

Winter 1989

## As We Forgive Our Debtors in the Classroom

Douglass Boshkoff

*Indiana University Maurer School of Law*

Follow this and additional works at: <https://www.repository.law.indiana.edu/ilj>



Part of the [Bankruptcy Law Commons](#), and the [Legal Education Commons](#)

---

### Recommended Citation

Boshkoff, Douglass (1989) "As We Forgive Our Debtors in the Classroom," *Indiana Law Journal*: Vol. 65 : Iss. 1 , Article 3.

Available at: <https://www.repository.law.indiana.edu/ilj/vol65/iss1/3>

This Symposium is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in *Indiana Law Journal* by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact [rvaughan@indiana.edu](mailto:rvaughan@indiana.edu).



**JEROME HALL LAW LIBRARY**

INDIANA UNIVERSITY  
Maurer School of Law  
Bloomington

# ESSAY

## Art and Law, At Home and Abroad

DOUGLASS G. BOSHKOFF\*

Earlier this year, the New York Times reported a new proposal to regulate art sales. According to the Times, the city's Department of Consumer Affairs was planning to require the posting of prices in commercial galleries. An official of the department explained the action as part of a continuing campaign to curb abuses in the marketing of art.

"This is a town made up of people in the middle class who want to make investment purchases. . . . They are entitled to know what their purchases will buy them without being subject to the vagaries of mystery, theater and snobbery."<sup>1</sup>

Reaction from the objects of this regulation was predictably unenthusiastic. According to one dealer, the posting of prices "creates a psychological barrier that inhibits the viewer from reacting to work on its own merits."<sup>2</sup> Another dealer opined that "if prices were too conspicuously posted, conversation in the gallery easily turned to discussion and 'rude comments' about the figures. In the art business there is never any mention of money. . . . Even when we type our invoices, we don't type a dollar sign. It's just numbers."<sup>3</sup>

These complaints are not likely to attract much support from a public that has little understanding of the art market and no sympathy for the plight of dealers who offer goods commanding five-, six- and seven-digit prices. Even the cognoscenti will probably find these protestations to be somewhat lame. Nonetheless, it is far from clear that this type of regulation will result in increased protection for purchasers of high-priced art.<sup>4</sup> Regulation of the art market, to be effective and productive, should reflect a

---

\* Professor of Law, Indiana University School of Law; J.D., Harvard University Law School.

1. McGill, *Art Galleries to Post Prices*, N.Y. Times, Feb. 10, 1988, at C17, col. 1.

2. McGill, *Galleries Are in Distress Over Order to Start Posting Prices on March 1*, N.Y. Times, Feb. 12, 1988, at C20, col. 4.

3. *Id.*

4. Kramer, *The Case Against Price Tags On Art*, N.Y. Times, Mar. 20, 1988, § 2, at 33, col. 1. Kramer's criticism of the price-posting regulation has been followed by expressions of reader opinion both supporting and criticizing his position. See *Of Snobs, Art and Price Tags*, N.Y. Times, April 24, 1988, § 2, at 15, col. 1; *Price Tags In Art Galleries*, N.Y. Times, May 1, 1988, § 2, at 44, col. 1.

firm understanding of the product, the process by which it is created and placed in the hands of consumers, and the importance of the product to our society. Those who regulate art must understand what it is, how it is used, and be sensitive to the possibility that some forms of legal regulation may be ineffective or even counterproductive. Artistic activity cannot escape legal regulation, nor should it. But effective regulation requires an awareness of the fact that a \$30,000 painting is something quite different from a \$30,000 automobile, and a Picasso is different from a cheese sandwich.<sup>5</sup>

The worlds of art and law often intersect and the protection of consumers is by no means the only important meeting place. The first amendment protects artistic expression while the copyright law may either encourage or inhibit artistic activity.<sup>6</sup> Proposals are pending in Congress to provide artists with greater post-sale control over their creations.<sup>7</sup> Even nations are drawn into the regulatory net as proposals to control the international antiquities market attract increasing support.<sup>8</sup> It is not surprising, then, to find a reflection of the increased regulatory activity in legal education. Courses in art law are offered at some law schools, the American Association of Law Schools has established a Section on Law and the Arts, and there is even an Art Law Nutshell!<sup>9</sup> One of the major casebooks available for teachers interested in this field is *Law, Ethics and the Visual Arts (LEVA)* by John Merryman and Albert Elsen.<sup>10</sup> The publication of the second edition of this two-volume casebook provides an appropriate opportunity for a reassessment of these materials<sup>11</sup> and the course for which they are designed.

## I.

Art law is not a specialty whose contours are as well defined as contracts or income taxation. It is possible to offer a course on the law governing

5. Bremer, *Dealers Aghast at Command to Put a Price Tag On Art*, The Times (London), Mar. 26, 1988, § 1, at 7, col. 7.

6. For example, Artist A's use in a collage of a photograph by Artist B could be a violation of B's copyright. An incident involving Robert Raushenberg's unauthorized use of a photograph by Morton Beebe is discussed in J. MERRYMAN AND A. ELSÉN, *LAW, ETHICS, AND THE VISUAL ARTS*, 200 (2d ed. 1987) [hereinafter LEVA].

7. See Visual Artists Rights Act, S. 1619 and H.R. 3221, 100th Cong., 1st Sess. (1987), which would amend the Copyright Statute so as to give artists a right to share in resale profits and a right to protect the artistic integrity of their creations. See also *Visual Arts Rights Amendment of 1986: Hearings of S. 2796 Before the Subcomm. on Patents, Copyrights and Trademarks*, 99th Cong., 2d Sess. (1986); Horwitz, *Artists' Rights in the United States: Toward Federal Legislation*, 25 HARV. J. ON LEGIS. 153 (1988).

8. K. MEYER, *THE PLUNDERED PAST* (1973) is a powerful statement of the case for regulation. One tangible result of changing attitudes is the Convention on Cultural Property Implementation Act of 1983, 19 U.S.C.A. §§ 2601-2613 (West 1988).

9. L. DUBOFF, *ART LAW IN A NUTSHELL* (1984).

10. LEVA, *supra* note 6.

11. The first edition was published by Matthew Bender in 1979, also in a two-volume format. Unless otherwise indicated, all citations in this review are to the second edition which was published by University of Pennsylvania Press in 1987.

art and artists which is merely a specialized commercial law elective with an emphasis on such everyday matters as the artist-dealer relationship and reproduction rights.<sup>12</sup> These topics are not without interest and they receive an appropriate amount of attention in the Merryman-Elsen casebook. It is also possible to design a less conventional course, one in which a knowledge of legal rules helps illuminate the role and importance of art in contemporary society, and one in which an understanding of artistic activity permits the student to make more sophisticated judgments concerning the desirability and the adequacy of legal regulation. One need read no further than the Introduction to learn that Professors Merryman and Elsen have the latter type of course in mind. The authors state:

This book was written and revised with the authors having in mind a broad, rather than specialized readership. There are abundant desk or reference books on art law that tell you conveniently how to do or not do it. We are concerned with more than statutes and model contracts. This is a book that raises questions as well as answering them, and we hope it also elevates ethical consciousness with regard to art and artists. *Law, Ethics, and the Visual Arts* is intended not just for lawyers, artists, collectors, and dealers, but for historians of art and culture, and for the thinking lay person who is interested in the art world.<sup>13</sup>

The authors have lofty aspirations which, in most part, are well realized. The book opens with an examination of a long-standing controversy, the debate over the status of the Elgin Marbles,<sup>14</sup> currently resident in Room 8 of the British Museum. These marvelous sculptural fragments were removed from Greece in the nineteenth century, arguably with the consent of the Turkish government, then in control of Athens. Originally part of the Parthenon, they now are housed in a special gallery donated by the late Lord Duveen, a famous and controversial art dealer. The Greek government has demanded their return<sup>15</sup> and the controversy continues.<sup>16</sup> While I doubt that they will ever leave the confines of the British Museum, examination of the arguments for and against a change in possession is a stimulating exercise. One may think of this as a simple property controversy and attempt to decide whether the removal from Greece was legal, examining carefully both the document which allegedly authorized the act and the power of the document's issuer to bind the current Greek state. It is also possible to move away from this relatively narrow legal focus and attempt a resolution of the controversy which takes into account the cultural interests

---

12. F. FELDMAN, S. WEIL & S. BEIDERMAN, *ART LAW* (1986) is a two-volume treatise with an emphasis on commercial concerns.

13. LEVA, *supra* note 6, at XV.

14. Now discreetly renamed "The Parthenon Marbles" by the museum administration.

15. Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1882 (1985).

16. Sulzberger, *The Elgin Marbles Belong in Athens*, International Herald Tribune, Aug. 16, 1988, at 4, col. 1.

of the competing claimants and the even broader worldwide interest in preservation of art. The strength of the Elgin Marbles controversy as a teaching vehicle is its susceptibility to more than one line of analysis. It can be resolved without thinking about legal rules or it can be resolved without considering cultural and artistic values, but it yields the greatest instructional gains when it is used to introduce students to contrasting and complementary ways of resolving a controversy concerning art.<sup>17</sup> It is especially useful when course enrollment is not limited to law students. Students with no legal training find that they still can contribute significantly to the class discussion.

LEVA consists of seven chapters divided between two volumes. The Elgin Marbles controversy is the main attraction in the opening chapter whose overall focus is on the treatment of art during and after armed conflicts. Some appreciation of the cultural value of art can be obtained by considering the wisdom of attempting to preserve art during times of war or including artworks in the reparations process which often follows the cessation of armed conflict. How many readers of this review agree with Sir Harold Nicholson's moving appeal for the preservation of major artworks "even if their preservation entails the sacrifice of human lives"?<sup>18</sup> Nicholson explains:

I should assuredly be prepared to be shot against a wall if I were certain that by such a sacrifice I could preserve the Giotto frescoes; nor should I hesitate for an instant (were such a decision ever open to me) to save St. Mark's even if I were aware that by so doing I should bring death to my sons. I should know that in a hundred years from now it would matter not at all if I or my children had survived: whereas it would matter seriously and permanently if the Piazza at Venice had been reduced to dust and ashes either by the Americans or ourselves. My attitude would be governed by a principle which is surely incontrovertible. The irreplaceable is more important than the replaceable, and the loss of even the most valued human life is ultimately less disastrous than the loss of something which in no circumstances can ever be created again.<sup>19</sup>

I doubt that any of us (even Sir Harold) could make this sacrifice. Nevertheless, his provocative statement forces us to acknowledge the cultural importance of art, a driving force behind current proposals to regulate the movement of art and antiquities between nations, proposals which are studied in chapter 2. Here the authors expand upon the themes sounded in the opening chapter and also ask the reader to consider the effectiveness and desirability of various forms of legal control such as restrictions on the

---

17. All the competing considerations are detailed in Merryman, *supra* note 15.

18. LEVA, *supra* note 6, at 37-38 (quoting Nicholson, *Marginal Comment*, SPECTATOR, Feb. 25, 1944).

19. *Id.*

export and import of cultural property. This unit closes with a return to the Elgin Marbles controversy and a somber assessment of current attitudes toward the status of cultural property.

Many art-rich nations prohibit export and urge repatriation of cultural property. How well do such claims bear critical examination? . . . Do some of them justify policies that endanger, rather than protect, the cultural heritage? . . . In the United Nations, at UNESCO, and in the Council of Europe the justice of the claim of the nation of origin for retention or reparation is often accepted without question. In such an atmosphere the cultural heritage of mankind may be in greater danger than from the combined efforts of all the tombaroli and hanqueros and their local equivalents in art-rich nations. Byron has much to answer for.<sup>20</sup>

The opening two chapters provide a general introduction which encourages students to consider why artistic activity is important to modern society and whether the products of this activity should be subject to legal regulation. The remaining five chapters have a somewhat narrower focus, treating discrete topics such as limitations on freedom of expression, the extent to which the artists' rights in the work they create continue after disposition (copyright, resale proceeds right, and moral right) and, in volume 2, the legal problems of artists, collectors and museums. All of chapter 3 deserves careful coverage since it deals with issues which have been, and will continue to be, common subjects of legislative attention.<sup>21</sup> This material and the consumer protection segment of chapter 5,<sup>22</sup> along with the first two chapters, should always be assigned. The instructor can then select whatever other topics are of particular interest to teacher and/or students. The entire casebook, almost 750 pages of text, probably too long for a two-hour course, can easily be covered in a three-hour offering.

The second edition of LEVA is a vastly improved product. In part, the improvement is due to extrinsic factors. There is more to talk about than there was when the first edition appeared. The existence of new statutes and new decisions<sup>23</sup> has provided more raw material and has forced the authors to eliminate some items which made parts of the first edition rather heavy going. Professors Merryman and Elsen, in most cases, have made wise deletions.<sup>24</sup> They also deserve a great deal of credit for the note material which is greatly expanded and generally helpful, posing questions for class

---

20. LEVA, *supra* note 6, at 138-39.

21. *See, e.g.*, the proposed Visual Artists Rights Act, *supra* note 7 and state statutes collected in LEVA, *supra* note 6, at 162-71.

22. LEVA, *supra* note 6, at 476-82.

23. *See, e.g.*, United States v. McClain, 593 F.2d 658 (5th Cir.), *cert. denied*, 444 U.S. 918 (1979).

24. One unfortunate omission is *A Gas Station 25 x Seven*, ARTnews, Sept. 1974, at 16, which conveys an idea of the informality in some art dealings. It appeared in the first edition at 6-12 and is only referred to in the second edition. *See* LEVA, *supra* note 6, at 485.

discussion, amplifying matters referred to in quoted cases and articles, and directing reader attention to particularly important points.

There is an occasional slip. For example, in chapter 6, during the discussion of forgeries, the authors pose what they term a BIG QUESTION:

Suppose you own a painting that you think is powerful and beautiful and believe to be a work of Goya. An expert proves that it is a modern forgery. Is the painting any less powerful and beautiful than it was? If not, what difference does it make that the painting is not a Goya?<sup>25</sup>

This is an important question to ask because it directs our attention to matters of perception and psychology which are not irrelevant when evaluating the desirability and feasibility of protecting art purchasers.<sup>26</sup> I am not sure that the casebook provides a sufficient basis for responding to this inquiry and so the reader may be left with only an intuitive response and, I suspect, a frustrating inability to offer a rational explanation of why art assumes a different appearance when it loses the influential environment of a famous name. Consider an observation by Leonard B. Meyer:

Because our fundamental beliefs influence our sensations, feelings, and perceptions, *what* we know literally changes our responses to a work of art. Thus once we *know* that a work is a forgery our whole set of attitudes and resulting responses is profoundly and necessarily altered. It is pointless to say that it is all in the mind. Our beliefs are our beliefs and we can no more escape them once they have become part of our ingrained modes of thought and behavior than we can breathe in a vacuum. Once we have them, such beliefs condition and qualify our responses just as surely as do physical forces or physiological processes. To pretend that this is not so—to continue to admire a proved forgery—is a pretentious form of inverted snobbery.<sup>27</sup>

Professors Merryman and Elsen are content to cite the book from which this excerpt is drawn.<sup>28</sup> It would have been more helpful if they had included this quote or other explanatory material, rather than leaving students on their own. But this is a minor fault. The text almost always provides adequate coverage of topics. Furthermore, both the authors' contributions and the selections from writings of others often are lively reading. The quotation from the end of chapter 2 is a good example of the strong expressions of sentiment that appear throughout the book. I welcome such statements because they are a good stimulus to class discussion. One must be prepared, of course, for terms such as "appalling" and "ferociously"<sup>29</sup> which do not grace most law school casebooks and an occasional overly

---

25. LEVA, *supra* note 6, at 561.

26. See *infra* note 36 and accompanying text.

27. Meyer, *Forgery and the Anthropology of Art*, in *THE FORGER'S ART, FORGERY AND THE PHILOSOPHY OF ART* 81 (1983).

28. See LEVA, *supra* note 6, at 560, n.3.

29. LEVA, *supra* note 6, at 690.

exuberant and not very helpful question as "In a conflict between art and morals, which should prevail?"<sup>30</sup> This book is written by two people who exhibit a great regard for art. Their feelings are obvious, resulting in many stimulating questions and only a few awkward moments. The book is at its very best when it passes beyond an exposition of legal rules and challenges the reader to think about the role of art in society or to reflect on how the law might accommodate itself to the myriad forms of creative artistic activity. A little extravagant expression is acceptable in the midst of such stimulating commentary.

## II.

An art law course can be seen as a luxury item in the law school curriculum, not receiving as much attention from the producers and consumers of legal education as traditional staples such as UCC electives and income taxation. Like many specialized electives, however, some parts of an art law course deal with recurring issues and illuminate parts of the curriculum which, at first glance, seem to be very far removed from this offering.

Consider, for example, the matter of consumer protection, a topic which has received a substantial amount of attention in recent years. Several states have passed fine print statutes which require the disclosure of information relating to edition size, artist's involvement in the creative process, and the like.<sup>31</sup> The assumption is that purchasers will be able to make intelligent decisions with this information in hand. Regulation of the securities and consumer credit industries has emphasized disclosure. Can we assume that this device will be equally effective when the commodity is art, or are there differences in product and market organization which make it a less effective regulatory device?<sup>32</sup> We should remember that the disclosure mandated by the Securities Act of 1933 is part of a comprehensive regulatory scheme which also includes an active administrative agency (the SEC) and trade associations which monitor professional conduct. As Professor Loss observes, "The disclosure requirement will in itself prevent some fraudulent transactions that cannot stand the light of publicity, *and the judgment of those who do understand will be reflected in the market price and will seep down to the investor through his advisers.*"<sup>33</sup>

---

30. LEVA, *supra* note 6, at 19.

31. CAL. CIV. CODE §§ 1740-1745.5 (West 1985); HAW. REV. STAT. §§ 481F-1 to -9 (1987); ILL. ANN. STAT. ch. 121 1/2, paras. 361-369 (Smith-Hurd 1988); MD. COM. LAW CODE ANN. §§ 14-501 to -505 (1983); N.Y. ARTS & CULT. AFF. LAW §§ 15.01-.19 (McKinney 1988); OR. REV. STAT. §§ 359.300-.315 (1985).

32. Dean, *A Case History of Art Fraud*, L.A. Times, Nov. 25, 1979, pt. IX, at 10, col. 1, *reprinted in LEVA, supra* note 6, at 490.

33. L. LOSS, FUNDAMENTALS OF SECURITIES REGULATION 29-30 (1988) (emphasis added).



The disclosure mandated by fine-print statutes is not filtered through an equivalent intermediary<sup>34</sup> and may not be equally effective as a device for informing purchaser decisions. Furthermore, it is possible that certain types of mandatory disclosure are counterproductive, inducing complacency rather than stimulating caution. Do we want to emphasize scarcity as an element of investment value, an emphasis which is unavoidable with all the attention paid to disclosure of edition size?<sup>35</sup> When prints in an edition sell for more than single drawings of comparable quality by the same artist, factors other than relative scarcity are influencing prices.<sup>36</sup> Is it reasonable to expect that disclosure will bring the same advances to the art market that it has brought elsewhere?<sup>37</sup>

None of these lines of speculation need lead to the conclusion that fine-print statutes are an exercise in misguided regulation. It is, nevertheless, worthwhile to reflect on the question of whether art and corporate securities are sufficiently similar to warrant equivalent treatment, and, in so reflecting, the student may obtain a new perspective on regulatory activity in another segment of business. Similarly, Professor Merryman's note, *Contracts and Understandings*,<sup>38</sup> should be of interest to many beginning law students and his discussion of standing<sup>39</sup> touches upon a problem often encountered by lawyers who have not the slightest interest in the art world. One can learn much more than art-related legal rules through use of this casebook.

---

34. The National Association of Securities Dealers (NASD), for example, requires that purchase recommendations be "suitable" for customers. See NAT. ASSN. OF SEC. DEALERS, INC., REPRINT OF THE MANUAL, Rules of Fair Practice, Art. III, § 2, ¶ 2152 (1969). All broker-dealers are members of the NASD. Membership in the Art Dealers Association of America is confined to a small fraction of active art sellers and there is apparently no standard of conduct analogous to the suitability rule, although one requirement for membership is "a good reputation for honesty and integrity in dealings with the public, museums, artists and other dealers." ART DEALERS ASSOC. OF AMERICA, INC., 1986-88 DIRECTORY 5 (1986).

35. CAL. CIV. CODE § 1744(10) (West 1985); HAW. REV. STAT. § 481F-4(5) (1987); ILL. ANN. STAT. ch. 121 1/2 para. 367(c) (Smith-Hurd 1988); MD. COM. LAW CODE ANN. § 14-504(2) (1983); N.Y. ARTS & CULT. AFF. LAW § 15.03(6) (McKinney 1988); OR. REV. STAT. § 359.310(2) (1985).

36. The late Peter Deitsch once suggested to me that a price imbalance in which prints commanded higher prices than drawings might be caused by the fact that collectors can most directly compete with each other by amassing collections of similar prints, something not possible for collectors of dissimilar drawings.

37. It has also been argued that the disclosure system applicable to corporate securities does not provide the investor with the right type of information. H. KRIPKE, *THE SEC AND CORPORATE DISCLOSURE: REGULATION IN SEARCH OF A PURPOSE* (1979); Kripke, *The Myth of the Informed Layman*, 28 BUS. LAW. 631 (1973).

38. J. Merryman, *Contracts and Understandings*, Talk given at a meeting sponsored by Bay Area Lawyers for the Arts (1982), reprinted in LEVA, *supra* note 6, at 383.

39. Merryman, *Expanding Standing: Stone Walls and the Friendly Dog*, in ALI-ABA COURSE OF STUDY ON LEGAL PROBLEMS OF MUSEUM ADMINISTRATION 147ff (1985), reprinted in LEVA, *supra* note 6, at 691.

## III.

Bernard Buffet paints a composition on the front and sides of a refrigerator which is then sold at auction to benefit charity. He later discovers that the refrigerator has been dismantled and that the components are being sold separately. Should he be able to prevent these sales on the theory that the refrigerator as a whole is a work of art and that the separate sales violate the integrity of his artistic creation? The answer in France is clearly yes.<sup>40</sup> American courts, however, have not been sympathetic to suggestions that the concept of *droit moral* be recognized here. But, change is possible. Senator Kennedy is currently sponsoring amendments to the Copyright Act which would move American law closer to its continental counterparts.<sup>41</sup> Is such legislation a good idea? Would the proposed statute protect Buffet's refrigerator?<sup>42</sup> To push this inquiry a little further, should we also be interested in the preservation of graffiti, a prominent feature of our urban landscapes during the last twenty years?<sup>43</sup> Aesthetic judgments will inform the debate on such questions. This course then, more than most offerings in law school, demands attention to materials other than cases, statutes, and regulations—the staples of legal education.

Aware of this, Professors Merryman and Elsen have attempted to bring the world of art into the classroom through excerpts from nonlegal materials and also through seventeen illustrations. Bernard Buffet's refrigerator does not make an appearance but there is an illustration of *Shinto*, a large stainless steel sculpture by Noguchi, which was removed from its location in the lobby of the Bank of Tokyo in New York City in 1980. Too large to be relocated as one unit, it was cut into pieces. The educational objective of many illustrations in law school casebooks is limited, providing only a picture of a person, place, or object involved in a famous case to stimulate

---

40. Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L. J. 1023 (1976), reprinted in LEVA, *supra* note 6, at 143.

41. See the proposed Visual Artists Rights Act, *supra* note 7.

42. Section 3 of the proposed statute prohibits the intentional mutilation of "a pictorial, graphic, or sculptural work." There is no language in the proposed legislation which compels the conclusion that Buffet's refrigerator falls clearly inside or outside this definition. *Id.*

43. The New York Times reported a reduction in the amount of graffiti, particularly on subway cars, and noted that "[s]ome artists and devotees of the art world, who raised graffiti to be part of pop art in the late 70's are not so pleased with the ebbing of the tide." Butterfield, *On New York Walls, the Fading of Graffiti*, N.Y. Times, May 6, 1988, at B2, col. 3. More recently, it has been reported that graffiti is becoming increasingly evident in the London subway system. Blame for the increase has been placed on the authors and publishers of a book, H. CHALFANT & J. PRIGOFF, *SPRAYCAN ART* (1987), which speaks of "the arresting beauty and energy of graffiti art." Whitney, *New Plague in London: Graffiti Tags on Subway*, N.Y. Times, Oct. 13, 1988, at 6, cols. 1-6 (quoting H. CHALFANT & J. PRIGOFF, *supra*, at 7). See generally LEVA, *supra* note 6, at 302-03 where Professors Merryman and Elsen discuss graffiti in Chapter 4: Artistic Freedom and Its Limitation.

student interest.<sup>44</sup> At least some of the illustrations in LEVA have a greater educational impact, helping to increase the reader's understanding of art. It is difficult not to sympathize with demands for greater protection of artistic values after contemplating the dismemberment of *Shinto*.

Viewing of art is preferable to reliance on photographs. While this course can be taught using only the casebook, it benefits from the addition of a non-classroom component which includes some direct exposure to art. Any instructor with access to a university museum or a private art gallery has the opportunity to ensure that all students in the class are familiar with common forms of artistic expression such as painting, drawing, sculpture, and print-making.

The best possible situation is to teach in, or close to, a major art center. I discovered this when, in 1986, for the first time, I taught this course in London and was able to draw on the rich cultural resources of a world art center. It was an extraordinary experience since the classroom work could be supplemented in a manner, and to an extent, not previously possible. The British Museum was only a few blocks from the building where the class met, and my students had an opportunity to see the Elgin Marbles before we began discussing the merits of proposals to return them to Greece. There is no substitute for the real thing. Later in the semester we were fortunate enough to have the benefit of an exhibit organized by the Arts Council of Great Britain containing a number of fakes in juxtaposition with works of unquestioned authenticity.<sup>45</sup> The existence of this exhibition was a fortuitous event but there were many other less transitory advantages to the London venue.<sup>46</sup>

It is likewise helpful, although not quite as essential, for students to have direct contact with persons involved in the creation and marketing of art: artists, dealers, auctioneers, museum curators, and the like. In this regard, a major art center also offers many opportunities for supplementing the text. In the fall of 1986, London art dealers and one auction house (Sothebys) were very helpful in helping my students obtain a better understanding of how the art market functions.

No other city can boast of the Elgin Marbles, but Athens has the Parthenon and many sites, particularly in Europe, will offer attractions and institutions of comparable utility. A course using the Merryman-Elsen materials is, therefore, especially appropriate for inclusion in the programs

---

44. See, e.g., J. DAWSON, W. HARVEY & S. HENDERSON, *CASES AND COMMENTS ON CONTRACTS* (5th ed. 1987) (containing photographs, among others, of Learned Hand, Shirley MacLaine and "Black Angus in Pensive Mood").

45. *Don't Trust The Label: An Exhibition of Fakes, Imitations and the Real Thing*, August 9, 1986-January 24, 1987.

46. For example, the Victoria and Albert Museum has a permanent exhibition of fakes. It also has an extremely helpful exhibition explaining print-making techniques.

of overseas study which a number of American law schools now offer during both the summer and the regular academic year. Indeed, these foreign venues may be superior to most American locations, at least for the instructor who believes, as I do, that this course is taught most effectively when one takes advantage of cultural resources located outside the classroom.

Accreditation practices of the American Bar Association reinforce my conclusion that some foreign study programs should include an art law offering. Every credit-granting foreign program of an ABA-approved institution is subject to two quality controls. It must be reviewed during the normal reinspection of the law school itself which takes place every seven years.<sup>47</sup> Furthermore, no foreign program can be initiated without first notifying the ABA Consultant on Legal Education and obtaining acquiescence of the Accreditation Committee.<sup>48</sup> Compliance with a number of criteria is a condition of acquiescence for all summer-abroad study programs. Criterion IIc is as follows:

A significant portion of the academic program must be substantially related to the socio-legal environment of the host country or have an international or comparative focus.<sup>49</sup>

Foreign study is qualitatively different from work in the United States. This criterion for approval seeks to insure reasonable equivalence. The losses in academic effectiveness caused by the distractions of a new environment are to be balanced by the advantages associated with the foreign site. A course based on the Merryman-Elsen materials can help law schools comply with criterion IIc if they are located close to a major art center.<sup>50</sup> In this respect, it is as useful as teaching materials with a comparative or international orientation.

#### IV.

A final strength of these materials is their suitability for adoption in a course where some, or possibly all, the students have either no legal training or lack familiarity with artistic activity. I have used previous versions of this casebook in classes where there were no law students, where there were

---

47. RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS Rule 35 (1987).

48. *Id.*

49. Permanent Criteria for Approval of Foreign Summer Programs of ABA-Approved Law Schools as printed in POLICIES OF THE COUNCIL OF THE SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR AND OF THE ACCREDITATION COMMITTEE, no. 6, sec. II, ¶ C (1987). The ABA is currently in the process of approving similar criteria for semester-abroad programs.

50. Fifty-eight ABA-approved foreign summer programs were offered during 1988. More than half were located in, or close to, major art centers. 1988 List of ABA-Approved Foreign Summer Programs (available from the Office of the Consultant on Legal Education to the American Bar Association).

no non-law students, and where both groups were represented. Each type of class presents its own challenges. Homogeneous groups are easier to manage; classes with diverse student membership tend to be more lively. No matter how the class is constituted, LEVA provides a good deal of assistance to the neophyte by filling in gaps which may exist in either legal training or acquaintance with the arts. Indeed, the most significant improvement in the second edition is the very substantial increase in note material, a change which makes these two volumes much more suitable for use in classes where students are drawn from more than one school or department.<sup>51</sup>

Can we also assume that instructors with training in one, but not both, of the relevant disciplines will be equally at ease with these materials? I am less sure of the answer to this question. It is my sense that any instructor will benefit from an extensive understanding of either law or art, but there are some situations in which a firm grounding in the former discipline will be more helpful. Thus, I suspect that these materials will be more widely adopted in courses where a law professor is responsible for the instruction or shares this responsibility with an artist or an art historian than in courses where one of the latter two is the sole instructor. It is likely that LEVA will more often be used in a law school offering or in a course taught elsewhere in the university by a law faculty member.

The latter situation is probably less common today than it was between 1955 and 1970. Then, there was a great deal of interest in the study of law by undergraduates. Supporters of such instruction were reformers with a variety of objectives.<sup>52</sup> A happy consequence of this reform movement was a greater on-campus presence for the law school, a unit which quite often has not maintained very close ties with the rest of the university community.

One hears little today about the desirability of systematically including law study in the liberal arts curriculum. Interest in this venture has receded,<sup>53</sup> to be replaced by developments which bear more directly on professional training such as clinical education and economic analysis. Nonetheless, some faculty members still wish to teach elsewhere in the university, some law school deans continue to find it worthwhile to support a nonprofessional teaching mission, and more extensive integration of law schools into the larger university community remains a highly desirable objective. LEVA, which contains a minimum amount of forbidding technical material, is a very attractive choice for nonprofessional courses. Indeed, suitability for use in a wide range of teaching situations is one of the most interesting

---

51. See, e.g., comment 2, LEVA, *supra* note 6, at 52.

52. Lader, *Experiments in Undergraduate Legal Education*, 25 J. LEGAL ED. 125, 146-154 (1973).

53. I infer this from the lack of articles and other commentary. The Lader article, *id.*, which appeared 15 years ago, is the last major contribution on this topic to be published in the *Journal of Legal Education*.

characteristics of this text. It is a skillfully crafted set of teaching materials, equally appropriate for use in a law school elective, in a nonprofessional setting elsewhere in the university, or far from home in major foreign art centers.

