of death and its replication. The rectilinear grid (like a multiplication table) and the austerity of the execution room suggest the cold “efficiency” of electrocution: it is at once a by-product of Thomas Edison's electric light bulb;³³ the “science” over

27. Halley, *supra* note 1, at 41.

28. See RONALD RADOSH & JOYCE MILTON, *THE ROSENBERG FILES 430-32* (2d ed. 1997); see also Atossa M. Alavi, Comment, *The Government Against Two: Ethel and Julius Rosenberg's Trial*, 53 CASE W. RES. L. REV. 1057 (2003).

29. RADOSH & MILTON, *supra* note 28, at 98.

30. *Eisenhower Is Denounced to 5,000 in Union Sq. Rally*, N.Y. TIMES, June 20, 1953, at A1.

31. William Conklin, *Pair Silent to End; Husband Is First To Die—Both Composed on Going to Chair*, N.Y. TIMES, June 20, 1953, at A1; see also RADOSH & MILTON, *supra* note 28, at 416-17. Tellingly, one of the questions the FBI hoped to ask Julius Rosenberg was whether Ethel Rosenberg was aware of his activities. *Id.*

32. RADOSH & MILTON, *supra* note 28, at 418-19; FREDERICK DRIMMER, *UNTIL YOU ARE DEAD: THE BOOK OF EXECUTIONS IN AMERICA* 26 (1990).

33. MARK ESSIG, *EDISON AND THE ELECTRIC CHAIR: A STORY OF LIGHT AND DEATH* (2003).

“barba[ity]” justification by which New York became the first state to adopt execution,³⁴ and a means upheld by the Supreme Court in 1890 in *In re Kemmler*.³⁵ By the time the Supreme Court decided *Furman v. Georgia*,³⁶ in which it held that the death penalty as applied was unconstitutional, New York state alone had executed approximately 614 individuals in the electric chair.³⁷

With Ethel Rosenberg’s execution as a referent, the painting also points to electrocution’s inefficiency. Even if the names are not known or the details are hazy, on some level, the image of the empty electric chair in an empty chamber mnemonically triggers, like a bitter version of Proust’s “petite madeleines,” an almost visceral memory. Some will remember the 1997 execution of Pedro Medina in Florida. One newspaper account described the botched electrocution in the following way:

[It] was the stuff of nightmares and horror fiction novels and films. A foot-long blue and orange flame shot from the mask covering [Medina’s] head for about 10 seconds, filling the execution chamber with smoke and sickening witnesses with the odor of charred flesh. One witness compared it to “a burning alive.”³⁸

Later, Florida Attorney General Robert Butterworth would coolly remark, “People who wish to commit murder, they better not do it in the state of Florida because we may have a problem with our electric chair.”³⁹

Others might think of the execution of Allen Lee “Tiny” Davis in 1999. As part of the execution, executioners secured a leather strap across his mouth and placed a face mask over his head. As they applied the current, Davis screamed twice. A court later noted that by the time the execution was over, “a blood pool ‘the size of a dinner plate’ covered the front of Davis’s shirt. . . . Davis’s head, face, and scalp were severely burned, as were his knees and thighs.”⁴⁰

34. See *In re Kemmler*, 136 U.S. 436, 444 (1890) (quoting from Governor’s rationale for replacing death by hanging with death by electrocution); see also 1888 N.Y. Laws, ch. 489, § 505 (providing that “[t]he punishment of death must, in every case, be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death”).

35. 136 U.S. 436 (1890) (finding electrocution to be a constitutional means of state-imposed death).

36. 408 U.S. 238 (1972).

37. SCOTT CHRISTIANSON, *CONDEMNED: INSIDE THE SING SING DEATH HOUSE 1* (1999); see also Mark Gado, *All About Sing Sing Prison*, http://www.crimelibrary.com/notorious_murders/famous/sing_sing.

38. Editorial, *Retire ‘Chair,’ Use Lethal Injection*, SUN-SENTINEL (Fort Lauderdale, Fla.), Mar. 26, 1997, at 22A; see also Mike Clary, *Flames Erupt in Electric Chair’s Death Jolt; Execution: Fire Shoots from Florida Man’s Head, Renewing Capital Punishment Debate*, L.A. TIMES, Mar. 26, 1997, at A1.

39. *Execution Flames Renew Debate*, TAMPA TRIB., Mar. 26, 1997, at 1.

40. *Wilson v. State*, 525 S.E.2d 339, 353 n.18 (Ga. 1999). Shortly after Davis’s electrocution, Florida stayed all of its executions pending a ruling from the Supreme Court on the constitutionality of execution by electrocution. See John Kennedy, *Special Session Could Introduce Lethal Injection*, ORLANDO SENTINEL TRIB., Dec. 6, 1999, at A1.

And some might recall the execution of Larry Lonchar in 1996, which required two separate 2000 volt jolts of electricity. During the process, Lonchar “moaned, clenched his fists (which had turned dark red), lurched and gasped for air.”⁴¹ Twelve minutes passed before Lonchar was pronounced dead.⁴²

Even if these names and details are not readily familiar to everyone who views Warhol's series, they are there nonetheless, and this seems to be the point. By depicting an electric chair in a mostly non-descript room, Warhol points to the very anonymity of most executions, and to our distance from them.⁴³ One is reminded of *Caldwell v. Mississippi*,⁴⁴ the case in which the prosecutor, in urging the jury to vote “death,” informed them that their decision would not be the final one but would be instead reviewed by others. In other words, they would not be responsible. The death penalty is sanitized, antiseptic, and like the paintings themselves, mechanical.

By depicting an empty execution chamber, Warhol, however subtly, also shifts the focus from the painting as object to the viewer as subject. He thus foregrounds the space the viewer occupies as a spectator and a witness. Who else could the sign above the door be demanding “silence” from? As Austin Sarat has put it, “the public is always present at an execution. It is present as a juridical fiction, but as more than a fiction, as an authorizing audience unseeing and unseen, but present nonetheless.”⁴⁵ The frame itself suggests the one-way mirror of a viewing gallery (or, in keeping with the link the influential nineteenth century criminal law scholar James Fitzjames Stephen observed between punishment and intercourse,⁴⁶ the one-way mirror of a sex show). Warhol makes clear that we're on the safe side of the glass, the side in control. On the other side, there's no one

41. *Wilson*, 525 S.E.2d at 353 n.18.

42. *Id.* Other executions have caused a man's penis to explode, blood to pour from eye sockets, or body fluids to boil. See Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 359 (1997); see also *Francis v. Resweber*, 329 U.S. 459 (1947) (holding that a second attempt at execution—after a mechanical failure of the State's electric chair during the first scheduled execution of Mr. Francis, whom the Court took care to note was “a colored citizen of Louisiana”—did not violate the Eighth Amendment).

43. Craig Haney has argued that this distance is not accidental, but part of an elaborate system to ensure that citizens continue to sanction executions. See Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1449 (1997).

44. 472 U.S. 320 (1985).

45. AUSTIN SARAT, *WHEN THE STATE KILLS* 205 (2001). In most states, state-administered executions must be witnessed in order to be legal. See JOHN D. BESSLER, *DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA* 72-75 (1997).

46. 2 JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 82 (1883) (“The forms in which deliberate anger and righteous disapprobation are expressed, and the execution of criminal justice is the most emphatic of such forms, stand to [the hatred of criminals] in the same relation in which marriage stands to [sexual passion].”).

we know—a black or Hispanic probably,⁴⁷ as we were reminded in *McCleskey v. Kemp*,⁴⁸ which brought the death penalty's systematic problems of race to the Supreme Court's attention, to no avail.⁴⁹ Our response is on par with that of the Court: no one we know. Another Willie Horton, no doubt.⁵⁰ With a shrug, we can even say the execution was victimless.⁵¹

Most of all, however, Warhol's *Electric Chair* paintings, and their iconic status in our culture, call attention to our fascination with death in general, to state-administered death in particular, to the spectacle of capital punishment, and to our history of obtaining pleasure by gazing upon death.

47. Tellingly, Warhol started his *Electric Chair* series the same year he painted *Race Riots*, his silkscreen of police dogs attacking civil rights marchers. See CRONE, *supra* note 6, at 299, 302-03.

48. 481 U.S. 279, 313 (1987) (declining to invalidate a Georgia death-penalty statute on constitutional grounds despite statistical evidence demonstrating that, in Georgia, the imposition of death often strongly correlated with the race of the defendant and the race of the victim because the racial discrepancies “[did] not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process”); see also Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1411-13 (1988) (noting the seeming indifference of the Supreme Court to the continuing pervasiveness of racism in the administration of criminal justice). Subsequent studies have confirmed the continued presence of race as a factor in administering death. For example, a review of records from a particular district in Georgia showed that from 1973 through the end of 1990, the district attorney's office “sought the death penalty 38.7 percent of the time when the defendant was black and the victim white, 32.4 percent when both defendant and victim were white, 5.9 percent when both defendant and victim were black, and never when the defendant was white and the victim black.” Michael Kroll, *Chattahoochee Judicial District: Buckle of the Death Belt: The Death Penalty in Microcosm*, <http://www.deathpenaltyinfo.org/article.php?scid=45&did=540>.

49. We were reminded of these problems again in *Miller-El v. Dretke*, which confirmed that the problem still hasn't gone away. See *Miller-El v. Dretke*, 125 S. Ct. 2317, 2332 (2005) (granting habeas relief to a black death-row inmate after finding that prosecutors had engaged in purposeful discrimination in using their peremptory challenges to excuse ten of eleven black venirepersons, and noting “the general policy of the Dallas County District Attorney's Office to exclude black venire members from juries”).

50. In his race against Massachusetts Governor Dukakis, George Bush ran television ads depicting Willie Horton, a black convicted killer who, while on a Massachusetts furlough program, raped a white woman. The point of the ads was to contrast Bush, a supporter of capital punishment, with Dukakis, who was opposed to the death penalty. And Bush made the point by invoking the trope of the black rapist. As Regina Austin put it, “Willie Horton symbolized the threat that black males, aided by white liberal politicians, pose to innocent whites. Playing on racial fears, the ads' signifying was not limited to the criminal element; every black man was a potential Willie Horton, rapist, and murderer.” See Regina Austin, *Beyond Black Demons and White Devils: Anti-Black Conspiracy Theorizing and the Black Public Sphere*, 22 FLA. ST. U. L. REV. 1021 (1995). For more on this appeal to race, see D. Marvin Jones, “*We're All Stuck Here for a While*”: *Law and the Social Construction of the Black Male*, 24 J. OF CONTEMP. LAW 35 (1998); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999); Samuel R. Gross, *Crime, Politics, and Race*, 20 HARV. J. OF LAW & PUB. POL. 405 (1997).

51. Warhol himself commented on the anonymity in this series. “The death series [is] divided into two parts, the first one famous deaths and the second one people nobody ever heard of . . . It's not that I feel sorry for them, it's just that people go by and it doesn't really matter to them that someone unknown was killed.” PETER GIDAL, *ANDY WARHOL: FILMS AND PAINTINGS* 38 (1971).

III A HISTORY OF SPECTACLE

The history of executions in this country is also the history of our fascination with public death. Lawrence Friedman has noted that public executions in this country have been "tremendous box-office hits."⁵² When Bathsheba Spooner was hanged in 1778, an "immense throng of people" gathered, "many of whom had come a great distance."⁵³ The show, for that is what it was, included intended extras—Mrs. Spooner was "carried in a chaise" in a solemn procession, and the Reverend Thaddeus McCarty delivered a sermon—as well as unplanned extras in the form of "loud shouts of the officers . . . horses pressing upon those in front, the shrieks of women in the confusion and . . . loud peals of thunder."⁵⁴ Such an enormous crowd thronged the viewing stand at another execution—this one in Cooperstown, New York, in 1827—that the stand collapsed, killing two spectators. That same year, a crowd of between 30,000 and 40,000 gathered to witness the execution of Jesse Strang in Albany, New York.⁵⁵

Although judicially sanctioned executions began to be "officially" withdrawn from the public square in the mid 1830s⁵⁶—partly out of middle class revulsion toward "urban crowds"⁵⁷ and partly out of a new interest in privacy⁵⁸—they did not become invisible. For example, even though an 1835 New York law mandated that executions be "inflicted within the walls of the prison . . . or within a yard or enclosure adjoining,"⁵⁹ this largely meant a change of venue but not of audience. The 1878 execution of Sam Steenburgh, for example, which took place *within* the walls of the prison in Fonda, New York, still attracted approximately 15,000 spectators. "Two special trains from the east, aggregating 12 cars, and one of 7 cars from the west," brought many of the spectators, dressed in "holiday attire."⁶⁰ Apparently by climbing onto a roof of a nearby house, spectators could enjoy "an excellent view of the scene of execution." At 12:50 p.m., a drum roll began and the "procession" appeared around the jail corner, soldiers on either side of the defendant.⁶¹

52. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 168 (1993).

53. 2 *AMERICAN STATE TRIALS* 199 (John D. Lawson ed., 1914).

54. *Id.*

55. See PHILIP ENGLISH MACKAY, *HANGING IN THE BALANCE: THE ANTI-CAPITAL PUNISHMENT MOVEMENT IN NEW YORK STATE, 1776-1861*, at 108-09 (1982).

56. The last officially public execution took place in Missouri on May 21, 1937. See *THE DEATH PENALTY IN AMERICA* 13 (Hugo Adam Bedau ed., 3d ed. 1982).

57. See LOUIS P. MASUR, *rites of Execution: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776-1865*, at 96-100 (1989).

58. FRIEDMAN, *supra* note 52, at 76.

59. 1835 N.Y. Laws, ch. 258, § 1.

60. *Seven Murders Expiated: The Execution of Sam Steenburgh*, N.Y. TIMES, Apr. 20, 1878, at 1.

61. *Id.*; see also Michael Madow, *Forbidden Spectacle: Executions, the Public and the Press in Nineteenth Century New York*, 43 BUFF. L. REV. 461, 511 (1995) ("Even in the decades after the Civil

And of course, crowds still gathered for extrajudicial executions such as lynchings, which continued into the 1950s. Between 1889 and 1918, lynch mobs executed more than one hundred blacks a year on average.⁶² For these executions, crowds still gathered. Nearly two thousand spectators came to watch the mutilation and lynching of Sam Holt in 1889, for example.⁶³ Other lynchings were captured on camera; the images became post-cards that circulated like trading cards.⁶⁴

But even aside from those—the gawkers, the revelers, the merely curious—actually attending executions, there was another way that state-imposed death remained public. Instead of attending the show, picnic basket in tow, the public could now get its fix through the print media and, with the advent of photography, through visual images. As Lawrence Friedman notes, the “newspapers of the late nineteenth century adored executions; they described the major executions in lip-smacking detail.”⁶⁵ Because millions could experience them vicariously simply by reading a newspaper, executions actually became *more* public.

This was true even of death by electrocution, which had been championed because of its supposed privacy. In fact, the press allowed everyone to experience electrocutions from the comfort of his or her own living room. Consider this descriptive scene from the press coverage of the 1928 execution of Ruth Snyder who, together with her lover, plotted the murder of her husband and whose story became the inspiration for the films *Double Indemnity* and *The Postman Always Rings Twice*:

Tomb-like silence. Ruth Snyder in the electric chair. The crunching sound of the executioner cramming down a lever. A sinister whine and a crackling, sputtering sound like a Fourth of July sparkler. Silence. . . . Then the prison physician breaking the silence with these words: “I declare this woman dead.”⁶⁶

The public even had a photograph. A reporter for the *New York Daily News*, sitting in the front row of the gallery, used a concealed camera to take a photograph just as the electrocution began.⁶⁷

War, hangings in non-metropolitan parts of New York continued to look very much like the ‘carnavalesque’ public hangings of the early nineteenth century.”).

62. See NAACP, *THIRTY YEARS OF LYNCHING IN THE UNITED STATES: 1889-1918*, at 7-8 (1919).

63. *Sam Holt Burned at Stake*, *KISSIMMEE VALLEY GAZETTE* (Fla.), Apr. 28, 1899, reprinted in *100 YEARS OF LYNCHINGS* 10-11 (Ralph Ginzburg ed., 1962).

64. See JAMES ALLEN ET AL., *WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA* 11 (2000).

65. FRIEDMAN, *supra* note 52, at 170.

66. *Id.* at 445.

67. See *id.* The execution of Martha Place in 1889 is another example. The public knew that Mrs. Place clutched a Bible and was “dressed in a black gown with big sleeves and a few fancy frills at the bosom [and] russet slippers” as she was guided into the chamber. They knew that her hair was braided, though a spot had been clipped near the crown to allow for an electrode to be fastened. They knew that another was fastened to her leg, and that a total of 1,760 volts ripped through her body. They knew that

Though courts in the last thirty years have repeatedly denied requests to film executions,⁶⁸ even today executions remain, on a certain level, visible.⁶⁹ The idea of execution, whether it be by electrocution, by lethal injection, or by gas, is so ingrained in our collective consciousness, both in fact and in fiction,⁷⁰ that even when the media does not provide a final image for us, we can still provide one for ourselves. Most Americans are familiar with the photo of Timothy McVeigh being led away by U.S. marshals. The next image is already in their brains.

Lawrence Friedman has suggested that punishment was public during the colonial period because it was an "open affirmation of the rules and their enforcement; a kind of divine social theater. It taught people about good and bad, and the wages of sin. It punished the guilty, and made justice and the law concrete."⁷¹ But this doesn't tell the whole story. Our parents tell us about good and bad. We don't flock to listen to them. Rather, our history suggests that it is the spectacle of death that draws us, especially since, as a pedagogical tool, public executions tell us little about who was good and who was bad, other than to confuse the two.

It is often said that the first recorded execution in this country took place in 1608 in Jamestown.⁷² To my mind, the first execution can be

it was over in a short time. They knew that the execution was "successful in every way." *Woman Dies in the Electric Chair*, NAT'L POLICE GAZETTE, Apr. 8, 1899, at 6.

68. See, e.g., *Rice v. Kempker*, 374 F.3d 675 (8th Cir. 2004) (holding that a Missouri Department of Corrections media policy, under which videotaping or recording of executions was prohibited, did not violate the First Amendment); *Lawson v. Dixon*, No. 94-4004, 1994 U.S. App. LEXIS 20830 (4th Cir. June 13, 1994) (affirming the North Carolina Supreme Court's denial of defendant's request to have his execution videotaped by the Phil Donahue Show); *Garrett v. Estelle*, 556 F.2d 1274 (5th Cir. 1977) (reversing the order of a Texas district court that permitted the plaintiff, a television reporter, to attend and film executions); *Entm't Network Inc. v. Lappin*, 134 F. Supp. 2d 1002 (S.D. Ind. 2001) (barring filming the execution of Timothy McVeigh); *Halquist v. Dep't of Corr.*, 783 P.2d 1065 (Wash. 1989) (denying a journalist access to executions because the public at large did not have such access); see also William Bennett Turner & Beth S. Brinkmann, *Televising Executions: The First Amendment Issues*, 32 SANTA CLARA L. REV. 1135 (1992).

69. For example, in 1995, ABC's *Nightline* focused on the execution of Mario Marquez in Texas. The camera followed host Ted Koppel into the prison, with Koppel announcing, "If we are going to live with capital punishment, we have to see it and know what it is about." Although Koppel later conceded that "We can't show it [the execution] to you," he promised to describe the execution he witnessed. And he did: "[T]here was a short explosion of breath. That is all there was to see." SARAT, *supra* note 45, at 191-92. More recently, the public radio program *On the Media* broadcasted an audio recording of an execution in *The Execution Tapes*. The recording, which excerpts the 1984 execution of Ivon Ray Stanley by the Georgia Department of Corrections, can be heard on-line at <http://www.onthemedial.org/otm050501.html>.

70. For example, photos of Tiny Davis's execution are available on the Internet at <http://www.ccadp.org/tinydavis.htm>. Fictional images of executions appear in several films, including *DANCER IN THE DARK* (MMV New Line Prods., Inc. 2000), *THE GREEN MILE* (Warner Bros. 1999), *DEAD MAN WALKING* (Havoc, Inc. et al. 1995), and *I WANT TO LIVE!* (Metro-Goldwyn-Mayer 1958).

71. FRIEDMAN, *supra* note 52, at 25.

72. See Michael H. Reggio, *History of the Death Penalty*, in *SOCIETY'S FINAL SOLUTION: A HISTORY AND DISCUSSION OF THE DEATH PENALTY* 3 (Laura E. Randa ed., 1997); see also *DEATH*

traced much earlier—to 1585, to the very first English colony in this country, Roanoke. Think of the colonists' ship running aground on the Outer Banks of North Carolina, their food spoiled but for ten days' worth of grain. Think of Sir Richard Grenville leading an expedition into the Sound between the Outer Banks and the coast of Carolina and discovering one day that a silver cup—just a silver cup—was missing. Supposedly convinced that only someone in the Indian village they had passed two days earlier could have stolen that silver cup, the expedition returned, and without judge or jury but with the authority of the law, they meted out summary punishment, burning the entire village, and presumably its villagers, to the ground.⁷³ Good sport.

Indeed, the spectacle of death so draws in the public that, during the colonial period, at least two jurisdictions permitted simulated hangings. Under a 1701 New Hampshire statute, a man and woman convicted of adultery were to be “Sett upon the Gallows” for an hour “with a Rope about their necks and the other . . . [end] cast over the Gallows.” After this simulation, they were to be “whipt” and then made—à la Hester Prynne—to “for ever after weare a Capitall Letter: A: of two inches long and proportionable in Bignesse.”⁷⁴ A 1749 Rhode Island statute contained a similar punishment.⁷⁵

Sarat has argued that executions should be televised to expose the horror of capital punishment.⁷⁶ Unfortunately, Sarat thinks too highly of viewers; he imagines us better than we are. Given our obsession with *CSI New York*, *CSI Miami*, and *CSI Insert Your Town Here* and with buying our teenagers *Grand Theft Auto: Vice City* while our children watch *Itchy and Scratchy*, is there any reason to think a contemporary audience would react with horror to televised executions? After all, despite waning support in the 1950s and 1960s, today, Americans still overwhelmingly support capital punishment.⁷⁷ They would lap up televised executions. Shirley Jackson, in her brilliant 1940s short story “The Lottery,” in which townspeople hold an annual lottery to see who will be stoned, got it right.⁷⁸ If there were no crime, we'd invent it just to have execution.

PENALTY INFO. CTR., HISTORY OF THE DEATH PENALTY (2005), <http://www.deathpenaltyinfo.org/history1.html>.

73. KAREN ORDAHL KUPPERMAN, ROANOKE: THE ABANDONED COLONY 72-73 (1984); HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 12 (2003).

74. 1 LAWS OF NEW HAMPSHIRE: PROVINCE PERIOD 676 (Albert Stillman Batchellor ed., 1904).

75. See An Act Against Adultery, Polygamy, and Unlawfully Marrying Persons and for the Relief of Such Persons as are Injured by the Breach of Marriage Covenants (1749) (R.I.), *microformed on RHODE ISLAND COLONIAL SESSION LAWS 1636-1776* (William S. Hein & Co, Inc.).

76. SARAT, *supra* note 45, at 208-09.

77. See Gross & Ellsworth, *supra* note 23, at 7, 13; see also Samuel R. Gross, *Update: American Public Opinion on the Death Penalty—It's Getting Personal*, 83 CORNELL L. REV. 1448 (1998).

78. Shirley Jackson, *The Lottery*, in THE NORTON ANTHOLOGY OF SHORT FICTION 668 (R. V. Cassill ed., 3d ed. 1986). For an analysis of *The Lottery* and capital punishment, see Earl F. Martin, *Tessie Hutchinson and the American System of Capital Punishment*, 59 MD. L. REV. 553 (2000).

We desire execution because scheduled death intrigues us—at least initially. How else can we explain why so many went on-line, or to video stores,⁷⁹ like prurient consumers of snuff films, to view the beheadings of Daniel Pearl and Nicholas Berg, in all their theatricality?⁸⁰ During the French Revolution, women called *tricoteuses* would knit while watching executions. Now, we are the *tricoteuses*.⁸¹ After a while, of course, the spectacle became a little redundant. We became a little anesthetized. Like the tessellation in Warhol's *Electric Chair* paintings, repetition numbs. But still we watched. Watch.

Recently, in *Roper v. Simmons*,⁸² the Supreme Court reversed *Stanford v. Kentucky*⁸³ and concluded that capital punishment for crimes committed before the age of eighteen violates the Eighth Amendment. The Court predicated its decision on a shifting national consensus. Coming just three years after its decision in *Atkins v. Virginia*,⁸⁴ which ruled that the Eighth Amendment barred the execution of the mentally retarded and which overruled a contrary decision in *Penry v. Lynaugh*,⁸⁵ scholars and commentators understandably began to ask whether this augured a trend toward the abolition of capital punishment.⁸⁶ What's missing from this speculation, however, is something both simpler and more complex—something that implicates race and gender and religion and disability and

79. Neil Graves & Ilan Kayatsky, *DVD-Capitation; Iraq Murder Documentary in Stores*, N.Y. POST, Nov. 14, 2004, at 10. The video, which also shows public stonings and firing squads, was briefly available at Virgin Megastore. The distributor also claims to have sold over 90,000 copies of the DVD over the Internet. *Id.*

80. The theatrical nature of the beheadings has not gone unnoticed. See, e.g., Jason Burke, *Theatre of Terror: Terrorists Have Become Film Directors and the Video Camera is Their Most Powerful Weapon, with the West a Captive Audience*, THE OBSERVER, Nov. 21, 2004, at 1 (“The execution videos in Iraq combine all the tried-and-tested elements of the genre. They are dramatic productions. There is the main subject centre stage, there is a carefully designed set and backdrop and there are carefully chosen props, such as the cage that Kenneth Bigley appeared in, that send particular messages to particular audiences. In recent videos, there is even a script, carefully drafted statements that have to be read out by victims, often in a hideous duet with their killer.”).

81. See Olga Craig, *Inside the Sick, Sad World of the Execution Groupies*, SUNDAY MAIL (Queensland, Australia), Oct. 31, 2004, at 88 (noting that execution websites have become some of the most accessed websites on the Internet, and that there may be up to 750,000 hits a day when new footage of an execution is aired, and that Americans comprise the majority of viewers). According to Dan Klinker, who owns one of the most popular websites, the downloading of images is also popular:

The “most downloaded videos,” says Mr. Klinker, are the Uncensored (World) Trade Centre Jumpers, the Beheading of Nick Berg (more than 10 million downloads) and the execution of Kim Sun Il, a South Korean kidnapped in Iraq. Seventy-five per cent of visitors to the site are male, and most (65 per cent) log on from the US.

Id.

82. 125 S. Ct. 1183 (2005).

83. 492 U.S. 361 (1989).

84. 536 U.S. 304 (2002).

85. 492 U.S. 302 (1989).

86. See, e.g., Adam Liptak, *Another Step in Reshaping the Capital Justice System*, N.Y. TIMES, Mar. 2, 2005, at A13 (noting the various opinions “about where the process will end”).

age and comfort. Warhol posed the question for us with each *Electric Chair* painting. Who are we comfortable visualizing in the chair?⁸⁷

IV AND THE SUBLIME

In the end, it's to Warhol's *Electric Chair* paintings—"the ultimate still life"⁸⁸—that I return, precisely because paintings work differently from language, history, rhetoric, and law. Art historian James Elkins noted in *Pictures and Tears* that paintings "work . . . in a way that isn't easily put into words, that slides in and out of awareness, that seems to work upward toward the head from somewhere down below: a way that changes the temperature of your thinking instead of altering what you say."⁸⁹

Of course, Warhol was not the first artist to address capital punishment as a subject matter. Rather, his *Electric Chair* series emerges from a long tradition of drawings and paintings of torture and executions. Recall, for example, Brueghel's *Justicia* (1559), which depicts an individual hanging from his bound wrists and ankles while spectators look on and the goddess Justice blindly slashes out at random with her sword.⁹⁰ Or Diebold Schilling's *Chronik* series (1480), which chronicles a variety of public executions—by drowning, by manual disembowelment, by burying alive, and by wheel.⁹¹ The British painter William Hogarth also painted executions, in his case an execution by wheel in *South Sea Scheme* (1721). There is

87. Although none of the Justices referred to the race of the defendant in *Roper*, given their detailed factual recitation of the crime, it is likely that they were aware that the defendant, whose photograph was reproduced in various newspapers, was white. In fact, at least in the photograph that appeared in the *New York Times*, the defendant appears clean-cut and boyish. See Linda Greenhouse, *Supreme Court, 5-4, Forbids Execution in Juvenile Crime*, N.Y. TIMES, Mar. 2, 2005, at A1. One could easily imagine his appearance being a factor in the Court's decision. The question is whether the Court would have reached a different decision had the defendant not been white, had the defendant not appeared boyish, or had the defendant not seemed beyond redemption.

88. NORMAN BRYSON, IN MEDUSA'S GAZE: STILL LIFE PAINTINGS FROM UPSTATE NEW YORK MUSEUMS 125 (1991).

89. JAMES ELKINS, PICTURES AND TEARS: A HISTORY OF PEOPLE WHO HAVE CRIED IN FRONT OF PAINTINGS, at x (2001).

90. On the history and shifting depictions of Lady Justice, see Martin Jay, *Must Justice Be Blind? The Challenge of Images to the Law*, in LAW AND THE IMAGE: THE AUTHORITY OF ART AND THE AESTHETICS OF LAW 19 (Costas Douzinas & Lynda Nead eds., 1999).

91. Samuel Y. Edgerton has described execution by wheel in this way:

At the place of execution, the condemned would be forced to lie prone on the ground, spread-eagled and tied to stakes. The executioner would then proceed to smash his stretched-out arms and legs with an iron bar, breaking the bones in both upper and lower limbs. Next, a large wagon wheel would be exhibited to the audience, and then shoved under the prisoner's body. The executioner would untie his arms and legs from the stakes and retie them to the wheel, not with rope but by binding the shattered limbs themselves around the spokes. Finally, the wheel was mounted on an axle-pole and raised up vertically, where the poor mangled victim, entwined on the horizontal rim, faced the hot sun and unrelenting elements until he slowly and most painfully expired.

Samuel Y. Edgerton, *When Even Artists Encouraged the Death Penalty*, 15 LAW & LITERATURE 235, 251 (2003).

Goya's overtly critical *The Third of May 1808* (1814), depicting a mass execution by firing squad, and Manet's *The Execution of Maximilian* (1867-68), also depicting death by firing squad, and Gericault's *Heads Severed* (1818), depicting guillotined heads following an execution. Among American artists, Horace Pippin's *John Brown Going to His Hanging* (1942) comes to mind. This is to say nothing of the tradition of crucifixion paintings.⁹²

But the effect of the *Electric Chair* paintings is different. The artist has removed the condemned, making him both no one and everyone. And the placement of the chair, suggestive of the papal chair in Velasquez's *Pope Innocent X* (1650), as well as the papal chair in Francis Bacon's less reverent *Study after Velasquez I* (1950), taps into Michel Foucault's theory that executions are a necessary demonstration of sovereignty. According to Foucault:

The public execution . . . has a juridico-political function. It is a ceremonial by which a momentarily injured sovereignty is reconstituted. It restores that sovereignty by manifesting it at its most spectacular. The public execution, however hasty and everyday, belongs to a whole series of great rituals in which power is eclipsed and restored (coronation, entry of the king into a conquered city, the submission of rebellious subjects). . . . [T]here must be an emphatic affirmation of power and of its intrinsic superiority. And this superiority is not simply that of right, but that of the physical strength of the sovereign beating down upon the body of his adversary and mastering it.⁹³

In Warhol's *Electric Chair* series, just as the condemned is both absent and present, so is the State—and this is comforting. Complicity is shared. No one is to blame. Our system of capital punishment thrives partly because of this (joint) presence and absence. The state is present in the very bureaucracy of execution, from the legislative decision to authorize capital punishment to the judicial sanctioning of death-authorized juries.⁹⁴ At the same time, the state creates its own absence in diffusing authority among the cast of participants: legislators, prosecutors, jurors, trial and appellate

92. For two excellent surveys of such art, see LIONELLO PUPPI, *TORMENT IN ART: PAIN, VIOLENCE AND MARTYRDOM* (1990); MITCHELL B. MERBACK, *THE THIEF, THE CROSS AND THE WHEEL* (1998).

93. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 48-49 (Alan Sheridan trans., 1977).

94. In *Wainwright v. Witt*, 469 U.S. 412 (1985), the Supreme Court sanctioned the exclusion of jurors who would not impose death. To say this skews the fairness of the process is perhaps an understatement. In fact, it is more like placing a brick on a scale. See, e.g., Susan Raeker-Jordan, *A Pro-Death, Self-Fulfilling Constitutional Construct: The Supreme Court's Evolving Standard of Decency for the Death Penalty*, 23 HASTINGS CONST. L.Q. 455, 537-44 (1996).

judges,⁹⁵ governors with their ability to grant clemency, the executioner himself. And this is what I mean by absence. To borrow from another commentator, the diffusion allows everyone to say, "I'm only doing my job. I'm just a cog in the wheel. I didn't kill him."⁹⁶ The room is empty, even though it is full.

Of course, it is the viewer whose absence and presence is most felt, whose complicity is most telling. We linger in front of these paintings for a reason. Like the colors that saturate each frame—lavender, cadmium red, magenta, cyan, saffron—the paintings are beautiful, as is death. And this is perhaps the most significant point Warhol adds to the discourse about the death penalty, a point that legal scholarship surrounding the persistence of the death penalty in America has yet to fully accept, despite demonstrated evidence that it offers no better deterrent than life imprisonment,⁹⁷ despite numerous exonerations.⁹⁸ Warhol lays bare the aestheticism in executions. Death, like each little death of sex, is beautiful. Death reminds us. It reassures us. It comforts us. It whispers, "Not you. Not yet. You're alive."

95. For a discussion of how trial judges, by administering death-qualifying procedures, "convey [to jurors] the message that the legitimate and favored position in the legal system is one supporting [death]," and of the appellate review process that allows jurors to believe they themselves are not deciding death, see Haney, *supra* note 43, at 1482.

96. Martin, *supra* note 78, at 558. Professor Markus Dubber makes a similar observation: Viewed in its complex entirety, the modern system of capital punishment appears as one mad and futile scramble to deny personal responsibility for the necessarily violent aspect of law. It is the system of capital punishment that inflicts the pain of its punishment, not any of its members. If a particular member of the system is to be held responsible for the system's acts, it is always someone else, someone earlier, and someone elsewhere.

Markus Dirk Dubber, *The Pain of Punishment*, 44 *BUFF. L. REV.* 545, 605-06 (1996).

97. See Michael L. Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 *J. CRIM. L. & CRIMINOLOGY* 1, 3 (1996) (concluding that "the death penalty has virtually the same effect as long-term imprisonment on homicide rates").

98. Since 1973, 119 death row inmates have been exonerated. See *DEATH PENALTY INFO. CTR., INNOCENCE: FREED FROM DEATH ROW* (2005), <http://www.deathpenaltyinfo.org> (follow "The Issues: Innocence" hyperlink; then follow "List of Exonerees Since 1973" hyperlink) (listing exonerated individuals). Many of these exonerations are the result of DNA evidence. See generally *Innocence Project*, <http://www.innocenceproject.org> (tracking number of capital and non-capital defendants exonerated by DNA evidence).