

Not Representing Justice: Ellsworth Kelly's Abstraction in the Boston Courthouse

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Our task is not to find the maximum amount of content in a work of art, much less to squeeze more content out of the work than is already there. Our task is to cut back content so that we can see the thing at all.

– Susan Sontag¹

I think that if you can turn off the mind and look only with the eyes, ultimately everything becomes abstract.

– Ellsworth Kelly²

Ellsworth Kelly's *Boston Panels*—a series of twenty-one large rectangles, each a single vibrant color—is one of the most important and valuable works by a living artist in the city of Boston.³ The Moakley United States Courthouse, where the Kelly panels hang, is itself an important model of architectural planning for the more than ten billion dollars worth of federal buildings constructed in its wake.⁴

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1. SUSAN SONTAG, *Against Interpretation*, in *AGAINST INTERPRETATION AND OTHER ESSAYS* 3, 14 (1966).

2. Paul Taylor, *Ellsworth Kelly: Interview*, *ARTSTUDIO*, Spring 1992, at 154.

3. Jonathan Saltzman, *Courthouse's Bold Art Draws a Mixed Verdict: Not All See Worth in Valuable Works*, *BOS. GLOBE*, Mar. 28, 2008, at A1.

4. JUDITH RESNIK & DENNIS CURTIS, *REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS* 168 (2011). The U.S. General Services Administration based its Design Excellence Program, which aims to “attract world-renowned architects to federal projects,” on the design consultation and planning process crafted by then-Judge, now-Justice Stephen Breyer and District Court Judge Douglas Woodlock during the design of

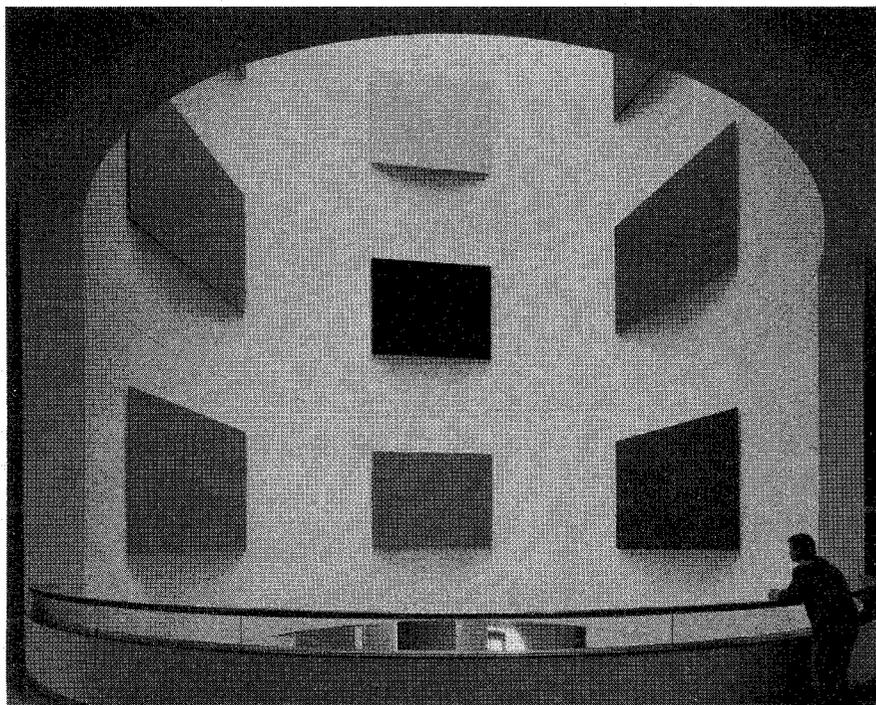


Figure 1. *The Boston Panels*, Ellsworth Kelly, 1998, John Joseph Moakley United States Courthouse, Boston, Massachusetts. Photographer: Steve Rosenthal. *See also* Color Plate 4.

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But despite the prominence of both artwork and building, no one has yet given a convincing answer to a simple question: Why is the former located in the latter? What do large rectangles of brute color have to do with justice—or the courts, or the federal government, or democracy? How do they—in the words of the General Services Administration (GSA), their owner—“facilitate a meaningful cultural dialogue between the American people and their government”?⁵

Descriptions of the monochromes as “oversized Post It notes”⁶ or “paint-store samples writ large”⁷ hardly bring out their civic potential. But neither is their civic role explained by claims that the paintings are

Boston’s federal courthouse. *Id.*

5. U.S. GEN. SERV. ADMIN., JOHN JOSEPH MOAKLEY UNITED STATES COURTHOUSE AND HARBORPARK: BOSTON, MASSACHUSETTS 21 (2003) [hereinafter GSA, MOAKLEY U.S. COURTHOUSE].

6. Saltzman, *supra* note 3.

7. Christine Temin, *Court of Many Colors: Ellsworth Kelly Installs a Major Commission in the City Where He Got His Art Start*, BOS. GLOBE, Sept. 16, 1998, at C1; cf. Robert Campbell, *A Mixed Verdict on New U.S. Courthouse*, BOS. GLOBE, Sept. 7, 1998, at A1 (“Kelly’s paintings are simple to say the least: Each consists of a single solid color, like a paint sample.”).

“inherently democratic,” since “[v]iewers are left to create their own meaning . . . based on their personal reactions to the colors.”⁸ This last argument, though repeated in more than one of the GSA’s official publications, gets the aesthetics and the politics of Kelly’s panels wrong in equal measure.

Yet with this work in particular, it matters that we get the aesthetics and politics right.⁹ *The Boston Panels* offers a limit case for—or *reductio* argument against—the use of abstraction in public art, particularly in American courthouses. By stripping his art of figuration, pattern, arrangement, and line—of nearly everything, in fact, but color and shape¹⁰—Kelly poses in its purest form a question as important for aesthetics as for politics: Can contemporary abstract art carry on the role that visual imagery has traditionally played in promoting, explaining, enforcing, or legitimating the state and its system of justice?¹¹

Judith Resnik and Dennis Curtis, in their magisterial survey of the iconography of justice, turn to Kelly’s work in a section on “The Safety of Abstraction.”¹² *The Boston Panels*, they claim, can be seen as a “safe haven,” a “conservative” artistic choice, because it allows the state and its courts to “avoid the question of what Justice might, could, or does look like.”¹³ Their point is that traditional representations of Lady Justice avoided controversy only so long as women were not legal persons, thus not parties before courts, thus apt as symbols of neutrality.¹⁴ Questions about what Justice *looks* like are really questions about what the state wants to *communicate* about it. When gendered as a woman, Justice was

8. GSA, MOAKLEY U.S. COURTHOUSE, *supra* note 5, at 20.

9. Here as elsewhere, I use “we” pointedly. As will become clearer, my concern about previous interpretations of Kelly’s panels focuses largely on their individualistic relativism: their denial of a “we” in interpretation. This, I will argue, is hardly the stance that “we” aspire for in sites of adjudication.

10. This is not quite true. The panels have (literal) depth, particularly in the rotunda where they are set against a curved wall. They also, importantly, have a readily discernable texture: perfect smoothness. Still, their smoothness registers as an absence of texture—yet another stripping. Even their shape is nondescript; unlike Kelly’s well-known curved canvases, the rectangles of the *Boston Panels* almost seem like no shape at all. As such, the panels allow viewers to focus on their color without competing distractions.

11. Put another way, the question is whether the Kelly panels do, or can, play a role resembling that of the great public and legal art throughout history, whether the image of Hammurabi inscribed above his Code, Lorenzetti’s *Allegories of Good Government* in Siena, the paintings and statues that fill the Town Hall of Amsterdam, or the innumerable Lady Justices, blindfolded or not, placed atop courthouses throughout the world. For discussion of those and many other examples, see RESNIK & CURTIS, *supra* note 4, at 18-90. I believe the answer to this question is yes, for the reasons given in Part IV of this Note.

12. *Id.* at 124.

13. *Id.* at 124-26; see also Saltzman, *supra* note 3 (“The selection of Kelly’s artwork for the courthouse probably reflected another reality: It’s increasingly difficult, in an era of identity politics, to find traditional representational art that won’t offend one group or another.”).

14. RESNIK & CURTIS, *supra* note 4, at 15.

meant either to symbolize the virtue's attributes, or to attract people—that is, men—toward it.

So even if Resnik and Curtis are right to say that Kelly's work "avoids the question of what Justice might . . . look like," the pressing questions are whether his work still might have anything to say about what justice involves, or any power to draw people to it. *The Boston Panels* can be seen as safe or provocative only once one has some idea of what that work is trying to mean, or do.¹⁵

I prefer the latter option: to ask what the panels do. The reason that Kelly's work has been so poorly understood is that people have tried so hard to understand it. They have sought meaning, usually some message about justice, in his colors. Kelly himself has not always remained innocent of this, though more often he directs viewers' attention away from meaning and toward his colors' "voluptuousness"—a word that calls to mind those many Lady Justices. His work's goal, he says—as does the GSA in its official materials—is to provide viewers with a particular experience: to "get at the rapture of seeing."¹⁶

Here, then, is the puzzle: If justice is meant to be blind,¹⁷ why would anyone ever want to emphasize the rapture of seeing within the walls of a courthouse? Answering that question and understanding the relationship between Kelly's abstraction and justice requires viewers to get beyond meaning—or stay short of it—and give themselves over instead to his work's sensuous color, its visual voluptuousness. It is only by focusing more on seeing than understanding that viewers can "see"—which is to say, understand—that Kelly's work is aimed at a different audience, and promotes a different side of adjudication, than any of the "representations of justice" that have long filled courthouses throughout the world.

I.

The Boston Panels comprises twenty-one rectangles, each a monochrome, spread throughout the public areas of the Moakley Courthouse. Nine are grouped together in the courthouse's cylindrical rotunda. Each of these is eleven feet high by thirteen-and-a-half feet wide.

The remaining twelve panels are grouped in pairs, two at either end of

15. To say that the *work* means or does something is to resist a reduction of its meaning either to the explicit intentions of its artist or the freewheeling, acontextual projections of its viewers. A necessary fiction in art as in law, personification has long served this purpose. See generally Brian Soucek, *Personifying Art*, in *NEW WAVES IN AESTHETICS* 224 (Kathleen Stock & Katherine Thompson-Jones eds., 2008).

16. GSA, MOAKLEY U.S. COURTHOUSE, *supra* note 5, at 23; see also U.S. GEN. SERV. ADMIN., *THE BOSTON PANELS: ELLSWORTH KELLY* 7 (n.d.) [hereinafter GSA, BOSTON PANELS].

17. See generally RESNIK & CURTIS, *supra* note 4, 91-105 (discussing the use of blindfolds and blindness in representations of Justice).

the courthouse's three long, curved public walkways. Along one side of the walkways are the entrances to the building's twenty-seven courtrooms; along the other, a sloped glass curtain provides a giant window onto Boston's harbor and skyline. The panels at the ends of the hallways are narrower: eleven feet high by seven feet, four inches wide.

The panels are made of aluminum and fiberglass, and they come in shades of blue, green, red, orange, yellow, and black. The color on each is completely uniform, utterly effaced of brushstrokes or other expressive markings.

Though beautifully produced and arranged, Kelly's panels are hardly the first such monochromes, and the difference between his and his predecessors' is instructive. Compare, for example, the series of seven rectangles in blue, green, red, yellow, gray, white, and black published by Alphonse Allais in his *Album Primo-avrilesque* of 1897. On paper, five of the rectangles look nearly identical to Kelly's: after all, they are just blocks of solid color. Yet Allais's monochromes predate the *Boston Panels* by nearly a century. And, importantly, they are jokes. As such, the red monochrome is entitled "Tomato Harvest by Apoplectic Cardinals on the Shore of the Red Sea." The white panel "depicts" a "First Communion of Anemic Young Girls in Snowy Weather."

I put "depicts" in scare quotes because that is the joke: treating monochromes as representational pictures. If art is thought to imitate reality, an all-red painting must be a painting of an all-red scene.¹⁸ In this, Allais was not entirely original. His Red Sea joke had already been anticipated, and by none other than Søren Kierkegaard. In *Either/Or*, Kierkegaard pseudonymously wrote of a life achievement that

amounts to nothing at all, a mood, a single color. My achievement resembles the painting by that artist who was supposed to paint the Israelites' crossing of the Red Sea and to that end painted the entire wall red and explained that the Israelites had walked across and that the Egyptians were drowned.¹⁹

Despite its age, the joke seems not to have grown old. In 1998, the year the Moakley Courthouse opened, the Tony award for Best Play went to Yasmina Reza's *'Art'*, in which an all-white painting was said to show a skier disappearing into snow falling from white clouds.²⁰

Reviewing Reza's play in June 1998, the philosopher and art critic

18. See ARTHUR C. DANTO, *Yasmina Reza's ART*, in *THE MADONNA OF THE FUTURE: ESSAYS IN A PLURALISTIC ART WORLD* 304, 307 (2000) ("The ancient theory that art is imitation can accommodate a monochrome painting providing it mimics a monochrome reality . . .").

19. SØREN KIERKEGAARD, *1 EITHER/OR* 28 (Howard V. Hong & Edna H. Hong trans., 1987) (1843).

20. YASMINA REZA, *'ART'* (Christopher Hampton trans., 1996).

Arthur Danto claimed that “monochrome painting has never been more alive than it is today.”²¹ Addressing the common question of how monochromes should be understood, Danto responded: “There is no single right answer; we have to take them one at a time. The only wrong answer, at least since 1915 [the date of Malevich’s *Black Square*], is pictorialization.”²² Jokes aside, most modern monochromes are simply not meant as pictures—representations of some “monochromatic reality.”²³

Yet Danto’s “wrong answer” is the one that those who discuss Kelly’s monochromes have given all too often. Even a member of the selection committee reported that she responded to Kelly’s panels because, to her, they suggested nautical flags²⁴—an admittedly germane association, given the courthouse’s location on the Boston harbor and the court’s historic tie to admiralty law. More bizarrely, tour guides in the building have been said to claim that the blue panel represents the “merging of the races in Boston.”²⁵

If these claims are easy to dismiss, what do we make of a story that Ellsworth Kelly himself tells in which he links the black panel to judicial robes? In his telling, “Justice Breyer asked what [the panels] meant, and I said it’s a bunch of colors, the black panel in the center holds it all together just like you Judge in your black robe. And they laughed and liked that answer.”²⁶ If the central black panel represents the robed judge, might it not equally represent death, as does one of the most famous monochromes in history, the black page in *Tristram Shandy*?²⁷ Is the black panel holding everything together, or pointing to some absence or darkness at the center of the enterprise?²⁸

21. DANTO, *supra* note 18, at 311.

22. *Id.*

23. *Id.* at 307.

24. See Meeting Minutes (Dec. 12, 1994), GSA Art-in-Architecture Archive AA 283, Ellsworth Kelly, at 3.

25. Jane Holtz Kay, *The Courthouse as a Bastion Against Terror*, N.Y. TIMES, Jan. 31, 1999, at 34.

26. ELLSWORTH KELLY: THUMBING THROUGH THE FOLDER, A DIALOGUE ON ART AND ARCHITECTURE WITH HANS ULRICH OBRIST 15 (2010). Judge Douglas Woodlock offers a more sophisticated version of this reading:

[T]he relatively few cases and controversies that present themselves in the courthouse for resolution as multifaceted systemic litigation find representation in the nine-panel array in the Boston courthouse’s central drum. There, a central black panel (the robed judge?) absorbs (in color theory and the physics of light, as well as in resolving disputes) the limited spectrums of the surrounding eight multi-colored partisans.

Douglas P. Woodlock, *Communities and the Courthouses They Deserve. And Vice Versa.*, 24 YALE J.L. & HUMAN. 271, 284 (2012).

27. LAURENCE STERNE, 1 THE LIFE AND OPINIONS OF TRISTRAM SHANDY, GENTLEMAN 71 (1768); cf. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) (“Legal interpretation takes place in a field of pain and death. . . . A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.”).

28. Cf. Linda Nochlin, *Kelly: Making Abstraction Anew*, ART IN AM., Mar. 1997, at 68, 77

The problem is that there is no way of knowing. If the panels were to have a message, it would have to be one projected onto them, not found there. In this, they are perhaps less like the black page in *Tristram Shandy*—the point of which is clear—and more like the white (or blank) page in Volume 6, where the reader is invited to draw one of the book's characters: to "paint her to your own mind" and "please but your own fancy in it."²⁹

The architecture critic Robert Campbell said nearly this when describing *The Boston Panels* soon after the work's installation. In his description of the panels: "[T]he horizontal ones in the rotunda are landscapes and the vertical ones at the ends of the corridors are portraits. . . . [T]hey are as if the message were yet to be inscribed."³⁰

Something like Campbell's idea—that the panels are potentialities "yet to be inscribed"³¹—underlies most of the interpretations of monochromes offered so far. The Kierkegaard-Allais-Reza jokes, the nautical flags, the black square as robed judge (or criminality, or death)—these readings all pictorialize the monochromes, attempting to find (or more accurately, ascribe) meaning there. But so do more sophisticated readings that see the panels as symbolizing or reflecting some aspect of justice. These take a variety of forms: Kelly has compared the panels' "measure and balance" to that of justice;³² Judge Douglas Woodlock, the person most involved in the courthouse's planning and construction, has suggested that the paired panels at the end of each hallway represent "bi-polar disputes."³³

Since those meanings are not present on the face of the work, however, they must necessarily be ascribed by the viewer. In other words, the monochromes are just as Campbell said: potentialities, with meaning yet to be inscribed. By seeking representation (anemic schoolgirls, flags, robes) or expression (justice, criminality, courtroom adversaries), interpreters treat the monochromes as open or unfinished. They become like Sterne's blank page, which viewers are meant to complete, constrained only by their "own fancy."³⁴

("[T]he criminal is at the very heart of the law," André Breton once said. 'It's obvious: the law could not exist without the criminal.' Perhaps Kelly's black panel exists to remind us, simply by being where it is, of the contradictions that lie not merely at the heart of our visual apprehensions, but, by analogy, in our institutional practices and their theoretical grounding as well.")

29. LAURENCE STERNE, 6 *THE LIFE AND OPINIONS OF TRISTRAM SHANDY*, GENTLEMAN 146-47 (1769).

30. Robert Campbell, Architecture Critic, Boston Globe, Remarks at the Symposium on the Art and Architecture of Civic Buildings, Boston, Mass. (Sept. 24, 1998).

31. *Id.*

32. Kelly has said that "his paintings are governed "by measure and balance," . . . just like justice itself." Temin, *supra* note 7.

33. Woodlock, *supra* note 26, at 284 ("[T]wo adversaries in tension seek to have courtroom proceedings establish a balance between them.")

34. STERNE, *supra* note 29, at 147.

In its official literature on the *Boston Panels*, the GSA makes a virtue out of this indeterminacy. “Viewers,” it says, “are left to create their own meaning for the work based on their personal reactions to the colors. As a result, the experience of looking at the paintings is inherently democratic; each viewer participates in the artist’s act of creation.”³⁵ The GSA’s claim is the political version of the Campbell thesis. Like Campbell, the GSA sees the monochromes as incomplete. Viewers participate in the “act of creation” by adding “their own meaning for the work.” Because all can do so “based on their personal reactions,” viewing Kelly’s monochromes is said to be a democratic experience.

II.

The unfettered, democratic free-for-all that the GSA advertises in regard to the *Boston Panels* is wrong both aesthetically and politically, and in almost equal measure.

As an art-historical matter, treating Kelly’s monochromes as potential portraits or landscapes gets abstraction exactly backwards. Monochromes like Kelly’s are spare because the extraneous has been pared down, not because they await completion. Abstraction, in art as elsewhere, is a process of stripping away. Arthur Danto has described modernist painting as “a regressive, systematic dismantling of that entire system of illusionistic devices built up over the centuries to facilitate convincing pictorial representations”³⁶ The monochromatic canvas, he says, is “the logical terminus of this collective depictorializing procedure.”³⁷

What is true of modern painting is true of Kelly’s own career as an artist as well. In Diane Waldman’s account, “Kelly progressed from the representation of subjects in nature to arrangements of color by chance, which he extended to a deliberate selection of colors, and then finally to the gradual reduction of form and the enlargement of scale.”³⁸

Taking a strangely ambivalent stance, the GSA’s publications recognize the formalist aspect of Kelly’s work even as they tout viewer-inscribed meaning.³⁹ “Kelly’s work does not depict anything,” one pamphlet

35. GSA, MOAKLEY U.S. COURTHOUSE, *supra* note 5, at 20; *see also* Woodlock, *supra* note 26, at 284-84 (“The Kelly panels can fairly be read, I think, as an invitation to future litigants, lawyers, jurors, and judges to inscribe their own meanings on the walls of the courthouse.”).

36. Arthur C. Danto, *Abstraction*, THE NATION, Apr. 8, 1996, at 42.

37. *Id.*

38. Diane Waldman, *Ellsworth Kelly*, in ELLSWORTH KELLY: A RETROSPECTIVE 10, 25 (Diane Waldman ed., 1996).

39. This ambiguity recurs in the GSA’s official description of another recent commission in Massachusetts: Sol LeWitt’s *Wall Drawing #1259: Loopy Doopy* (2008) in the Springfield Courthouse. “[LeWitt’s] patterns are not meant to be symbolic or representative of anything, although viewers will create their own interpretations. The wall drawing might evoke water currents, sound waves, winding vines or countless other associations. This complete accessibility and openness of

accurately claims. “Instead, his work isolates and distills fragments of visual experience.”⁴⁰ The point of his work is “to cultivate a heightened awareness of the visual environment . . . , to get at the rapture of seeing.”⁴¹

In Part IV, I offer my own view of what it might mean politically for an artwork to cultivate rapturous visuality within a courthouse. But mine is *not* the political story told by the GSA. Instead, what the GSA claims as “inherently democratic” is the work’s indeterminate meaning—the fact that “viewers are left to create their own meaning for the work based on their personal reactions.”⁴² Charitably fleshed out, the GSA’s argument is likely that individual citizens in a democracy must be allowed the autonomy to determine questions of meaning for themselves. As the Supreme Court has said: “At the heart of liberty is the right to define one’s own concept of existence, *of meaning*, of the universe, and of the mystery of human life.”⁴³ Courts are relevant to this story only insofar as they guard the negative liberty of citizens to determine their own meaning. That meaning need only be based on people’s “personal reactions.”

This account is “democratic” in a sense: it recalls the minimal democracy of the private voting booth, in which each individual has an equal chance to express his or her opinion, with no need (or, indeed, opportunity) to provide reasons justifying that opinion. But this sense of democracy has little if anything to do with adjudication. If the United States’s courts are seen as democratic institutions it is because, ideally, they treat every litigant with equal respect; they provide each an opportunity to be heard, in a presumptively public forum, by an impartial judge bound to decide each case on the basis of stated reasons. In doing so, they allow individual citizens to place a check on their government—a fundamental democratic value—by means of reasoned argument.

Courts are democratic, in other words, because they are sites for reasoned public discourse. Yet this is precisely *not* the claim made on behalf of the Kelly panels, the indeterminacy of which is said to foster personal, private reactions.

Kelly’s particular brand of abstraction, with its emphasis on pure, “voluptuous”⁴⁴ color, provides an especially striking case of non-

meaning are hallmarks of LeWitt’s art and are also well-suited to the civic function of the courthouse.” U.S. GEN. SERV. ADMIN., UNITED STATES COURTHOUSE: SPRINGFIELD MASSACHUSETTS 22 (2008).

40. GSA, BOSTON PANELS, *supra* note 16, at 7.

41. *Id.*

42. GSA, MOAKLEY U.S. COURTHOUSE, *supra* note 5, at 20.

43. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (emphasis added).

44. Mark Rosenthal, *Experiencing Presence*, in ELLSWORTH KELLY: A RETROSPECTIVE 62, 63

publicity. By reducing his panels to brute color, Kelly's work foregrounds what has historically been thought of as the *least* intersubjective element of the visual arts. For the philosophers who gave aesthetic theory its shape in the eighteenth century, color was often thought to lie outside the bounds of what could even be called beautiful. From Hutcheson at the beginning of the century to Kant at its end, aesthetic theorists repeatedly distinguished the sensuousness of pure color from the "higher beauty" of line, arrangement, and form.⁴⁵ Kant dismissed "mere color" as "mere sensation," which "deserve[s] to be called only agreeable."⁴⁶ "[B]ecause the quality of the sensations themselves cannot be assumed to be in accord in all subjects," he wrote, "it cannot easily be assumed that the agreeableness of one color in preference to another . . . will be judged in the same way by everyone."⁴⁷

Kant's point is that judgments of beauty, though subjective, still make a claim to universal agreement.⁴⁸ We think someone is simply wrong if he believes that Thomas Kinkade is a better painter than Rembrandt.⁴⁹ Not so with judgments about, say, chocolate versus strawberry ice cream; these, for Kant, are judgments about the "merely agreeable," not beauty. When it comes to gustatory taste, there are no wrong answers. As the adage has it: "There's no disputing about taste."

I draw out this (admittedly questionable) distinction only to stress the fact that within modern aesthetic theory, brute color, like tone or timbre in music, has generally been placed on the side of the agreeable. That is to say, works that foreground pure color—and it is hard to imagine a work

(Diane Waldman ed., 1996) (referring to "voluptuousness" as a favorite word of Kelly's); see also Temin, *supra* note 7 (quoting Kelly as saying that he wanted his "pictures to be more voluptuous, sexier" than Mondrian's).

45. Because they refused to call pure color beautiful, the philosopher George Dickie dismissed these figures as victims of "the great, eighteenth-century, philosophical, color-blindness plague." See GEORGE DICKIE, *THE CENTURY OF TASTE: THE PHILOSOPHICAL ODYSSEY OF TASTE IN THE EIGHTEENTH CENTURY* 151 (1996).

46. IMMANUEL KANT, *CRITIQUE OF THE POWER OF JUDGMENT* 108 (Paul Guyer & Eric Matthews trans., 2000) (1790).

47. *Id.* at 109.

48. This is a reason why aesthetics played such a central role in eighteenth-century philosophy: it offered a model of judgment that was rooted in human sentiment, yet still public. It opened a space in which subjectivity and universality need not be opposed. Politically, aesthetic judgment thus offered a way of resisting Hobbesian egoism while accepting the role it gave to human passions. On this, see Brian Soucek, *Resisting the Itch To Redefine Aesthetics: A Response to Sherri Irvin*, 67 J. AESTHETICS & ART CRITICISM 223, 225 (2009).

49. Cf. DAVID HUME, *Of the Standard of Taste*, in *ESSAYS: MORAL, POLITICAL, AND LITERARY* 230-31 (Eugene F. Miller ed., 1985) (1757) ("Whoever would assert an equality of genius and elegance between OGILBY and MILTON, or BUNYAN and ADDISON, would be thought to defend no less an extravagance, than if he had maintained a mole-hill to be as high as TENERIFFE, or a pond as extensive as the ocean. Though there may be found persons, who give the preference to the former authors[,] no one pays attention to such a taste; and we pronounce without scruple the sentiment of these pretended critics to be absurd and ridiculous.").

that does this more effectively than Kelly's *Boston Panels*—are analogized to ice cream and other purely sensory delights. They can certainly provide pleasure, just not the shared, public pleasures of the beautiful. But if the Kelly panels are really just means of providing sheer sensation,⁵⁰ it becomes unclear how, as a philosophical matter, they prove any different from ice cream. (A reporter once observed that Kelly talked about the green in a painting by Cranach the Younger “as if he wanted to eat it.”⁵¹) Would a different purpose be served if, instead of Kelly's paired monochromes, the Moakley Courthouse gave out two flavors of ice cream at the end of each hallway?

III.

The answer depends, yet again, on what we see as the purpose of Kelly's work. Consider an account by one prominent interpreter: Justice Stephen Breyer, who helped select the architect and artwork for the Moakley Courthouse when he served on the First Circuit Court of Appeals. Justice Breyer once suggested that Kelly's vibrant panels were installed in the courthouse “[s]o the people who wander there are not totally dismal, even if their case is hopeless. . . .”⁵² In a nicely democratic convergence, a court officer in Boston has been quoted in the press as saying, similarly: “It's nice to have some paintings here, because there's so much sadness. There's a lot of people going to jail.”⁵³

On what we might call “the Breyer account,” there really is little difference between the Kelly panels and the ice cream giveaway I imagined above. Both offer cheer or comfort for those engaged in the often sad business of the federal courts. The Breyer account does little to distinguish courthouse art from courthouse cafeterias.⁵⁴ Or, to recall an actual criticism of the *Boston Panels*, it makes its purpose little more than decorative.⁵⁵

The Breyer account has three genuine strengths, however, which should

50. Rosenthal, *supra* note 44, at 63 (“Because sensuality and even hedonism are crucial to Kelly's art and thought, color symbolism is precluded . . .”).

51. Temin, *supra* note 7.

52. Nikki Schwab, *Justice Stephen Breyer Champions Art, Restaurants, Advice*, U.S. NEWS WASH. WHISPERS (May 12, 1999), <http://www.usnews.com/news/blogs/washington-whispers/2009/05/12/justice-stephen-breyer-champions-art-restaurants-advice>.

53. Saltzman, *supra* note 3.

54. See Schwab, *supra* note 52 (“Breyer is not interested just in making public buildings architecturally and artistically pleasing. He has plenty of ideas to make them real, usable, public spaces, too. . . . He thinks that serving tasty food helps. . . . ‘It's important to have a good restaurant in a building.’”).

55. See Campbell, *supra* note 7 (“I don't know where [the *Boston Panels*] rank as art, but they're successful as decor.”). *But see* Temin, *supra* note 7 (“Color has nothing to do with decor for [Kelly].”).

not be ignored. In all three ways it is an improvement over the previous interpretations we have encountered.

First, Justice Breyer's account takes seriously the realities of a courthouse and the needs and desires of its users. Justice Breyer and the unidentified court officer recognize that courts are not sites of unfettered democratic interpretation, as the GSA would suggest. Instead, they are places where definitive judgments are made—judgments which often produce sadness, and incarceration, and despair.⁵⁶ Justice Breyer's account takes note of this and calls for sensitivity. His account might not distinguish well between art and food service, but it does distinguish courthouses from other types of government buildings. His realism about courts stands in happy contrast to the GSA's generic, inapposite claims about "inherently democratic" relativism.

A second strength of the Breyer account is its willingness to ascribe a causal power to courthouse art. He allows them to "do," not just to "mean." Justice Breyer's causal goal is relatively modest: Kelly's panels might cheer people up. But it is worth noting the venerable aesthetic tradition that this account joins. Plato's worry about the ways music shapes character provides an early and influential example.⁵⁷ Court art has long been driven by causal theories. Often, works were directed at judges: Last Judgment scenes reminded judges that they themselves would be judged, while gorier paintings depicted earthly punishments for corrupt judges.⁵⁸ In both cases, the art's goal was to cause judges to carry out their roles more virtuously.

The causal theory of courthouse art is hardly ubiquitous, however. Some of the most common iconography, such as images of blindfolded Justice, is meant more to *symbolize* impartiality than to help bring it about. Many of the interpretations given of the Kelly panels likewise forgo causation in favor of symbolism. According to Judge Woodlock's reading, for example, in which the paired panels represent bi-polar adjudication, the panels are ascribed a meaning. The Breyer account, on the other hand, offers the potential that art might not just represent the aspirations of the court; it might play a role in bringing that state of affairs about. It is worth pointing out in passing that, elsewhere, Judge Woodlock himself has suggested such a role for the Kelly panels. "I aspire to write opinions with the rigor, clarity, and perfect pitch for color evident in the

56. See Cover, *supra* note 27.

57. See PLATO, REPUBLIC, bk. 3 (C.D.C. Reeve trans., Hackett Publ'g 2d ed. 1992); *cf.* Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) ("From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known [music's] capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state.")

58. See RESNIK & CURTIS, *supra* note 4, at 33-37.

Ellsworth Kelly panels that grace the walls outside my courtroom,” he has written.⁵⁹ Judge Woodlock’s aspiration suggests another judge-focused, causal role for court art: providing an inspiring example of technical craftsmanship and attention to detail.

The Breyer account’s third and perhaps most important strength is that it avoids the pictorialism and symbolism that infect all of the interpretations given previously. The various attempts to make Kelly’s blank rectangles into unfinished portraits or vague symbols of justice are misguided not just because they lead to indeterminate, contradictory meanings. The real problem is that these readings do nothing to distinguish Kelly’s artistic project from that of any other monochromist⁶⁰ or to engage abstraction on its own art-historical terms. They treat abstraction as if it were the forerunner of representational art rather than a conscious rejection of it. In failing to see Kelly’s work as a move away from representation, interpreters have no way of determining what his work moves toward—that is, what his work aims to achieve.

The Breyer account at least accepts Kelly’s paintings on their own terms. Unlike other interpretations, it does not require the panels to be something more (or other) than they are. Where most readings draw a relation between the panels and some idea or object they are said to represent, the Breyer account focuses instead on what the panels do to their viewers. Stressing the colors and the reactions they inspire, the Breyer account actually comes closer to expressing the more sensuous goal that Kelly himself has suggested: “to get at the rapture of seeing.”

The question that remains is why the pleasures of sight should be emphasized in a court. This requires, finally, a positive account of the role *The Boston Panels* plays in the Moakley Courthouse. Admittedly, the discussion thus far has been largely critical. Previous interpreters, I have claimed, have erred aesthetically by insisting that Kelly’s panels be about something. They have made political blunders by aligning democratic courts with private meaning rather than public spheres. Meanwhile, the passing comment that I have inflated into the so-called Breyer account, while avoiding these pitfalls, puts Kelly’s masterworks philosophically on par with the court’s cafeteria.

Still, positive desiderata emerge from each of these critiques. A good account of Kelly’s monochromes as civic art should acknowledge, even

59. BOSTON ATHENÆUM, VANDERWARKER’S PANTHEON: MINDS AND MATTER IN BOSTON 26 (2009).

60. Arthur Danto begins *The Transfiguration of the Commonplace* by imagining a gallery of seven perceptibly indiscernible red monochrome paintings. Each comes from a different artistic tradition or genre, and each thus has a distinct meaning—except for one whose red is merely the ground of an unfinished painting. A commonplace object rather than an artwork, it lacks meaning. ARTHUR C. DANTO, *THE TRANSFIGURATION OF THE COMMONPLACE* 1-2 (1981).

celebrate, their primary feature: voluptuous color. The account should tie the work to the real democratic function of courts: fair and public adjudication. The account needs to consider whether the works have a causal power, as public art long has. And it should confront the question with which I began, about the political role vision does or should play in courts.

IV.

Given how often Justice has been shown as blindfolded,⁶¹ the link between visibility and courts might appear puzzling. Blindfolding Justice is often meant to highlight its impartiality: the judge's refusal to be swayed by bribes or by the status or identities of the respective litigants. Covering the eyes possibly signals a resistance to temptation. It might also indicate an emphasis on reason rather than passion.⁶² Finally, to emphasize the absence of sight is to suggest its substitute: hearing. Within the American legal tradition, "[t]he fundamental requisite of due process of law is the opportunity to be *heard*."⁶³ Since arguments are what judges are meant to hear, blindfolded Justice again represents the primacy of reason over superficial appearances. Why, then, would Kelly promote the sensuousness of visual experience—the very thing reason is supposed to overcome?

The answer requires us to see, and move beyond, a nearly universal fact about the standard iconography of Justice: its focus on the judge. More precisely, imagery is standardly focused upon the relationship between judges and the parties before them. If blindness and blindfolds are common and suggestive visual metaphors, this is because they suggest that *judges* should not distinguish litigants on the basis of their gender, race, wealth, or power. If the blindfold's denial of the senses is compelling, it is because reason should govern the interactions between judges and those being judged or, more likely, their attorneys.

But Kelly's *Boston Panels* is not necessarily aimed at judges, attorneys, or litigants. For those parties, sight is admittedly not a primary value. Yet public courts require an additional party as well: namely, the public. And the value of the public is precisely that of an observer. In other words, it turns on sight. Kelly's *Boston Panels* is perhaps that rare piece of

61. This is not to suggest that Justice has always been depicted with a blindfold. For rich discussions of many sighted as well as blindfolded Justices, see RESNIK & CURTIS, *supra* note 4, at 62-76; and Theodore Ziolkowski, *The Figure of Justice in Western Literature and Art*, 75 INMUNKWAHAK: J. HUMAN. 197 (1996).

62. See RESNIK & CURTIS, *supra* note 4, at 75.

63. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) (emphasis added). Hearing is itself a metaphor here, for courts have made clear that arguments made through briefs comport with due process. A party's argument is "heard," in other words, when a judge *reads* what they submit.

courthouse art that celebrates, and ideally stimulates, an observing public. To show this, however, requires a few preliminary words about the value of publicity in the context of democratic courts.⁶⁴

In the United States, publicity is explicitly required under the federal constitution in just two types of proceedings: criminal trials⁶⁵ and confessions of treason.⁶⁶ Modern courts have extended these protections much further, however, requiring that courts—and, importantly, court filings—be open to the public in civil trials, bankruptcy proceedings, and myriad other hearings.⁶⁷ Open courts are prized, as Justice Holmes once wrote, not because everything that goes on in them is interesting to the public, but “because it is of the highest moment that those who administer justice should always act under the sense of public responsibility”⁶⁸

Holmes’s checking function has a long pedigree. We have already seen it reflected in the Last Judgment scenes that often adorned European courts.⁶⁹ At least one purpose of those was to remind judges that they too would be judged; their actions were being observed by God. The same idea was given secular expression by Jeremy Bentham, perhaps the most forceful philosophical proponent of public trials.⁷⁰ As he believed, “the more strictly we are watched, the better we behave.”⁷¹ Note how the checking function works in all of these theories: the claim is not that the public (or God) will directly intervene in the workings of a court should they see injustice or corruption occur.⁷² The public serves its checking function just by sitting there watching; it is the fact of being watched that alters the participants’ behavior.

Bentham, and modern courts in his wake, suggested other benefits to publicity beyond its checking function. It has been said that the presence of a viewing public promotes civic education, reduces the chance that witnesses will lie, increases confidence in judicial decisions, and,

64. Here I borrow heavily from Judith Resnik, *Bring Back Bentham: “Open Courts,” “Terror Trials,” and Public Sphere(s)*, 5 L. & ETHICS HUM. RTS. 1 (2011).

65. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”).

66. U.S. CONST. art. III, § 3 (“No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”).

67. See *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 765 F. Supp. 2d 411, 431 (S.D.N.Y. 2009) (collecting cases).

68. *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884) (Holmes, J.).

69. See *supra* note 58 and accompanying text.

70. See Resnik, *supra* note 64 (describing Bentham’s commitment to publicity as “fierce”).

71. JEREMY BENTHAM, 1 POOR LAWS 277 (Michael Quinn ed., 2001) (quoted in Resnik, *supra* note 64).

72. Compare, in this regard, the often interventionist role once played by the public at public executions. See Thomas W. Laqueur, *Crowds, Carnivals and the State in English Executions, 1604-1868*, in *THE FIRST MODERN SOCIETY: ESSAYS IN ENGLISH HISTORY IN HONOUR OF LAWRENCE STONE* 305 (1989).

especially in the criminal context, allows for community catharsis.⁷³ Given the multiple values served by an observing public, the right of access to courts has been hailed as “inherent in the nature of our democratic form of government.”⁷⁴

This returns us to Kelly’s *Boston Panels*, which the GSA similarly refers to as “inherently democratic.” As I have noted, the GSA ties the *Panels*’s democratic value to the work’s open-endedness: viewers, it claims, are called to democratically participate in the work’s creation by ascribing to it their own subjective meanings. I also want to say that Kelly’s work calls for democratic participation, but of a more important sort, and one better tailored to the judiciary.

My claim is this. With its striking, “voluptuous,” perfectly executed fields of color, Ellsworth Kelly’s *Boston Panels* aims to give viewers the sensuous, even rapturous, experience of pure seeing. Arranged in the courthouse’s atrium and at the end of its courtroom hallways, the panels draw the viewing public into the courthouse, up to the courtroom floors, and then down the rows of courts. They draw viewers in these directions for a single purpose: so that they might experience the pleasure of looking—Kelly’s “rapture of seeing.” As civic art, it is entirely fitting that the panels emphasize looking, just as it is helpful that they attract lookers. And this is because an observing public is a necessary condition of truly democratic courts.

In this way, the Kelly panels continue the best traditions of courthouse art. They play a causal role, not only drawing viewers in, but also offering, even teaching, the sometimes forgotten sensuous pleasure of looking. At the same time—more innovatively—they celebrate, without representing, a core element of democratic adjudication: public viewing. None of this is to say that the panels are the *only* way that publicity could be celebrated or encouraged through art. I do claim, however, that Kelly’s work is concerned with a facet of democratic adjudication that public art has traditionally ignored. In this respect, Kelly’s work is anything but conservative.⁷⁵

Admittedly, there remains a difference between the sensuous experience of viewing Kelly’s color panels in the hallway and the cognitively richer viewership that ideally goes on within the courtroom. I do not mean to run the two together. Yet this objection to my reading can

73. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569-73 (1980); *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 217 (3d Cir. 2002) (listing six values “typically served by openness”); see also Resnik, *supra* note 64 (discussing the truth-promoting, educative, and disciplinary functions of publicity according to Bentham).

74. *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1069 (3d Cir. 1984).

75. Cf. *supra* notes 12-13 and accompanying text.

be made into one of its virtues. The objection incorporates into my interpretation the frustration that motivated previous readings—those I rejected earlier. Interpreters constantly, almost unavoidably, seek meaning in Kelly's panels, insisting that they be more than just colors. The pervasiveness of such accounts points to the fact that viewers crave meaning;⁷⁶ seeking a cognitive understanding of things one observes is as natural as looking for figures in clouds. Looking at Kelly's *Boston Panels* thus must prove both pleasurable and unsatisfying. Yet this is perfect, if what we ultimately want is for the viewing public to head inside the courtroom. Viewers' quest for meaning should not lead them to project meaning onto the artwork outside the courtrooms. It should open them to observing the meaningful activities taking place *inside*.

The claim that Kelly's *Boston Panels* are aimed not at judges, lawyers, or litigants, but at the viewing public, finds plenty of support in the structure of the building in which the panels hang. The previous sentence itself echoes a sentiment expressed by Justice Breyer and thought important enough to carve into granite alongside the courthouse's lawn. "This most beautiful site in Boston," Justice Breyer claimed, "does not belong to the judges. It does not belong to the lawyers. It does not belong to the Federal government. It does not belong to the litigants. It belongs to the people."⁷⁷

This aspirational notion is embodied architecturally by the sloped curtain of glass that defines the Moakley Courthouse's harbor-facing side—the side looking toward the buildings of downtown Boston, across the water. Using glass to signal transparency is, by now, a standard trope in the architecture of courthouses and other public buildings.⁷⁸ The goal of transparency is related to open courts and the values of publicity which I have already described. But praise of transparency is often imprecise. The real value for courts is not transparency, but the presence of a viewing public; "transparency" simply means that nothing blocks the public's view. The design of the Moakley Courthouse respects this, using glass not for its own independent symbolism, but as a medium which the public—the city of Boston—can literally see through. More importantly, the building gives the public two things to see when it looks through that

76. In an article about a show of abstract art at the DeCordova Museum, described as a "warm up for [the unveiling of] the *Boston Panels*, which some people will find difficult," one curator was quoted to say: "In most American public and private schools, there's little visual education. It's all text-based. So people are unfamiliar with pure visual experience." A colleague of the curator added: "People don't trust their own responses. . . . They feel that someone has to tell them about art." Christine Temin, *Proving Abstract Art Isn't Child's Play: DeCordova Museum Thinks Two New Exhibits Will Help Us Come To Know and Like It*, BOS. GLOBE, Sept. 13, 1998, at C6.

77. See GSA, MOAKLEY COURTHOUSE, *supra* note 5, at 3.

78. See RESNIK & CURTIS, *supra* note 4, at 340-42.

glass: Kelly's panels and the courtroom doors.

If the building is thus designed to highlight the public as observer, its plan also insures that other parties—particularly judges and prisoners—will *not* be Kelly's audience. The GSA's *U.S. Court Design Guide* calls for segregated circulation patterns for judges, criminal defendants, and the general public.⁷⁹ As a result, judges in Boston have their own elevators, taking them from locked office suites to a private parking garage. Prisoners similarly move, or are moved, through the courthouse without encountering the general public—or any art. As Professors Resnik and Curtis have noted, “to the extent that any of the texts or imagery inscribed on the walls [in courthouses] aim at didacticism or that windows and skylights bespeak transparency, the narrow path through secure tunnels . . . taken by defendants excludes them from the normative prescriptions offered.”⁸⁰ The practical realities of court construction in a security-conscious world only reinforce my aesthetic claim: that the Kelly panels are addressed to the viewing public rather than the participants (judges and prisoners) most commonly associated with courts.

The intended audience matters in this case. Were the *Boston Panels* aimed, for example, at judges or prisoners, we might expect them to have something to say about justice. They might be a didactic reminder to judges about how to carry out justice, or they might offer instead a threat, reassurance, or promise to prisoners about the justice they will receive.⁸¹ Shifting the audience from judges or litigants to the public opens up new possibilities for courthouse art. This for a simple reason: the public plays a role in courts that is not shared by any other party. The public's role as observer constitutes its distinctive contribution to democratic adjudication. Art that has the viewing public as its audience thus has the potential to celebrate and foster the very act of viewing. I am not aware of other courthouse art that does this.

Ellsworth Kelly's *Boston Panels* makes viewing rapturous in a location where viewing is a civic virtue. In this sense, the GSA may have been right. Kelly's artwork is engaged in a project that is as inherently democratic as the court in which it hangs.

79. *See id.* at 173.

80. *Id.* Resnik and Curtis note also that these segregated circulation spaces often account for an astonishing thirty to fifty percent of the usable space in new courthouses. *Id.*

81. These didactic goals do not necessarily require figuration. Dorothea Rockburne's giant mural in Portland, Maine's federal courthouse is colorful and abstract, yet it is titled *The Virtues of Good Government* and recalls the frescos in Siena's Palazzo Pubblico. *See id.* at 33.