

KLUWER LAW INTERNATIONAL

# Thinking about the Elgin Marbles

Critical Essays on Cultural Property, Art and Law

**SECOND EDITION**

John Henry Merryman



**Wolters Kluwer**  
Law & Business

**KLUWER LAW INTERNATIONAL**

**Thinking About the Elgin Marbles**  
**Critical Essays on Cultural Property, Art and Law**

**SECOND EDITION**

**John Henry Merryman**



**Wolters Kluwer**

Law & Business

AUSTIN   BOSTON   CHICAGO   NEW YORK   THE NETHERLANDS

*Published by:*  
Kluwer Law International  
PO Box 316  
2400 AH Alphen aan den Rijn  
The Netherlands  
Website: [www.kluwerlaw.com](http://www.kluwerlaw.com)

*Sold and distributed in North, Central and South America by:*  
Aspen Publishers, Inc.  
7201 McKinney Circle  
Frederick, MD 21704  
United States of America  
Email: [customer.care@aspenpubl.com](mailto:customer.care@aspenpubl.com)

*Sold and distributed in all other countries by:*  
Turpin Distribution Services Ltd.  
Stratton Business Park  
Pegasus Drive, Biggleswade  
Bedfordshire SG18 8TQ  
United Kingdom  
Email: [kluwerlaw@turpin-distribution.com](mailto:kluwerlaw@turpin-distribution.com)

*Printed on acid-free paper.*

ISBN 978-90-411-2875-1

© 2009 Kluwer Law International BV, The Netherlands, except where otherwise explicitly noted.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA. Email: [permissions@kluwerlaw.com](mailto:permissions@kluwerlaw.com).

Printed in Great Britain.

## PREFACE

This volume contains twenty-three of my articles on cultural property and art law, and responses from others to three of them, all of which originally appeared in a variety of foreign and domestic journals, symposium proceedings, *Festschriften* and the art and antiquities press. The articles included here are a selection from a larger body of published work on cultural property and art law, the remainder of which is listed in the Appendix.

Art historian Albert E. Elsen and I worked closely together for twenty-five good years, and much of whatever is of value in these essays derives from that association. I also owe a great debt to the published work and collegial criticism and support, in this new and rapidly developing field, from Quentin Byrne-Sutton, Sabino Cassese, Clemency Chase Coggins, Richard Crewdson, Gilbert Edelson, Kate Fitz Gibbon, James Fitzpatrick, Jonathan Franklin, Marc Franklin, Manlio Frigo, Patty Gerstenblith, Paul Goldstein, Lawrence Kaye, Pierre Lalive, Patrick O'Keefe, Norman Palmer, Robert Paterson, Linda Pinkerton, Lyndel Prott, Marc-André Renold, Ignaz Seidl-Hohenveldern, Daniel Shapiro, Kurt Siehr and Stephen Urice. I am grateful to the original publishers for their generous permission to republish these works and to Andrew McCaffery Jackson, Miriam Siekevitz and Vivian Wang for their invaluable help in the preparation of this book for publication. And, as always, I owe the superb staff of the Stanford Law Library special thanks for the uncountable ways in which their work has enriched mine.

*John Henry Merryman*  
*Stanford, 2009*

# TABLE OF CONTENTS

<b>PREFACE .....</b>	<b>vi</b>
<b>INTRODUCTION.....</b>	<b>1</b>
<b>PART I CULTURAL PROPERTY LAW .....</b>	<b>19</b>
1. Thinking About the Elgin Marbles.....	24
2. Whither the Elgin Marbles?.....	66
3. Two Ways of Thinking About Cultural Property .....	82
4. Cultural Property Internationalism.....	110
5. The Public Interest in Cultural Property .....	142
6. The Retention of Cultural Property .....	170
7. The Nation and the Object .....	206
<b>PART II INTERNATIONAL TRADE IN ART AND ANTIQUITIES .....</b>	<b>223</b>
8. Cultural Property, International Trade and Human Rights....	226
9. A Licit International Trade in Cultural Objects.....	244
10. Draft Principles to Govern a Licit International Traffic in Cultural Property .....	294
- <i>Edward Dwyer</i> : Critical Comments on the Draft Principles to Govern a Licit International Traffic in Cultural Property .....	297
- <i>Karen D. Vitelli</i> : An Archaeologist's Response to the Draft Principles to Govern a Licit International Traffic in Cultural Property .....	303
- <i>Katherine Walker Tubb</i> : Thoughts in Response to the Draft Principles to Govern a Licit International Traffic in Cultural Property .....	307
- <i>Albert E. Elsen</i> : Full Disclosure by Museums to Improve the Licit International Traffic in Art .....	311
- <i>Maxwell L. Anderson</i> : Art Market Challenges for American Museums.....	315

- <i>Ranee A. Katzenstein: Critical Comments on the Draft Principles to Govern a Licit International Traffic in Cultural Property</i> .....	319
- <i>Constance Lowenthal: Critical Comments on the Draft Principles for a Licit Trade in Cultural Property</i> .....	323
- <i>Thomas K. Seligman: What Value in Surplus Cultural Property?</i> .....	325
- <i>Arielle Kozloff Brodkey: The Failure of the Nationalization of Cultural Patrimonies</i> .....	329
11. The UNIDROIT Convention: Three Significant Departures from the <i>Urtext</i> .....	334
12. Archaeologists Are Not Helping .....	344
13. Thinking About the SEVSO Treasure .....	348
14. Cultural Property Ethics .....	376
15. The Free International Movement of Cultural Property .....	390
<b>PART III ART LAW</b> .....	403
16. The Refrigerator of Bernard Buffet .....	406
17. The Moral Right of Maurice Utrillo .....	432
18. The Wrath of Robert Rauschenberg .....	442
19. Counterfeit Art .....	468
20. The Good Faith Acquisition of Stolen Art .....	520
21. The 'Straw Man' in the Rothko Case .....	542
- Letters .....	547
22. Are Museum Trustees and the Law out of Step? .....	555
- Letters .....	563
23. Museum Ethics .....	568
<b>APPENDIX</b>	
List of additional publications by the author on cultural property, art and law .....	577
<b>INDEX</b> .....	581

## INTRODUCTION

*The following dialogue, partly reconstructed from faulty memory but largely invented, takes place between a journalist (J) and the author of this book (A) during a cultural property conference in New York City.*

J: Delighted to meet you, Professor Elia. It is very good of you to . . .

A: My name is Merryman. Elia is an archaeologist.<sup>1</sup>

J: Merryman? Oh yes, of course. Forgive the confusion. You're the art historian.

A: Actually, I'm a law professor.

J: Oh dear, I am contrite. A law professor? How very interesting (*translation: how utterly boring*) but I don't quite see . . .

A: Does it help that I teach a course on Art and the Law?

J: Art and the Law? How curious.

A: Curious?

J: How shall I put it? "Art and the Law" seems like a conjunction of incompatibles. In art what is valued is the creative act, the gesture that transcends boundaries, defies conventions, breaks the rules. Law would appear to be a system of boundaries, conventions and rules, maintained by an established order. How can they coexist? Is there not an inexorable equation: the more law the less art, and vice versa? (*I actually put that rather well.*)

A: Nicely put, but wrong. Think about it this way. Law establishes the conditions of social peace and stability that liberate the artist to make art. It protects the artist against repression or censorship on political, religious or moral grounds. Through copyright, moral right, resale right and property law the artist enjoys enforceable rights in the work of art. Law provides the structure that makes possible the assembly and display of art collections

---

<sup>1</sup> See 12, "Archaeologists Are Not Helping".

and exhibitions and the formation and operation of private and public museums. It underlies and regulates the traffic in art, providing an orderly process for the distribution and redistribution of works of art. It defines and protects the interests of the parties in transactions between artists, dealers, auction houses, collectors and museums. It ensures the freedom of art historians, experts and critics to study art and to express their views.

In short, and you might want to put this in italics, *without the legal system, and the body of nascent law we call ethics, there could be nothing comparable to the abundance, diversity, sophistication and prosperity that art and artists presently enjoy in the West and, increasingly, in the non-Western world.* Clearly, the art world we know would not exist without the legal system to support it. The interesting area of inquiry lies elsewhere, at the level of critique: how sensitively does the law perceive art world interests and relationships, and how well does it respond to art world problems?

J: How clear you make it seem. (*Translation: that sounded rehearsed. He's probably quoting himself.*<sup>2</sup>) Speaking of clarity, I'm unclear about the relationship between cultural property law and art law.

A: They're closely related. At times it seems right to call the topic art law; at other times one finds it natural to speak of cultural property law. Actually, a Matisse painting is as much cultural property as an ancient Greek vase is a work of art. Whether an object is called one or the other, or both, depends on the context. If the authenticity of the Matisse is questioned, significant art law questions arise. If the owner exports the same painting from Italy without an export permit, the terms of the dialogue shift to the cultural property mode. For some purposes the terms are roughly synonymous; for others, one may appear to be more inclusive than the other. As a convention, I use art law to include both and speak of cultural property when that seems more precisely appropriate.

J: That's helpful. How did you happen to get involved in art law? I suppose you have an art background.

A: No art background. Pure serendipity. Mrs. Merryman became an art dealer while we were on sabbatical in Germany in 1969. I came to know the late art historian and art world activist Albert E. Elsen in 1970. The combination of those two forces of nature was irresistible, and I was drawn into the field.

J: May I take it that art/cultural property law is an established field?

---

<sup>2</sup> Right. See p. xxvi of John Henry Merryman, Albert E. Elsen and Stephen K. Urice, *Law, Ethics and the Visual Arts* (5th edn, Kluwer Law International, 2007), cited hereinafter as LEVA5.



A: Barely. It began to emerge as a field in the early 1970s. Elsen and I taught our first “Art and the Law” course at Stanford in 1972, and I believe there was a seminar at Columbia before that. Greeted at first with what we preferred to think of as good-natured raillery by our Stanford colleagues, art law has since been accepted as a respectable, if marginal, addition to the curriculum.<sup>3</sup> Our book, entitled *Law, Ethics and the Visual Arts*, was initially published in 1979.<sup>4</sup>

J: Law *and* ethics? I would have thought that law was the antithesis of ethics.

A: You have heard too many lawyer jokes. In the art world, where the law is still relatively underdeveloped, ethics often fills (*or should it be “fill”?*) the gap. Today’s ethical principles often are tomorrow’s law.<sup>5</sup> Of course they sometimes conflict, but more often they complement each other.

J: Maybe it would help if you could give me a better idea of what art law is about? If there is a there there, what is it?

A: My usual answer is that art law deals with “significant intersections of the visual arts world and the law.”

J: Only the visual arts? You exclude performing and literary arts?

A: Yes, only the visual arts, broadly defined to include whatever art museums collect and display: basically drawing, painting, sculpture, fine prints and photography, plus, of course, antiquities.

J: But isn’t there also a larger “arts” world that includes all of them? That certainly seems to be the premise of the National Endowment for the Arts (NEA), and of state and local arts commissions, and all those arts centers and the American Federation for the Arts, and so on.

A: Such “arts” administrations and coalitions exist on paper, but in practice they have to subdivide into separate, relatively autonomous units because, in an empirical sense, each of the arts occupies its own world.

J: I’m not sure that I grasp your “world” concept.

---

<sup>3</sup>. There are brief published descriptions of the course in (1974) 26 *Journal of Legal Education* 551 (Summer 1975) 34 *The Art Journal* 32; and (Fall 1976) 2 *Brief/Case* 7.

<sup>4</sup>. J. H. Merryman and A. E. Elsen, *Law, Ethics and the Visual Arts* (Matthew Bender, New York, 1979).

<sup>5</sup>. See 14, “Cultural Property Ethics”.

A: Look at it this way: the people and institutions involved with the visual arts — principally artists, the art trade (dealers and auctioneers), collectors and museums — interrelate professionally, economically and socially with each other and constitute an identifiable social subsystem that coheres around works of art. Any event that affects one of them, whether it is enactment of an artist's moral right or the growth of online art auctions, affects the others. They may also be interested in what goes on in literature, music and/or dance, but that is not where their professional lives are centered.

J: Just a minute. What about David Hockney, who designs opera sets, and Isamu Noguchi, who designed sets and props for Martha Graham, and all the others like them: Picasso, Léger and Rouault, for example.

A: What about them? If a bank commissions a sculptor to create something for its entrance plaza, does that make the artist a banker or diminish the coherence of the art world? Opera and dance are significant commissioners and consumers of visual art, but David Hockney, like Picasso, Léger and Rouault, is primarily a painter and only incidentally a set designer, and Noguchi was and remained primarily a sculptor. The visual arts world is not isolationist; it is just internally coherent and interdependent. And of course it has fluid boundaries; there always are line-crossers and envelope-pushers like performance artists, body artists, installation artists, sound sculptors and others.

J: So all you are really saying is this: art law is law specifically applicable to the art world.

A: Close enough.

J: (*Gee, thanks.*) Can you give me some examples of art world law?

A: Let's use the Socratic method here. What do you suppose might bring the law into contact with the art world?

J: How about copyright?

A: Obvious, but a good start. Copyright, together with moral right<sup>6</sup> and resale right (*droit de suite*)<sup>7</sup> are a related group of artists' rights in their works.<sup>8</sup> What else do you think of?

---

<sup>6</sup> See 16, "The Refrigerator of Bernard Buffet" and 17, "The Moral Right of Maurice Utrillo."

<sup>7</sup> See 18, "The Wrath of Robert Rauschenberg".

<sup>8</sup> These three rights are discussed in chapter 5 of LEVA5.

J: Censorship?

A: Another obvious one. The artist and the State: artistic freedom and the First Amendment, and all that.<sup>9</sup> Others not so obvious?

J: I'm the one who is supposed to ask the questions here. What other topics fall into your version of the art law field?

A: Our version? Fair enough. Here are a few more major areas:

- international law and the protection of cultural property in wartime against destruction and looting;<sup>10</sup>
- international trade in cultural property and the law applicable to stolen and illegally exported art and antiquities;<sup>11</sup>
- the artist's life (who is legally an artist?; artists' live/work zoning; toxic hazards; legal services for artists; artist/dealer relations; the artist and the museum; commissions; taxes and estate planning for artists);<sup>12</sup>
- collecting and the art market (dealing with dealers; dealing with auction houses; the "fine print" market; counterfeit art;<sup>13</sup> taxes and estate planning for collectors; charitable gifts);<sup>14</sup>
- museums (legal character and organization of museums; trustees, directors and staff; conflict of interests, self-dealing and misuse of inside information;<sup>15</sup> deaccessioning and the problem of the insolvent museum).<sup>16</sup>

And so on.

J: Hm. Only the first two appear to be about cultural property.

A: Right. They comprise the subject-matter of cultural property law, which in three decades has grown from a subtopic of art law into a semi-autonomous field with its own international societies, journals,<sup>17</sup> *cadre* of specialists and a

<sup>9</sup>. Covered in chapter 6 of LEVA5.

<sup>10</sup>. See chapter 1 of LEVA5.

<sup>11</sup>. All of the essays in Part II of this volume deal with this problem area, which is also the subject of chapters 2-4 of LEVA5.

<sup>12</sup>. See chapter 7 of LEVA5.

<sup>13</sup>. See 19, "Counterfeit Art".

<sup>14</sup>. See chapter 8 of LEVA5.

<sup>15</sup>. See 22, "Are Museum Trustees and the Law Out of Step?".

<sup>16</sup>. See chapter 9 of LEVA5.

<sup>17</sup>. The multidisciplinary *International Journal of Cultural Property*, which first appeared in 1992, is published for the International Cultural Property Society by the Cambridge

profusion of conferences like this one, at which the usual people usually appear and say what they usually say and occasionally achieve some small measure of progress in clarifying and resolving central cultural property issues.

Although cultural property law is largely concerned with international problems and is the subject of three major international conventions,<sup>18</sup> much of its development has taken place in the United States, which has the largest art and antiquities market and the largest and most developed body of cultural property law.

J: I was told that you are a leading authority in the field and that your books and articles are regarded as canonical.

A: That was a kind way of saying that I am older than the rest of them. When you get to the age at which you are no longer a threat to the young they begin to say nice things about you. If we are going to speak of canonical articles, we should begin with Paul Bator's "An Essay on the International Trade in Art".<sup>19</sup> Bator was a member of the US delegation to the conference that drafted the 1970 UNESCO Convention. He was stimulated by that experience and by an insightful book by a journalist<sup>20</sup> and a groundbreaking article by an archaeologist<sup>21</sup> to think expansively about the traffic in stolen and illegally exported art and antiquities. Bator's article still is fundamental, despite all that has happened in the field since its appearance.

J: Speaking of conventions, you were a drafter of the 1995 UNIDROIT Convention, right?

A: Not exactly.

J: Perhaps you should explain.

(Cont.)

University Press; and *Art, Antiquity and Law*, which first appeared in 1996, is published by Kluwer Law International.

<sup>18</sup> The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict is set out and discussed in chapter 1 of LEVA5. The 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects are both set out and discussed in chapter 2 of LEVA5.

<sup>19</sup> (1982) 34 *Stanford Law Review* 275, republished as a monograph entitled, *The International Trade in Art* (University of Chicago Press, 1983).

<sup>20</sup> Karl E. Meyer, *The Plundered Past* (Atheneum, New York, 1973).

<sup>21</sup> Clemency Coggins, "Illicit Traffic of Pre-Columbian Antiquities" (1969) 29 *Art Journal* 94.

A: “UNIDROIT” is the acronym of the International Institute for the Unification of Private Law, an international organization in Rome. At UNESCO’s request, UNIDROIT convened a Working Group to prepare a draft convention to establish rules about the return of stolen and illegally exported cultural objects. I was one of the twenty or so members of the Working Group.

J: Who else was in the US delegation?

A: There were no delegations at that stage. The members of the Working Group were invited by the Director-General of Unidroit. I was the only American. We met three times, for a week at a time, over a period of two years, with splendid support from the UNIDROIT staff, and produced a lovely draft convention.

J: Lovely? That seems like an odd way to describe an international convention.

A: Italians have the concept of the *bella legge*, the law that is beautifully drafted, economically expressed, appropriately nuanced and properly instructs the judge, while leaving space for interpretation to deal with the inevitable unanticipated cases. Legislation as an art form. We produced a *bella convenzione*.

J: And that *bella convenzione* became the UNIDROIT Convention?

A: Not exactly. Something happened along the *iter* from draft to final text. Our draft functioned merely as a working document, which was reviewed and revised at a series of week-long conferences, I believe there were four of them, of delegations of so-called “national experts.” Their product was further revised at a diplomatic conference, where it was finally promulgated as “The Unidroit Convention on Stolen and Illegally Exported Cultural Objects”. In the process, our lovely draft convention was changed. Some of the changes may have improved our work, but others made it unrecognizable to us.<sup>22</sup>

---

<sup>22</sup> See 11, “The UNIDROIT Convention: Three Significant Variations from the *Urtext*”. There is a full account of the Convention’s origins and *iter* in Marina Schneider, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Explanatory Paper* online at <[www.city.uk/artspol/schneider.html](http://www.city.uk/artspol/schneider.html)>. Ms. Schneider is a member of the Unidroit staff who provided support to the Working Group, the conferences of national experts and the diplomatic conference. For a discussion of the Convention from the point of view of US law see Brian Bengs, “Dead on Arrival? A Comparison of the Unidroit Convention on Stolen or Illegally Exported Cultural Objects and U.S. Property Law” (1996) 6 *Transnt’l L & Contmp Prbs* 503.

J: What happened? Were you Americans simply outvoted by other delegations?

A: I was not a member of the US delegation. The State Department Legal Advisor's staff person who selected and led the US delegation decided not to invite me.

J: Odd. You would seem to be the most qualified person. Why were you passed over?

A: Who knows? The conduct of the US delegation at the various conferences was consistent neither with my views nor with the draft. One of the most strident changes in our draft, one that displayed total insensitivity to its structure and objectives, was proposed by a zealous member of the US delegation, supported by its leader and adopted by the conference. In protest, the only knowledgeable member of the US delegation resigned.

J: This is getting interesting. Tell me more.

A: I think not. In fairness, the process of preparing and promulgating the Convention was necessarily complex. There were bound to be hazards and accidents along the way. In any event, the Preliminary Draft Unidroit Convention was only one of the products of our work together in Rome.

J: Really? What else did you accomplish?

A: We formed a community of interested scholars where none had existed, and we established the field of cultural property law. With help from the Kress Foundation and the Getty Trust, we founded the *International Journal of Cultural Property*, which is now in its 15th volume.

J: Those sound like parochial academic accomplishments, which involve a few professors with a limited audience. An international convention can change the way the world treats cultural property.

A: Ouch! "Parochial" *and* "academic!" Do I detect an anti-academic bias here?

J: No, just a bias against academic self-importance.

A: Let's talk about importance. You distinguish scholarship from legislation and place a higher value on legislation. Right?

J: (*Uh oh, here comes Socrates again*) I'm not sure I meant to say anything quite so uncompromising, but yes, something like that.

A: And where do the legislators get the knowledge base, the ideas and the structure of concepts with which they draft laws and treaties?

J: You are asking questions again. That's my role.

A: I take that as a concession. Ask away.

J: A final question about the UNIDROIT Convention: am I right in concluding that it has not accomplished what you hoped for?

A: You are right. In some ways the Convention improves matters, but the changes finally made in our draft encourage the perpetuation of unbridled source nation retentionism,<sup>23</sup> a policy that the Working Group had agreed did not deserve international enforcement. It is probably just as well that the USA and other important market nations seem unlikely to adopt the Convention.

J: Can we leave cultural property and talk about a few other art law topics? What would you say are the leading issues in art law today?

A: I'll take "issues" to mean interesting unresolved topics. Fair use of copyrighted art images is one such area. For another, agitation for adoption of the resale right has, fortunately, subsided in the USA but there is a strong effort to generalize it in Europe. And the rudimentary version of moral rights established in the Visual Artists Rights Act 1990 is still far from fully explored, and . . .

J: Just a minute. Back to the resale right, why do you say that agitation for its adoption has "fortunately" subsided? Isn't it a good idea to give artists a share in the enormous profits collectors make when they auction off art works that they bought for ridiculously low prices?

A: No. Even if that were the way it worked (which it isn't) it would be a bad idea. Aside from the small group of established, successful artists like Robert Rauschenberg who have a significant resale market, and the artists' rights collection societies that would benefit from the increased business, no one who understands the art world and can think clearly supports it.

Here's a reprint of my article on the subject,<sup>24</sup> in case you want to read about it.

---

<sup>23</sup>. On retentionism, see 6, "The Retention of Cultural Property".

<sup>24</sup>. See 18, "The Wrath of Robert Rauschenberg".

J: (*Golly, thanks.*) Thanks, maybe I will. You mentioned fair use and the moral right.

A: Yes, there are all sorts of unresolved questions in both areas, and some of them are linked. For example, does an auction house or an online auction site require copyright permission to reproduce a work consigned for auction? If the image that appears on an Internet site or a printed catalog is of poor quality and is reproduced upside down, misrepresenting the artist's work, does that impair the artist's right of integrity? Shouldn't the artist have a right to insist that his or her work be properly presented to viewers?

J: I see what you mean, but I was looking for more interesting stuff. How about censorship?

A: What about it?

J: Well, isn't artistic freedom constantly under attack in this country?

A: It depends on what you mean by artistic freedom. If you mean freedom from State repression — from censorship — we have a lot of artistic freedom. Since the decision in *Miller v. California*<sup>25</sup> anything claimed to be obscene is protected if it has "serious artistic value." As to aesthetic and political censorship, some people (I am one of them) would argue that removal of Richard Serra's *Tilted Arc* from Foley Square was an act of censorship, but Serra has gone from strength to strength since then, and the reaction of the art world against the removal of *Tilted Arc* may actually have worked to his advantage.<sup>26</sup> There still are cases in which an artist is denied a permit for transparently specious reasons — the Christo and Jeanne-Claude project for Central Park was one,<sup>27</sup> and there are others<sup>28</sup> — but they seldom survive judicial scrutiny. I would say that, on the whole, the courts have done a good job of protecting the artist against the State.

J: But what about the *Mapplethorpe* case?

A: Excellent. Let's talk about that case. It began when the Director of the Corcoran Gallery got cold feet and called off a regularly scheduled, curated Mapplethorpe show that was partially supported by an NEA grant to the

---

<sup>25</sup>. 413 U.S. 15 (1973).

<sup>26</sup>. *Serra v. General Services Administration*, 847 F. 2d 1045 (2d Cir. 1988) is set out and discussed in LEVA5, p. 779 et seq.

<sup>27</sup>. Discussed in LEVA5, p. 760 et seq.

<sup>28</sup>. See LEVA5, p. 705 et seq.



Museum. This ill-considered act of self-censorship attracted public attention and handed Senator Helms and his staff, long opponents of the NEA, a political opportunity that they happily seized. Meanwhile the Washington Center for the Arts stepped in and rescued the show, which was well attended and attracted no controversy. When the same show travelled to the Cincinnati Contemporary Arts Center, however, some zealot, or perhaps a misguided opportunist, brought a criminal charge of lewdness and obscenity against the Center and its Director, Dennis Barrie. At a jury trial the defendants, despite unfavorable rulings by the judge, were quite properly acquitted by the jury.<sup>29</sup>

A number of people may have been damaged by the *Mapplethorpe* case, but the artist (actually, his estate; he had died before the episode began) was not one of them. His work received a great deal of attention, most of it favorable and supportive, and a lot of media publicity in which his name was spelled right. The jury found that his work had serious artistic value and was not obscene. It was like a stamp of legal approval. How many artists have had their work legally declared to be artistically valuable? Mapplethorpe's reputation and his market both gained substantially from the episode. Where is the repression?

J: But how about the effects on others, including the NEA?

A: The NEA took some punishment. It barely survived efforts to abolish it, but with a reduced budget. And, as a result of Senator Helms's efforts to capitalize on the Mapplethorpe-Serrano furor, the NEA Chairperson is now required to "take into account general standards of decency and respect for the diverse beliefs and values of the American public" when considering applications from artists for grants-in-aid.<sup>30</sup> But I thought we were talking about artistic freedom here. Can you name any artists whose freedom was impaired as a result of these actions?

J: The art world is made poorer by the reduction in funds and is more inhibited by the added concern for "decency." That must affect some artists.

A: Possibly, but let's keep this in perspective. Even before the Mapplethorpe-Serrano episode, the NEA had a modest budget, and only part of that was earmarked for visual arts, and of that part, only a portion was available for grants to artists. The American visual arts world is dominated by the private sector: by individual and corporate collectors, museums (most of which are

---

<sup>29</sup>. The *Mapplethorpe* case is set out and discussed in LEVAS, p. 692 et seq.

<sup>30</sup>. This provision was found unconstitutional by the US District Court, whose decision was affirmed on appeal to the Ninth Circuit, but the Supreme Court reversed the decision in *National Endowment for the Arts v. Karen Finley*, 524 U.S. 569 (1998).