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Threatening the Preservation of a Cultural Legacy:

The Fate of the Barnes Foundation

by

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ABSTRACT

This thesis examines the recent December 2004 court decision permitting Barnes Foundation trustees to modify several of the Foundation's by-laws. In an effort to transform the educational institution into a full time museum and tourist attraction, the trustees overrode Dr. Albert Barnes's directions to use the art collection as a tool in the education of fine arts and aesthetics. Although the by-law modifications were presented as a necessity and the least drastic remedy to fix the Foundation's current financial crisis, they severely alter the specific charitable intentions of the donor, and threaten the preservation of cultural heritage. The most damaging by-law modification is the relocation of the Barnes Foundation's art collection from its original home in the Township of Lower Merion to downtown Philadelphia, thereby separating the two complementary parts of the Barnes Foundation – an art collection and an arboretum. As a result, the preservation of the Barnes Foundation as an unique cultural ensemble is threatened.

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THREATENING THE PRESERVATION OF A CULTURAL LEGACY:**THE FATE OF THE BARNES FOUNDATION**

On December 13th, 2004, the Honourable Justice Mr. Stanley Ott, a Philadelphia Orphan's Court Judge, made a ruling that determined the fate of the Barnes Collection, one of America's most conflict-ridden art collections (*re The Barnes Found. A Corp.* Fiduc. R rpt., 58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004). Barnes Foundation trustees had requested changes to the trust indenture that would allow the collection to be moved from its original suburban environment to a more 'accessible' one in downtown Philadelphia. Although the collection's founder, Dr. Albert C. Barnes (1872-1951), explicitly opposed such a move in the trust indenture, the court overrode his terms in order to 'increase' public access and 'ensure' the artworks' preservation.

The petition to modify the indenture was driven by the Barnes Foundation's purported desperate financial situation (*BarnesWatch*, Spring 2003, p.1). Decades of often hostile litigious fighting among stakeholders over the management and preservation of the collection had drained the trust's coffers. In 2003, the Pew Charitable Trusts, the Lenfest Foundation and the Annenberg Foundation, supported the Barnes' trustees' strategy to change the trust indenture and allow the collection to be moved (Eisenstein, 2003, p.2). These groups offered the Barnes Foundation US\$150 million on the condition that public access is improved (Nivala, 2003).

Enamored of ideals of education and democracy, Albert Barnes opposed the elitism and snobbery of the art world establishment. He accordingly set up a Foundation in 1922 and, in 1924, erected a gallery in the township of Lower Merion to house his

collection of late 19th and early 20th century works—181 by Renoir, 69 by Cézanne, 46 by Picasso, 59 by Matisse, and the numerous other works by artists such as Modigliani, Corot, Van Gogh, Monet, Gauguin and Manet (Barnes Foundation, 2003). Trust by-laws stipulated restrictions on the use of and access to the collection. Although he opened the gallery to the public as an explicitly ‘educational experiment’, this purpose was challenged by President Richard Glanton beginning in the early 1990s (Barnes Foundation’s By-Laws, 1922, Charter Para.2).

Barnes required that the gallery be open to the general public for a maximum of two days a week and that admittance be extended to interested visitors at the discretion of its board (Para. 29). It also denied general public access on the remaining days of the week so that the Foundation’s educational goals could be pursued. The gallery was used five days a week for registered students (Para. 29).

Barnes also forbade the collection to be lent or sold, prohibited the charging of admission and the use of the gallery for fundraising (Para. 9 and Para. 10). These activities are, however, commonly undertaken by private art galleries to increase revenues for collection management (Weil, 1983, p.45). Given that the Foundation was not allowed to participate in fundraising and that the \$9 million endowment was to be invested only in government bonds, revenues were severely limited. The financial stability of the Barnes collection was further depleted by inflation, rising maintenance expenses and costly lawsuits.

Unintentionally, Barnes’ own restrictions along with numerous suits challenging the Foundation’s charter, led the trust to its current position on the brink of financial ruin (Nivala, 2003). His restrictions also led to the collection being viewed by the trustees,

the press and leaders in the Pennsylvanian art community as a “fetishistic” monument to his ethos and idiosyncrasies and, ultimately, to the court’s approval of amendments to the trust indenture in 2004.

To make matters worse, the community introduced by-laws to reduce traffic near the gallery, thus limiting the number of visitors (Eisenstein, 2003). The trustees claim that this contributed to the collection’s impending bankruptcy and potential dissolution.

The collection is said to have suffered from five decades of trustee mismanagement. Stakeholders, including the Lower Merion Township, the general public and the trustees have each been concerned with preserving their particular visions of how the Barnes Collection should be managed. Debate stemmed from questions such as: How can the trustees follow Barnes’ charitable intents while addressing the undeniable public interest in the collection? Should Barnes’ restrictions for educational reasons outweigh the public’s right to open access? How can public access be achieved while managing adverse impact on the neighborhood in which the gallery is located? These are but a few of the questions that have been consistently raised in legal suits pertaining to the Barnes Collection since the mid 1990s.

By setting a precedent in the early 1990s to allow the Barnes trustees to amend Foundation by-laws, the courts have played a significant part in shaping the legal landscape. Failing to uphold the trustees’ duty to respect donors’ intentions according to the laws of charitable trusts, the courts allowed the Barnes trustees to deviate from Dr. Barnes’ educational mission (*BarnesWatch*, 2005, p.1; Nivala, 2003, p.3). The Orphan’s Court, a division of the Montgomery County’s Court of Common Pleas, and the Court of

Appeal in Pennsylvania both contributed to the abuse of the doctrines of administrative deviation and *cypres* to alter the specific wishes of the trust's founder.

The court's recent decision to change terms of the trust was intended to remedy legal issues that had continually plagued the Foundation for more than eight decades (Lee, 2000). The courts stated that Barnes' charitable intentions to provide the 'plain and working people of Philadelphia' with an "educational institute for the study and appreciation of fine arts and aesthetics" would be upheld with the greatest effect and efficiency by moving the collection (*re The Barnes Found. A Corp. Fiduc. Rpt.*, 58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004). This decision also set conditions upon which the three Philadelphia-based Foundations will donate funds to the Barnes collection, thereby securing the entire \$150 million endowment for collection maintenance. At the same time, the decision was made to 'rectify' limitations imposed by the Township of Lower Merion and the public's right of access to the gallery.

Although moving the collection appears to resolve conflicts among stakeholders that have plagued the trust throughout the collection's history, it was done with the least regard for Albert Barnes' specific educational intents. Similarly, the amendments, including the proposed move, threaten the preservation of the collection's unique character as part of a cultural heritage ensemble that consists of an estate that Barnes bought in 1922, its buildings, the gallery and the contiguous park.

The collection and its environment are a monument to a culture in which art collectors established the American tradition of philanthropy in the arts (Nivala, 2003, p.2). To remove the art from its context destroys its significance both as cultural property and as an example of a pioneer's aesthetic legacy.

The current trustees and the court's decision to move the gallery sets a dangerous precedent for art donations and the management of charitable trusts. This precedent will weigh upon how art collectors will open their collections to the public and how they view whether or not their charitable wishes may or may not be respected.

...

In Chapter 1 of this thesis, the intricacies of Albert Barnes' intentions in creating his public institution, his aesthetic theories and educational mission are laid out. Barnes' aesthetic and charitable vision is key for assessing how the trust he established has been criticized and challenged by stakeholders.

Chapter 2 presents the stakeholders, namely its beneficiaries, the public, its board of trustees and the community in which the collection resides. How the creation of the Barnes Foundation as a charitable trust opened the art collection to legitimate claims by its stakeholders is also described. In addition, the intricacies and nuances of charitable trust law introduce the legal landscape.

In Chapter 3, the December 13, 2004 court decision to amend the terms of the trust will be assessed. After reviewing the historical legal context and previous court decisions, the misapplication of the doctrines of *cy pres* and administrative deviation will be examined. How the current trustees and the courts diverted the gallery from its primary use as an educational institution to its new use as an art museum is also shown.

Chapter 4 proposes alternatives for solving the financial crisis at the Barnes Foundation while minimizing administrative deviation and *cy pres* modifications to the donor's intents, and for balancing the interests of the community and public right of access. The impact of the imminent move and its effects on stakeholders will be

compared with more equitable solutions, such as remunerated loans to other public museums, increased e-commerce of reproductions and other educational materials.

The final section concludes that the courts and the current trustees have not upheld the principles of charitable trust laws to the detriment of Albert Barnes' intent, his memory, and to the collection as part of an ensemble of historically significant cultural property.

CHAPTER ONE

A Man with a Mission: Dr. Albert Barnes

Introduction: Challenging Albert Barnes' Philanthropic Beliefs

Despite America's relative youth as a nation, it has garnered a wealth of art collections, among the greatest in the world. Its museums are bursting with Europe's treasures and wealthy Americans dominate the market as the world's most active private collectors. These unrivalled collections are the fruit of a tradition established by the nation's 19th century wealthy industrialists of making art available to the public (Duncan, 1994, p.286). This intimate relationship between art and philanthropy persists to this day.

At the turn of the 20th century, two tax regulations set in motion the greatest surge to date of private collections becoming public (Feld *et al*, 1983, chapter 1). These regulations levied import taxes on fine arts and allowed for art collections to be classified under the legal framework of charitable Foundations (Weil, 1983, p.20).

As a result, several of America's greatest collections moved into the public domain between 1900 and 1940 (Shaw, 1987, p.28). Most notably, the Frick Collection in New York (1935), the Gardner Museum in Boston (1903), the Phillips Collection in Washington (1918), the Guggenheim Collection in New York (1939), and the Barnes Collection in Philadelphia (1922), made the change from private gallery to public trust (www.frick.org; www.gardnermuseum.org; www.phillipscollection.org; www.guggenheim.org; www.thebarnesFoundation.org). However, unlike other American public art galleries of this period, the Barnes Foundation stands apart. Although the Barnes pays homage to its founder's passion as do other galleries, the

history of the Barnes Collection, and its founder's vision, is fed by a different charitable vein.

Although Barnes shared an appreciation for the arts, he disdained the associated materialism and class distinctions (Collins, 2002). He did not support the idea that an interest in fine arts should distance upper-class society from the working-class men and women. Yet, 80 years after Barnes established and endowed a Foundation embodying his vast art collection and his philosophies, the current trustees of the Foundation are attempting to hand the collection over to the kinds of organizations and institutions of which Barnes had been critical throughout his lifetime. In 2002, the Barnes trustees began to seek permission from the Court of Common Pleas to deviate from the detailed provisions in the trust's indenture on how Barnes' art collection should be preserved and used after his death (Zucchino, 2002). As a result, the preservation of the Foundation and its founder's legacy is threatened.

According to the trust's management and trustees however, the Foundation is saddled with crippling debts that have forced them to choose between bankruptcy and drastic alterations to many of Barnes' specific instructions. Ms. Kimberly Camp, the current president of the Barnes Foundation, targeted the strict investment guidelines that Barnes wrote in the Indenture and the restrictions imposed on the Foundation by the residents of the Township of Lower Merion, where the gallery and associated property are currently located, as the primary causes of the financial crisis.

The Foundation's neighbours dispute this and claim that Camp and the trustees have turned the gallery and property into a museum, not an educational institution as Barnes had stipulated (*BarnesWatch*, Spring 2003, p.3). The gallery and arboretum are

zoned as an educational institution with limited accessory use as a gallery, and the neighbours want to protect the Barnes from being transformed into a tourist destination. They intend to keep the Barnes Foundation intact as a cultural ensemble, encompassing all the components of the Barnes estates: namely, the gallery, the art collection, as well as the arboretum surrounding the gallery. To this effect, in 1995 they imposed zoning restrictions limiting the number of weekly visitors to the gallery to 1200 people (*re The Barnes Found. V. The Township of Lower Merion*, 242 Fiduc. Repr. 3d, 151, 2001 U.S. Appl, Pa, 2001). As a result, the citizens of Lower Merion Township have been accused by the Foundation trustees, the press, and Pennsylvania's political leaders of restricting public access to the art, and causing the trustees to move the gallery as the last resort for ensuring its survival (Anderson, 2003, p. 126).

Financial rescue became a reality in 2003: The Pew Charitable Trusts, the Lenfest Foundation and the Annenberg Foundation offered to help the Barnes Foundation by raising \$150 million with the condition that the collections move to Philadelphia (Eisenstein, 2003, p.2). Barnes trustees and these three organizations present their charitable alliance as a way to 'recover' the artworks on the public's behalf (Wilkes, 2001, p.3). They claim that the collection has transcended Barnes' intended educational use of the artworks, the gallery's current suburban location, and Barnes' "egotistic" control over public access.

The three Foundations stand to profit financially from gaining control over the Barnes collection. By promulgating the estimated economic return that the move would create for Philadelphia, the Barnes Foundation's charitable patrons gained the political and legal support from the Governor of Pennsylvania, the Attorney General, and the

Mayor of Philadelphia. Once in downtown Philadelphia, the gallery is projected to generate more tourism within the city, making Philadelphia the home to one of the world's greatest collections of impressionist and post-impressionist art (Rose, 2003).

The local press and art institutions, both of which were once direct targets of Albert Barnes' social critiques, also support the transformation of the Barnes from an educational institution to a full-time museum. All the while, as the move's supporters argue that their interests lie in preserving the Barnes Foundation and increasing the public's access to the art collection, the move will not only violate Albert Barnes' personal vision for the Foundation, but it will also destroy its unique character and charm.

Albert Barnes' Unique Vision

Albert Barnes did not intend his gallery, and the art collection it housed, to be used as a museum or a financial 'cash cow'. He stipulated in the Foundation's Charter that the Foundation's primary purpose was to ensure that individuals regardless of class, colour, and artistic exposure, were to have free access to the art gallery and the arboretum for educational pursuits in fine arts and aesthetics (The Barnes Foundation's By-Laws, 1922, Charter Para. 2). To this end, visits for curiosity and casual entertainment were restricted. It is this educational and democratic mandate that sets the Barnes Foundation apart from other public art galleries. Unlike other museums, Barnes' purpose was to teach his curriculum on aesthetics. The establishment of the Foundation as an educational institution with specific educational goals has been the catalyst for debate over the accessibility. Moreover, education lies at the centre of the conflicts that currently face the Barnes Foundation with respect to the Court's approval of the trustees'

wishes to modify the trust's indenture. While Barnes took extensive care in creating this oasis for learning, the Court's decision allowing trustees to relocate the gallery contradicts Barnes' philosophy and beliefs, and allows for his art program to be treated as if it were a sideshow of a reframed tourist attraction.

An introduction to Albert Barnes' life provides an understanding of his intentions in keeping the Foundation's mandate strictly tied to the pursuit of his educational philosophy. His background, philosophies and specific aesthetic beliefs are explored in the following, highlighting the unique vision and perspective that the donor had for the Foundation and its use.

The intended audience for Barnes' art collection is a social group Barnes related to people of humble origins. Born and raised in one of Philadelphia's poorest neighbourhoods, Albert Coombs Barnes was born on January 2, 1872 to a mail-carrier father and homemaker mother in Philadelphia, Pennsylvania, as reported by the first of four Barnes biographers, Henry Hart (1963, chapter 1). He grew up knowing what it was to be deprived of food and comfortable shelter, let alone decorative arts for the home.

As a youth, Barnes recounts that his greatest joy was participating in Methodist revival camps to which his mother took him (The Barnes Foundation, 1993, p.3). These revivals, attended mostly by African-Americans from the surrounding Philadelphia area, are where Barnes' keen interest in African and African American culture developed: "I became an addict of Negro camp-meetings, baptisms, revivals and to seeking the company of individual Negroes" (The Barnes Foundation, 1993, p.3). Barnes' empathy for and affiliation with African Americans influenced his choices and philosophies

especially his choice to leave his art collection under the discretionary control of a prominent African American educational institution, Lincoln University.

William Schack, a former Barnes Foundation employee and biographer, noted that despite his socio-economic background, Barnes went to high school, where his interest in art first became apparent (1963). He befriended William Glackens, later to become one of the famed Ash Can School painters (Schjeldahl, 2004). John Sloan, another to-be artist, ignited Barnes' interest in aesthetic theory and painting. Although both of these high school mates pursued art, Barnes realized he did not have the talent to paint and entered the University of Philadelphia's three-year medicine course (Greenfeld, 1987, p.8). Barnes' interests in psychology and philosophy developed at this time and "could have been responsible for his decision to give up medicine as a career" (Schack, 1963, p.32).

Upon graduation and after two years in Germany, where Barnes studied philosophy and chemistry, Barnes began his professional pharmaceutical career in 1899 (Schack, 1963). With a business partner he recruited from Germany, chemist Hermann Hille, Barnes produced the drug *Argyrol*, a silver compound antiseptic used on the eyes of newborns to prevent blindness from gonorrheal infection. Consumers recognized that *Argyrol*'s silver protein did not cause the same irritant side effects that were common in silver nitrates used at that time (Schack, 1963, p.44). This product, along with Barnes' second creation, *Ovoferrin*, made Barnes his fortune; according to Barnes biographer John Anderson, "by the end of 1904, sales had reached the \$100,000 mark... and worldwide demand was rising" (2003, p.21).

By 1906, when sales from *Argyrol* had topped a quarter of a million dollars, with profits of over \$185,000, Barnes and Hille dissolved their partnership (Anderson, 2003, p.22). Barnes took over sole control of the *Argyrol* factory, turning it into a co-op. It was through Barnes' management of the co-op factory that he first experimented with democratic, educational and aesthetic theories. Barnes was now free of the financial constraints of his youth and could pursue his passion for aesthetics, philosophy and psychology. According to Howard Greenfeld, a Barnes biographer, through the co-op, Barnes wanted employees to feel equally responsible for the success of the factory and wanted to organize the three African American male and five white female employees (1987, p.23).

Barnes' Educational and Aesthetic Theories

Inspired by philosopher John Dewey's *Democracy and Education*, Barnes applied his educational theories in the teachings he gave to his employees (The Barnes Foundation, 2004). Convinced that any human could improve their social situation through self-understanding and education, Barnes took it upon himself to teach Dewey's philosophies to his employees (Greenfeld, 1987, chapter 6). His educational self-improvement program consisted of daily two-hour seminars, cutting work down from eight to six hours (p.55). Although the employees' attendance was voluntary, everyone attended the seminars without fail. Beyond psychology, topics covered art, music, poetry and drama on the basis of aesthetic principles. John Anderson, an author that wrote a biography on Albert Barnes and his Foundation, entitled *Art Held Hostage*, claims that having started collecting art in 1900, Barnes had hung more than 100 canvases

throughout the factory by 1916 to bring art into the visual sphere of his employees (2003, p.24). Barnes offered the paintings to employees at cost, an offer that many employees accepted after studying the new and modern styles of art in Barnes' collection (The Barnes Foundation, 1993, p.5).

Determined to challenge his own aesthetic appreciation, Barnes abandoned collecting conventional art, which was the focus of the majority of art collectors in America at the time. In 1912, on the advice of his long-term friend, William Glackens, Barnes' shifted his focus from Barbizon paintings to modern art (Schack, 1963, p.78). He began to collect mostly African artifacts and French Modernists, known today as the Impressionists. The Impressionists were not household names during the early 1910s in America, nor were they in France (p.79). To start his new collection, Barnes commissioned Glackens to go to Paris and purchase modern paintings with \$20,000 (Greenfeld, 1987, p.34). Upon Glackens' return, the Renoirs, Van Goghs and Monets he had chosen did not appeal to Barnes. As William Schack empathetically describes Barnes' reaction, "to step out of the woodland scenes of the Barbizon painters, with their restrained light pattern among dark masses, into the Impressionist world, in which the woods were cut down to let in sun-drenched color, was a blinding experience" (1963, p.79). Several examples of the Impressionist and Post-Impressionist paintings that Barnes acquired can be seen in Appendix A. Believing in the universality of aesthetics, Barnes was determined to understand the canvases and the artists. In the words of author Howard Greenfeld, a Barnes biographer, "gradually, analyzing these works of art with the skill of a scientist, he came to learn what these painters had done and why, and to understand... their vitality" (1987, p.36). Within six months, Barnes was on his way to

Paris, becoming one of the first fervid supporters of the *avant-garde* modern art movements (p.43). The Barnes Foundation is now regarded for its extensive collection of Impressionist and Post-Impressionist art, currently two of the most fashionable and widely sought art styles (Appendix A).

Proud to be entering the un-chartered territory in art collecting, Barnes was confident he could recognize great art and wanted to share his aesthetic theories with the world. In 1915, Barnes wrote his first art criticism article in the magazine *Art and Decoration*, entitled “How to Judge a Painting”. In this article, he made the statement:

[B]ooks, the usual means of acquiring elementary knowledge, fail. A textbook on art is an impossibility. The standard so-called authoritative works are, for the most part, compilations of the traditions and accretions that surround art, barely touching it, written by antiquarians, experts, bad painters, professional writers or plain dunces. (Schack, 1963, p.87)

According to Barnes, the way an artist handled color, line and space in an artwork determines its quality (Barnes, 1965, p.27). These intrinsic qualities in painting, or the ‘plastic elements’ as Barnes coined them, were the basis for aesthetic judgment: “the more fully the work of integration is carried out, that is, the greater the formal unification of all the constituent matter, the better the painting, the symphony, or the statue” (p.27). He felt that these elements are the universal qualities in all art that make it possible for art to transcend time, place and culture. A balance of the basic ‘plastic elements’ makes a good painting—depth of color, variety, richness and harmony are required to make a painting of good ‘plastic form’ (p.55). As Alfred Barr, Jr. the first director of the Museum of Modern Art in New York attested: “This [Barnes’] is an important book because it presents a systematic and confident statement of what is central in the ‘modern’ attitude toward painting” (The Barnes Foundation, 1993, p.13). Barnes also

used the ‘plastic elements’ as the basis for ‘modern’ comparison between the varying *objets d’art* in his collection, contrasting African sculptures with his Impressionist canvases (p.13).

According to personal conversations with Barnes, former Foundation employee William Schack claims Barnes emphasized objectivity in his method of judging art, which as he stated, reduces judgments being made on merely personal and arbitrary preference to a minimal level (1963, p.189). As another Barnes biographer Henry Hart explains further, Barnes’ academic devotion to the scientific method and objective theory were borrowed from Dewey, who argued that the increase in knowledge is based on the education of rational thought and first-hand experiences (1963, p.63). Barnes’ application of Dewey’s aesthetic theories was the basis for his first book, *The Art in Painting*, on which he worked through the early 1920s until its publication in 1925. In addition to the more mechanical process of evaluating a painting, Barnes stressed the essential affinity of art to nature (The Barnes Foundation, 1993, p.13). Barnes sought to convey a means of sorting out the varieties of human experience embodied in a painting: “The artist’s diverse emotional response to his surroundings, his imaginative formulation of that interaction in terms unique to painting, was foremost in Barnes’ method” (p.13). Henry Hart explains that the culminations of Barnes’ art theories, quoting Degas’ dictum that “literature has only done harm to art”, were not only captured in print but in the display and use of his art collection as well - Barnes sought to provide his students a first-hand experience of art by using great works (1963, p.56).

Establishing the Barnes' Educational Institution

By the early 1920s, Barnes' collection of art had matured beyond the space it filled in the doctor's factory and his home. Reported by Anderson, Barnes and his wife Laura, nee Leggett, whom he had married in 1918, purchased the Lower Merion Township property of Joseph Lapsley Wilson in 1922 (2003, p.28). The sole condition of the purchase, according to Greenfeld, was that the Barnes' had to promise to maintain and expand the arboretum that Wilson had begun in the 1880s (1987, p.72). Having lived in another house in the new, upper-class development on Latches Lane since 1905, Barnes envisioned the Wilson's 12-acre property as a perfect sanctuary for his art collection, and the ideal location in which to establish his educational institute. Barnes saw the potential of the arboretum as a project for his wife. Similarly, Barnes' belief that art and nature have an "essential affinity" made the synthesis of art gallery and arboretum a unified educational institution (Barnes Foundation, 1993, p.13).

With the art, the land and the finances to support the growth and maintenance of an art collection, Albert Barnes was ready to turn his dream of running an educational institute devoted to aesthetic appreciation into reality. Barnes reportedly told the Glackenses that he intended to establish a gallery which would be open to everybody, "the only rule being the rigid one that no guided tours, lectures or critical examinations whatever were to be allowed: the public could come and look for itself" (Schack, 1963, p.115). To this effect, the Foundation he established on 4 December 1922 was not a museum, but was created with the sole purpose of education (The Barnes Foundation's By-Laws, 1922, Charter Para. 2). With Judge J. F. Miller, acting on behalf of the State of Pennsylvania, the Barnes Foundation was chartered to "promote the advancement of

education and the appreciation of the fine arts” and the “encouragement of arboriculture and forestry” (The Barnes Foundation’s By-Laws, 1922, Charter Para. 2). Barnes transferred most of his personal art collection and endowed \$6 million for the Foundation so it could achieve these specific educational purposes.

To design the new educational facility required to house the collection, Barnes enlisted the expertise of Paul Phillippe Cret (Greenfeld, 1987, p72). Cret, a reputable Philadelphia architect of French origin and a graduate from the École des Beaux Arts in Paris, is remembered in Philadelphia for designs that are considered urban landmarks (Nivala, 2003, p.5). Cret designed the Benjamin Franklin Bridge and the Rodin Museum, both in Philadelphia as part of the City Beautiful movement in the early 1900s. Along with other buildings, memorials and bridges, Cret’s designs can also be found throughout America. Examples of his work include the French Embassy in Washington, D.C., the Cincinnati Art Museum, and several buildings at both the University of Texas and the University of Chicago (Greenfeld, 1987, p.72). Cret’s Beaux-Arts designs attracted Barnes. The two decided, however, that the gallery would in the French Renaissance Chateau style, as can be seen in Appendix B, Figures 1 through 5 (The Barnes Foundation, 1993, p.10). Cret felt that this style would be more compatible with the vivid paintings inside than would the modern style he had used in other projects, recounted by William Schack (1963, p.119).

Designing the buildings around the collection, Barnes and Cret considered how the lighting, space and overall layout of the 23-room gallery, the administration building, and the surrounding landscape would affect the display of the art: “each room has at least one large window that provides natural light with unobstructed space for pictures on the

other three walls" (The Barnes Foundation, 1993, p.10). Furthermore, in Henry Hart's words, Cret's design and layout of the rooms "enables the pictures and other art objects to be seen with an intimacy museums rarely achieve, and also enables the Foundation's classes to assemble without classroom-like formality" (1963, p.82).

In addition to the custom-designed gallery, Barnes commissioned several original works to complete his Institution's desired aesthetic form and purpose. Finding 12 feet of unoccupied space in the back of a room, Barnes commissioned French sculpture Jacques Lipchitz to create a sculpture to fill the space (Greenfeld, 1987, p.81). A year later, Barnes again commissioned the sculptor to carve seven *bas-relief* "garden pieces" for the exterior of the gallery (p.81). Examples of the built-in friezes created by Jacques Lipchitz can be seen in Appendix B, Figure 1. In addition to these commissions, Barnes hired the Enfield Pottery and Tile Works to create the Gallery vestibule ceramic tile work, as can be seen in Appendix B, Figure 8 (The Barnes Foundation, 1993, p.10). The designs were based on Barnes' collection of African art, complimenting a Baule door he owned, which was to be hung on the mezzanine of the Gallery, also seen in Appendix B, Figure 8 (p.10). Furthermore, in 1933, Barnes enlisted the famed artist, Henri Matisse, to compose a mural to hang above the three windows in the main gallery that overlook the arboretum. The outside view of the three windowed gallery can be seen in Appendix B, Figure 5 (The Barnes Foundation, 2003). According to law Professor John Nivala, *La Dance* is the only mural in America created by Matisse one of the three that he created (2003).

Installation of the paintings and African artifacts were considered with the same specificity and care Barnes had stated in the design of the gallery. They had also had an

educational purpose greater than mere decoration of the main gallery. Of the African art-inspired tiled entrance, Barnes stated that “it gives a touch to that part of the building and is worthy of the other works of art which will be its neighbors on the inside” (Barnes Foundation, 1993, p.11). Barnes’ intentions were to mix medias and intermingle traditions, constantly pushing students’ aesthetic appreciations and beliefs: paradoxes between east and west, tribal and *haute époque* were praised in Barnes’ layout of the gallery and in his wall installations (p11).

Barnes juxtaposed old and new art forms in order to challenge students to see connections and draw relationships among often seemingly disparate traditions. In Barnes’ own words he explained that “the paintings exhibited here provide a striking demonstration of what ought to be... a commonplace of aesthetic criticism – the continuity of great art throughout the ages” (Barnes & De Mazia, 1943). For Barnes, the ensembles on a wall were more meaningful to aesthetic understanding than the study of art, painting by painting or period by period: “the way we hang pictures is not the ordinary way: each picture on a wall has not only to fit in a definite unity but it has to be adapted to our purpose of teaching the traditions” (The Barnes Foundation, 1993, p.15). The care Barnes displayed in each installation reinforced his belief that all art is interconnected and that art’s value lies in how it is viewed and interpreted by each individual. Although art theories recognize such views today, in the 1920s Barnes’ aesthetic philosophies were not endorsed by art critics, and he and his Foundation were ultimately challenged by critics and historians for promoting such theories.

The Unveiling of Barnes' Collection

During the final stages of construction of the gallery, the Barnes' residence and the service buildings, Barnes went to Paris for what author Howard Greenfeld describes as Barnes' most acquisitive trip (1987, p.85). On this expedition, Barnes discovered the work of Chaim Soutine and Amadeo Modigliani (Appendix A, Figure 3), and purchased Matisse's *Joy of Living* and 74 other paintings by artists such as Pablo Picasso, Giorgio de Chirico, and Helene Perdriate. These had been exhibited in Paul Guillaume's gallery in Paris, creating international news for their ultra-modern styles and subject matter (p.86).

In 1923, hearing of the unique ensemble of modern art collected by the Philadelphia native, the Philadelphia Academy of Fine Art asked Barnes to exhibit the paintings at the museum (p.92). With hopes of being applauded for his impressive collection and taste in art, Barnes graciously accepted. Although Barnes did not endorse conventional art criticism and the conventions of museums, he agreed to display his art with hopes of increasing the profile of his gallery and the modern artists he loved so much. According to former employee William Schack, this was also the opportunity for Barnes to prove himself to the social groups in Philadelphia that had ostracized him as a poor youth (1963, p.154).

The overt confidence Barnes had in his own approach to art criticism was publicly revealed in the introduction he wrote for the exhibition: Barnes wrote, "these moderns [artists] are as individual in their expressions of what they believe constitute the essentials of plastic art as are any of their predecessors. That entitles their work to respect and attention for what it is in itself" (Greenfeld, 1987, p.92). Although Barnes

did provide lengthy suggestions to viewers on how to understand the aesthetic elements in the paintings, viewers' did not find the same redeeming qualities in the modernist canvases as their collector did (Toobin, 2002). Reactions were not favorable, and art critics did not praise Barnes for his innovative tastes and opinions, as he had anticipated. Art critic Dorothy Graffly described the exhibition as uncleanness: "it is as if the room were infected with some infectious scourge... the fevered passion [of the artists] for unclean things. The modernists lack subtlety, delicacy, or finesse" (Schack, 1963, p.129). Newspaper critics were equally critical of Barnes' collection (Anderson, 2003, p.30). John Anderson further states, "Philadelphia newspaper critics, generally hostile to modern art, greeted the show with a mixture of incomprehension, mystification, and anger" (p.29).

Barnes, having set an anti-art establishment tone, took the criticism personally. He rebutted the criticism by publicizing his disregard for the art world in press releases announcing the Foundation's launch. In his letter to Forbes Wilson, editor of *The Arts Magazine*, Barnes wrote:

Primarily the hope is that every person, of whatever station in life, will be allowed to get his own reactions to whatever the Foundation has to offer, that means that academism, conformity to worn-out conditions [art conventions], counterfeits in art, living and thinking, can have no place in the intended scope of the Foundation (Schack, 1963, p.123).

As William Schack explains, "in an artist, anger is a natural defence of the pride of creation; in a collector, it is only the hurt pride of possession" (1963, p.131). Barnes' tastes were insulted and he retaliated against those that criticized and mocked him. In turn, his lifelong disdain for the press and art critics had begun, and it was only to grow stronger as the Foundation and Barnes' reputation grew.

What the Barnes Foundation Refused to Be

Segregating himself from the conventional art establishment, Barnes staffed his Foundation for its educational purposes with reputable philosophers from several East Coast universities (Hart, 1963). Over the next three years, instructors included Munro, Buermeyer and John Dewey. Dewey, who had been teaching at Columbia University, was named Director of Education in 1923 and classes began the same year (Schack, 1963, p.136). Following the terms outlined in the by-laws of the trust's charter, the educational programs were to run for five days a week and the general public was only admitted to the art gallery and arboretum for up to two days a week, and only by card of admission (p.152). By-law 29 further explains these regulations:

Donor [Barnes] makes these provisions and stipulations for the reason that said art gallery is founded as an educational experiment under the principles of modern psychology as applied to education (Barnes Foundation's By-Laws, 1922, The Charter).

Barnes stipulated that even art students were to be admitted by special arrangement, thereby eliminating those that were only moderately interested in the fine arts and sought entry based on mere curiosity. These restrictions, the by-law explained, were imposed because the art gallery was founded “to perfect the plan so that it shall be operative for the spread of the principles of democracy and education after the death of Donor and his wife” (Barnes Foundation's By-Laws, 1922, Para. 29).

After the death of Barnes in 1951 and his wife in 1967, the gallery was to be open to the public up to three days a week at most, leaving it to the board of trustees to choose who could be admitted. The board of trustees was to make:

such regulations as will ensure that it is the plain people, that is, men and women who gain their livelihood by daily toil in shops, factories, schools, stores and similar places, who shall have free access to the art gallery upon those days when the gallery is open to the public (Barnes Foundation's By-Laws, 1922, Para. 30).

Barnes' intended educational and democratic purpose for the gallery was firmly stated in the Charter and the Indenture's By-laws.

Although Barnes' believed his aesthetic theories were sound, his educational institution was not supported in Philadelphia as he had anticipated. He had believed that the use of his book, *The Art in Painting*, as the text for his institution's courses, and his mode of teaching were rationally founded. He also tried to have his system adopted by the Philadelphia Board of Public Education, as he believed that to show the young how to look at paintings would be the most effective means of improving art in America (Schack, 1963, p. 159). Similarly, he appealed to his *alma mater*, the University of Philadelphia, offering its students the opportunity to study aesthetics in his gallery for credit. Discouraged by the university's and its students' lack of enthusiasm, Barnes reacted by tightening the reins of control and access to his Foundation. In November of 1926, Barnes wrote to the provost of the University of Pennsylvania suspending all agreements with the Foundation (Greenfeld, 1987, p.121).

With the growing interest in America for modern art, the number of admission requests to the Foundation by the interested public increased annually. In 1929, the same year the Museum of Modern Art opened in New York, according to William Schack, the number of students at the Barnes Foundation was between 50 and 75 a year (1963, p.176). Notwithstanding the keen interest expressed by most applicants, the Foundation continued to refuse entry to the majority. The letter read:

The Barnes Foundation is not a public gallery. It is an educational institution with a program for systematic work, organized into classes, which are held everyday, and conducted by a staff of experienced teachers. Admission to the gallery is restricted to students enrolled in the classes. (p.178)

There was no consistency in Barnes' discrimination, except for his usual disdain for art professionals and art collectors, whom he held in disdain as frivolous millionaires of a certain "pedigreed" (p.178). Biographer Howard Greenfeld claims that Barnes' denied admission based on categories and art dealers, art critics and newspaper writers were strictly prohibited (1987, p.129). Once visitors were admitted to the gallery, they were allowed to stay for two hours. It is claimed that visitors were kicked out early if Barnes overheard them criticizing the collection, as he imposed his judgment on the conversation and behaviour of his visitors (p.132). Barnes similarly expressed his personal judgment in several rejection letters that have been described as 'vile', filled with Barnes' sadistic humour insulting the groveling attempts to gain admission (Schack, 1963, p.183). Barnes' admission policies were criticized for purportedly offering a democratic institution while paradoxically imposing his personal choice on who should be admitted and how they should behave.

Although Philadelphians continually targeted Barnes, casting him in a negative light, he did not waver in his strict regulations over access. He was adamant that the collection was strictly intended for educational experiment—teaching about aesthetics—and refused admission even to the most interested spectators. Barnes believed that his paintings were one of the tools for his teachings, along with the arboretum, and made the final amendments to the trust by-laws to ensure that the Foundation's educational focus would be primary for perpetuity. In accordance with the Foundation's purpose, and with

Barnes' sentiments with respect to the norms associated with the art world, he stipulated in the by-laws that at no time after his death "shall there be held in any building or buildings any society functions commonly designated receptions, tea parties, dinners, banquets, dances, musicals or similar affairs" (Barnes Foundation's By-laws, 1922, Para. 33). The properties on his estate, including the arboretum, were to be kept solely for the pursuit of his educational mission. To the same restrictive ends, Barnes barred loans, sales or reproductions of his artworks after his death. By-law 10 directs that

after Donor's death no picture belonging to the collection shall ever be loaned, sold or otherwise disposed of except that if any picture passes into a state of actual decay so that it no longer is of any value it may be removed for that reason only from the collection (The Barnes Foundation By-laws, 1922, Para. 10).

He also forbade the displacing of any painting or sculpture from its intended place in the gallery and the construction of any building on the 12-acre campus. Barnes had a clear and specific vision of how his art collection was to be used and he made every effort to see these wishes carried out. His estate was to remain intact as a cultural ensemble with its different parts used for their intended educational purposes.

Preparing the Fate of the Barnes Foundation

As admission requests steadily increased, and the waiting list of eligible students for Barnes' courses grew, Barnes continued his limited access policies, restricted admittance to fewer than 200 students a year and granted admission to a nominal numbers of visitors. Sentiments that grew towards the Foundation by interested viewers that were denied admission were anger and resentment. Since they were denied access, *The Philadelphia Inquirer* and *The New Republic*, the two local daily newspapers, also

publicized the idea that Albert Barnes was a cantankerous madman (Anderson, 2003). In the words of William Schack, by the 1940s, Barnes had endured criticism from those in his native city enough, giving

a final word of caution to the Museum officials and their friends...I shall not tolerate the repetition of any such cowardly, unsigned vilifications as those of the supposedly unknown 'Syndic.' ... I shall match all such dirt by the public spilling of more potent dirt, and validate it by corroborative testimony... (1963, p.269)

He furthermore withdrew all his plans of collaborating with any local education and arts institutions. On April 10, 1947, in a Report on the Pennsylvania State University-Barnes Foundation experiment, Barnes wrote:

Thus ends a melancholy record of inertia, lethargy, disorder, blindness and futility on the part of Pennsylvania officials... by their torpor, the authorities have forfeited for the second, and last, time one of the most valuable gifts, educational and material, ever offered to a University. (Schack, 1963, p.356)

In the trust by-laws, Barnes ruled out the possibility of the University's participation in the Foundation in By-Laws 17 and 20 (Barnes Foundation's By-laws, 1922, Para. 17, 20).

He also specifically denied any role in the Foundation's future to other Pennsylvanian colleges and institutions, including Temple, Bryn Mawr, Haverford, Swarthmore, the Pennsylvania Academy of Art and the Philadelphia Museum of Art (Greenfield, 1987, p.279). He stipulated that no member or affiliate from any one of these institutions was to hold a seat as a trustee (Barnes Foundation's By-laws, 1922, Para 17).

Barnes was frustrated in his efforts to find a suitable institution to appoint as directing body of the Foundation upon his death. As reported by Howard Greenfeld, in 1946, Barnes established a new relationship with Lincoln University in Oxford, Pennsylvania, one of America's first African-American universities (1987, p.281). After meeting and corresponding with the school's President, Horace Mann Bond, Barnes

became involved in supporting educational projects at Lincoln (p.281). Barnes' interest in fostering leadership among African Americans, and visiting African students, aligned with his lifelong concern for improving the resources of segregated and deprived social groups. Barnes wrote, in a 1925 article, "Negro Art and America", published in *Survey Graphic*, that he believed in the emancipation of the Afro-American through empowerment and education:

We have begun to imagine that a better education and a greater social and economic equality for the Negro might produce something of true importance for a richer and fuller American life... this mystic whom we have treated as a vagrant has proved his possession of a power to create out of his own soul and our own America, moving beauty of an individual character whose existence we never knew... he may consent to form a working alliance with us for the development of a richer American civilization to which he will contribute his full share. (Barnes Foundation, 1993, p.26)

Barnes' commitment to African Americans deepened through the years, and Lincoln students were invited to study at the Barnes gallery during the 1950-1951 academic year.

Although Barnes' intentions in his partnership with Lincoln had been questioned of late, Barnes must have found this collaborative relationship with the university satisfying. On October 20th, 1950, Barnes amended the by-laws in the Foundation's charter stating that once the original board members had retired or passed away, Lincoln University's Board of Trustees would become responsible for appointing trustees (Anderson, 2003, p.46). The university was to nominate four of the five trustees, "vacancies occurring by the expiration of the term, death, incapacity or resignation of the Trustees nominated by the Board of Directors... of Lincoln University" (Barnes Foundation's By-laws, 1922, Para.17). The fifth trusteeship was reserved for a banker or financial adviser from the Girard Trust Company, an institution that Barnes' had

patronized (Barnes Foundation's Bylaws, 1922, Para.18). Without knowing of the direction it would have over the art collection, the university had planned a tribute to Barnes' charitable efforts to help the 350 students in June of 1950 (Anderson, 2003, p.46). Honoring Dr. Barnes with an honorary Doctor of Science degree on 5 June, 1951, the University's citation read, "You have faith in the capacities of the negro people, and this faith you have demonstrated in many ways throughout your life" (Barnes Foundation, 1993, p.26). A month later, Albert Barnes died in a car accident on 24 July, 1951, at the age of 78. Without any further explanations about his decisions on the future of the collection, Barnes' motives can only be speculated from his actions and the Foundation's final by-laws.

Barnes' Legacy: An Art Collection and its Endowment

Barnes had left a legacy that he was confident would withstand modification since he had written detailed provisions into the Foundation's by-laws as to how it should be maintained. Intending to ensure that the Foundation would not have to seek funds from outside sources, where competing views could challenge his terms, he bequeathed his entire estate to the Foundation which was directed by Mrs. Barnes' until her death in 1967 (Schack, 1963, p.402).

In 1940, Barnes had purchased a 350-acre farm, renamed Ker-Feal, with a farmhouse built in 1775 on the property (The Barnes Foundation, 2005). Although Barnes did not store any paintings at Ker-Feal, he had filled the restored farmhouse with American furniture, pottery, glass, pewter, ironwork and textiles and left the collection to the Foundation (Schack, 1963, p.402).

Reported by William Schack, a four-storey building in downtown Philadelphia that Barnes had purchased in the early 1930s for storage and administration was also left to the Foundation (1963, p.402). In addition to real estate, Barnes provided the Foundation with the art collection, then valued at \$5 million, and an endowment of \$9 million consisting of the 900 shares of common stock of the A.C. Barnes Co, (Anderson, 2003, p.49). Biographer John Anderson claims that in 2003 dollars, the endowment alone was equivalent to \$62,000,000, more than ample to keep an art collection and an educational institution afloat (p.49).

Funding the Foundation himself with annual donations of half a million dollars on average, the Foundation did not have to rely on public support (p.49). In addition to property and income tax exemptions that benefited the Foundation, Barnes also kept the Foundation's expenses to a minimum. Although he paid his employees higher wages than other educational institutions, Barnes wrote by-laws that set several salary caps for employees and limits on permissible expenses (Barnes Foundation By-laws, 1922, Para. 7, 19, 20, 22, 23, 24, 37, 38). These policies were intended to guarantee that the Foundation would have financial backing in perpetuity.

However, following Barnes' death, the financial terms of the indenture began to work against the endowment according to Anderson (2003, p.49). Barnes had prescribed in the by-laws that the endowment was only to be invested in government bonds, then called "obligations," a form of debt security that was popular in the 1920s (Weil, 1990).

Paragraph 27 of the Barnes Foundation's By-laws states that:

after Donor's death, such moneys may only be invested by Donee in such obligations of the United States of America, obligations of the several States of the United States and obligations of municipal corporations and districts in the

several United States which are legal investments for savings banks under the laws of the State of New York. (Barnes Foundation By-laws, 1941, Para. 27)

Although Barnes must have thought that this endowment would be able to finance the Foundation in perpetuity, factors beyond his foresight resulted in financial disarray. Anderson notes that “given the low rate of return on government securities, the endowment – which consisted of nothing but federal, state, and municipal bonds – did not grow, but... covered ordinary expenses” (2003, p.49). Anderson furthermore attributes the Vietnam war and the Arab oil embargo in the 1970s as contributing factors to the high rate of inflation that eclipsed the value of government bonds (p.49).

High inflation was not the only factor that led to the Foundation’s current financial predicament. Museum specialist and lawyer Stephen Weil explains that costs of maintaining an art collection, whether for educational purposes or as a traditional museum, rose exponentially over the last century (1995, p.33). Increased protection and preservation costs can be attributed to two factors especially, the growth of the illicit trade in art, and the increased adoption of art preservation techniques and standards by nations, art professionals and non-governmental organizations, such as UNESCO and ICOM. According to Keith Middlemas, a scholar in art theft, it is commonplace now that museums pay millions of dollars annually to insure their collections against theft and damage (1975, p.155). In Barnes’ lifetime, however, according to cultural economists William Grampp, F. Feldman, Stephen Weil, and Duke Biederman, most reputable public art collections such as the Louvre, did not carry insurance on collections (Grampp, 1989; Feldman *et. al.*, 1986, p.690). The dominant position, as Barnes even mentioned in the Foundation’s by-laws, was that any damage or theft could not be compensated by

monetary reimbursement. Consequently, the Foundation would be under no “obligation to keep the same [collection] insured in any manner, it being impracticable adequately or properly to insure the same; no insurance moneys being in any sense adequate to replace or repair the same in case of fire or other casualty” (Barnes Foundation’s By-laws, 1922, Para. 31). Although it seems impracticable today to not insure an art collection, it must be remembered that Barnes was following a standard practiced by other art galleries. Museums often avoid insurance issues stating that art should be valued according to its ‘true’ cultural values rather than endorsing the ‘market mentality’ that art is a trade-able commodity (Grampp, 1989, p.24).

Barnes recognized that the preservation and maintenance of an art collection is costly and, like most other collectors of the time, he took it upon himself to charitably care for and preserve the collection he had assembled (Sax, 1999, p.10). However, what Barnes did not foresee was how owners’ roles in preserving art held as their private property would evolve from being considered a voluntary act to being viewed as an obligatory responsibility and duty as traced by lawyer Nicole Wilkes (2001). As Michigan Law School professor Kathryn Rand explains, governments and non-government organizations increasingly undertook the preservation of art during the 20th century (1993). The American tradition of preservation laws and regulations protecting cultural heritage dates to the 1890s, but did not flourish until the ‘community’ stage of American preservation law from 1956 to 1980 when landmark designations imposed duties upon the owners of cultural heritage:

this shift in focus imposed a duty upon the owner to keep the exterior features of the building in ‘good repair’, ... so as not to “hinder the protection, enhancement,

perpetuation, and use of the landmark... for the education, pleasure and welfare of the people of the city (Rand, 1993, p.6).

Explained in an article written by Nicole Wilkes, entitled, "Public Responsibilities of Private Owners of Cultural Property: Toward a National Art Preservation Statute" in the *Columbia University Journal of Law and the Arts*, the costs of preservation have increased along with the growth and professionalization of the cultural property field (2001). Barnes did not anticipate the high standard to which public art collection preservation programs are now held. Stephen Weil explains that professional bodies overseeing the practices of museums and public art collections have written codes of ethics and publish articles enforcing the values that art galleries are expected to follow (Weil, 1983, p.180). The leading professional bodies overseeing museums' activities and preservation standards include: The American Institute of Museum and Library Services (IMLS), established in 1995; the Association of Art Museum Directors (AAMD), incorporated in 1969; and the American Association of Museums (AAM), founded in 1976 (www.imls.org; www.aamd.org; www.aam-us.org). Since the Barnes collection is open to the public, the standards of these organizations apply, a professional standard Barnes did not take into account. With the restricted investment and unexpected cost increases in maintaining an art collection, the endowment that Barnes left for his Foundation's care became insufficient to match its needs.

Conclusion: Written Words Aren't Forever

Although Dr. Barnes took great care in explicitly framing the environmental setting and aesthetic environment in which his educational purposes were to be followed,

the dead-hand control over one's estate, will, or Foundation, was not guaranteed. Barnes did not account for increased public and financial demands that would affect his art collection's maintenance. In the same way, Dr. Barnes did not foresee that the various elements of his Foundation – the gallery, the art collection, and the arboretum – would be eventually considered distinguishable from each other and that his art collection would be considered the primary asset subsumed within his Foundation. The public demands, seeking increased access and accountability for the preservation of the art collection, have in turn led to challenges to the Trust Indenture, and several of the Foundation's significant by-laws mentioned above. Barnes' final word in the Trust Charter stipulates that, "the following by-laws of the corporation are un-amendable and shall never be amended in any manner whatsoever" (Barnes Foundation's By-laws, amended 1950, Article 10). Even though Barnes directed that, after his death, no modifications were to be made to the terms of the trust, modifications have been made.

Rather than following Barnes' directions for the collection's dissolution if it were to fail, as written in the trust's by-laws, courts have allowed the Foundation to be pushed and pulled by stakeholders. The 11th by-law reads:

Should the said collection ever be destroyed, or should it for any other reason become impossible to administer the trust hereby created concerning said collection of pictures, then the property and funds contributed by Donor to Donee shall be applied to an object as nearly within the scope herein indicated and laid down as shall be possible, such application to be in connection with an existing and organized institution then in being and functioning in Philadelphia, Pa, or its suburbs. (Barnes Foundation's By-laws, 1922, Para. 11)

Notwithstanding these specific directions regarding unforeseen circumstances that might challenging the continuation of his educational experiment and the preservation of the complete estate, the courts and the trustees have continually deviated from the terms of

the Trust. The result is that Albert Barnes' charitable and aesthetic vision, described in this chapter, has been desecrated.

In the following chapter, the legal nature of the Barnes collection as a charitable trust is examined along with the interested parties that have staked claims with respect to access to the collection and its preservation. Also explained is how the law has attempted to balance donor intent with public interest and trustees' fiduciary duties, in the administration of charitable trusts.

CHAPTER TWO

The Legal Landscape

Introduction: Creating the Barnes Foundation

Until his death, Albert Barnes oversaw the management of his art collection as if he were still its sole proprietor, regulating access to the gallery at his discretion (Nivala, 2003). Had Barnes created his Foundation as a private corporation rather than a charitable trust, he would have been free to exert such restrictive control over his assets, with less legally-grounded protest from the public. American federal and state laws recognize art as private property and owners are not required to share it with the public (Wilkes, 2001). Collectors that keep art as a personal possession or hold it in a private corporation can therefore control access as they wish.

As biographer John Anderson explains, in 1922, however, when Albert Barnes donated his collection to the Barnes Foundation, his authority over it was removed by administration laws governing charitable trusts (2003, p.50). This transfer exposed Barnes' rigid management practice, which was considered by many as an eccentric and authoritarian effort to control America's cultural heritage. His policies were challenged both during his lifetime and following his death under the administration of five trustees and the supervision of Lincoln University. Similarly, Barnes' charitable intentions have continually been questioned. The terms of the trust led to decades of legal battles that would consume the energies of the Foundation and its stakeholders.

This chapter focuses on the legal consequences of the Barnes Foundation's creation as a charitable trust. The legal debates that arose from the competing interests of

its donor, the trustees and its beneficiaries are explored. The first section explores the legal nature of the Foundation as a charitable trust, as well as its unique character as an educational institution. The second section introduces the stakeholders— students, the community, the public and trustees— that have legally legitimate interests. The following section examines how the trustees honoured the terms of the trust while balancing their duties to other stakeholders and yet breached their fiduciary and curatorial responsibilities. By exploring how the courts addressed stakeholders’ interests, the historical context behind the court’s recent decision to amend the Foundation’s charter and allow the collection to be moved will be revealed. Understanding amendments to the by-laws will shed light on how the trustees and the court overextended their powers in changing the trust.

Charitable Trusts: Their Legal Character

As described by Evelyn Brody, assistant professor of law at the Chicago-Kent College of Law, the nature and histories of charitable trusts in America provide an understanding of the legal basis of the Barnes Foundation (1997). Charitable trusts in America fall within the parameters of the “third sector,” comprised of non-profit organizations. From 1917 on, individuals could donate assets in the form of property or capital to a charitable, non-profit organization and receive a tax deduction in return (Goldfarb Marquis, 1991, p.180). The government’s initial intent in establishing these guidelines came from the *Revenue Act* of 1913 by which private individuals were encouraged to take the lead in providing services to the public that are best offered

without the direct control of government (Edie, 1987, p.44). The contribution of art was one of these services (Fox, 1995, chapter 2).

According to cultural economist William Grampp, when Barnes donated his art for the public cause, the government was relying on wealthy charitable and philanthropic impulses to patronize the arts through non-profit organizations (1989, p.12). Rather than opening gallery doors to the public as corporate trusts or to a defined and limited number of beneficiaries as a traditional trust, art galleries for public access established in the early 20th century were established as charitable trusts - that is not-for-profit institutions (Brody, 1997). Other not-for-profit institutions in America include universities and hospitals.

Charitable trusts as not-for-profit organizations differ from non-charitable trusts. As each trust has its unique purposes, there are different kinds of trusts, including traditional trusts, corporate trusts, and charitable trusts (Weaver, 1967, p.39). According to Marie Malaro, museum lawyer at the Smithsonian Institute in Washington, D.C., a traditional trust is a fiduciary relationship whereby a party, known as a trustee, holds property that must be administered for the benefit of others (1998, p.5). Traditional trusts are usually used in the administration of property for minors or another limited beneficiary (p.5). With a similarly restricted beneficiary, a corporate trust holds property and administers assets for the benefit of its limited shareholders. Floating somewhere between a traditional trust and a business corporation is the charitable trust (p.9). A charitable trust is defined by Jennifer White, a legal scholar in the area of museum management, as “a fiduciary relationship with respect to property subjecting the person

by whom the title to the property is held to equitable duties to deal with the property for the benefit of another" (1996, p.3).

Charitable trusts differ from non-charitable trusts in that they must demonstrate a purely charitable intention in their activities and in their administration policies (Weaver, 1967, p.90). There are also three other significant differences—in the scope of the intended beneficiaries, the standard of conduct imposed on the trustees, and the application of the rule against perpetuities (p.44).

The first difference—the scope of the intended beneficiaries of traditional trusts—follows that the beneficiaries are named individuals or group of individuals, whereas the beneficiaries of charitable trusts are most commonly understood to be the public at large (Kosaras, 2000). Since the beneficiaries of charitable trusts are most often broadly defined, the accountability and oversight of these trusts is more difficult to monitor than in their traditional trust and corporate counterparts (Malaro, 1994). Because an undefined 'public' is understood to be the beneficiary of the trust, the state, acting on behalf of the 'public' takes on a supervisory role (Kosaras, 2000, p.3). The state oversees the conduct and activities of the charitable trust as led by its board of trustees. According to Professor Warren Weaver, a specialist in America's philanthropic foundations, as a result of the state's limited ability to oversee all charitable trusts, charitable trustees are held to a higher standard of conduct than corporate trustees (1967, p.90).

The second difference between charitable and non-charitable trusts, defined by the diverging standards of conduct imposed on their trustees, has led to inconsistent interpretation of charitable trust administration laws by the courts (Weaver, 1967, p.106). The standard of conduct to which a charitable trustee is held is less well defined because

of the ambiguous nature of a charitable trusts' beneficiaries: "American courts have left supervision of charitable trusts to the public precisely because the public is the ultimate beneficiary of all charities, notwithstanding the specific nature of the bequest" (Eisenstein, 2003, p.7). Trustees have a dual duty: to ensure that the trust's mission is carried out, while ensuring that the public benefits from the trust (p.7). Because of the ambiguous breadth of the public as a beneficiary, as well as the care required to ensure that the intents of donors are respected, charitable trusts are held accountable at law to a higher standard than are the board members of a corporate trust (Malaro, 1998, p.9). Corporate trustees are directly accountable to shareholders who can bring direct actions against trustees (p.8).

The Attorney General of each state in America is responsible for the direct oversight of charitable trusts and their activities (Atkinson, 1993, p.6). As ruled in *MacKenzie et al. v. Trustees of Presbytery of Jersey City*, 61 A. 1027, N.J. 1905, the following explanation of the Attorney General's involvement in charitable trusts appears: "the persons interested in the estate or fund, being an indefinite or fluctuating body, are properly represented only by the Attorney General". Attorneys General are also responsible for supervising the administration of traditional trusts (Malaro, 1998, p.7). However, as museum lawyer Marie Malaro explains, since traditional trusts are usually administered where good-faith control over assets is paramount, traditional trustees are held to a higher standard of conduct than charitable trusts (1998, p.7). Because of similarities between charitable and both corporate and traditional trusts, they are considered as semi-corporate and semi-traditional in essence. As a result, courts have inconsistently interpreted how charitable trusts should be administered and who the

rightful beneficiaries are (Brody, 1997). Both these questions have been posed by courts overseeing the Barnes Foundation and have raised further questions on the extent to which the trust's activities are truly charitable.

The third difference between charitable and non-charitable trusts is that the former are exempt from the usual rule against perpetuities (Brody, 1997). Traditional trusts last as long as the beneficiaries are legally capable of administering the trust themselves and as long as the trustees follow their duties loyally, with obedience and with care (Malaro, 1994, p.7). If and when the beneficiaries come of age or gain the required legal status to take control of the property held in the trust, the traditional trust ceases to exist (Weaver, 1967, p.96). In a similar manner, corporate trusts last as long as the corporation fulfills its corporate mission (Weaver, 1967, p.40). When a corporation dissolves, its property is distributed to its shareholders. In both tradition and corporate trusts, the rule of perpetuities acts as a security measure, constantly ensuring that these trusts are subject to review and assessment by the beneficiaries, the trustees and the law (Weaver, 1967, p.97). Since these trusts cannot legally last forever, the interested parties can examine whether the trust's purpose is still being fulfilled and whether or not it is still beneficial or if it should cease to exist. On the other hand, charitable trusts "may endure forever" (Eisenstein, 2003, p.2). Since the law recognizes that the activities of charitable trusts are conducted for the benefit of the public, it stipulates that a charitable trust must fulfill its charitable intent as long as it is able to (Brody, 1997). In the words of Michigan Law School Professor Lewis Sims, "in essence, in exchange for public benefit, [the donor] is permitted to determine the future disposition of his property without limitation

as to time" (1955, p.121). The unique characteristics of charitable trusts shape the nexus for their permissible conduct: the provision of charity to the public.

Charitable Trusts defined by the Law

The close link in America between charitable trusts and their tax exempt status has led to parallel legal definitions in both federal tax and trust laws regarding the regulations for establishing a charitable trust. As legal scholar Ilana Eisenstein explains, the definitions of 'charitable' in tax and trust law have become so deeply intertwined as to have created a 'uniform concept of charity' (2003, p.5). Section 501[c][3] of the Internal Revenue Tax Code outlines the various 'charitable' public purposes that may qualify an organization to be exempt from tax, and which in turn provide tax incentives to founders and subsequent donors (Weil, 1995, p.184). The term 'charitable' is defined in Section 501 [c][3] - 1 [b][2] to include, "among other things, relief of the poor and distressed or of the underprivileged, advancement of education, erection or maintenance of public buildings, and lessening the burdens of government" (Treas. Reg. Internal Revenue Code, Section 501 [c] [3] – 1 [b] [2], amended in 1990).

Treasury Regulations in the Code stated that the public access to art was identified as one of the permissible charitable services for non-profit organizations as early as the 1917 *Tax Code* (Kosaras, 2000, p.4). Similarly, under the Act of April 30, 1925, P. A. 388, which was passed in accordance with Article IX, Section 1, of the Constitution of Pennsylvania, land owned by a purely public charity that is necessary for the efficient discharge of its functions is entitled to exemptions from state property taxes (*Barnes Found. V. Keely et al*, 108 Pa. Super. 203; 164 A. 117; 1933 Pa Super.).

Art galleries established as charitable trusts in Pennsylvania are exempt from property taxes, falling under the not-for-profit ambit as an accepted charitable activity. Not for-profit visual arts organizations are considered to be providing a charitable activity by offering the public access to art, which has ‘educational’ purposes. According to lawyers Ralph Lerner and Judith Bresler, authors of a practical guide to legal aspects of art ownership, entitled *Art Law*, museums are legally defined as “permanent, non-profit institutions, essentially educational and aesthetic in purpose, with professional staff, which acquires or owns works of art, cares for them, interprets them, and exhibits them to the public on some regular schedule” (1992, p.1426). Art galleries, such as the Barnes, are exempt from both federal income tax and state property tax in order to support their educational missions. As the education of the public is a powerful way of instilling values and ideologies, the government values museums as social institutions that bind society (Schulz, 1994, p.184). In the words of museum specialist Stephen Weil,

Art’s educational purposes in museums is understood in the following ways: By being more than... merely decorative or a frill, the arts provide an essential public benefit through their unique ability to provoke, stimulate, and stretch us in ways that ultimately relate importantly to our future as individuals and to our destiny as a country. (1995, p.196)

Although the educational focus adopted by American museums clarified throughout the 20th century, becoming one of the primary roles for museums today, the nation’s first museums incorporated educational principles as part of their mandates to a lesser degree (Walker, 1974, p.28). During the early 1920s, the Barnes Foundation was distinct from other charitable trust art galleries by proclaiming its mandated purpose as primarily educational. Other museums were being established with minimal ‘educational intent’ with a primary focus on providing ‘quality leisure recreation’, a mandate sufficient to

qualify a gallery as a charitable organization (Fox, 1995, p.7). The Metropolitan Museum in New York was established to

encourage and develop the study of the fine arts and the application of the arts to manufacture, of advancing the general knowledge of kindred subjects, and, to that end, of furnishing popular instruction and recreation" (Kosaras, 2000, p.3).

Similarly, the tax laws or state justices authorizing the establishment of charitable art galleries did not require that a museum's educational intent be as democratic in scope as is required of museums today (Walker, 1974, p.29). In the words of John Walker, a former museum art director, the prevailing belief during the first half of the 20th century was that art museums were "for the enjoyment of the wealthy and educated elite", rather than the poor and underprivileged (p.29). Since the American upper class was exposed to art, it was the intended audience for most galleries, thus 'legitimizing' their position as 'natural' leaders within society (Van der Tas, 1993, p.49).

According to museum and collections scholars Daniel Fox and Joseph Alsop, for the most part, making an art collection available to the public was not done out of a selfless desire to improve the educational welfare of America's general public (Fox, 1995; Alsop, 1982). The Barnes Foundation, opening its doors for the 'plain and working people', was unique in establishing the working class citizen as the intended participant in his educational art program (The Barnes Foundation, 2005). Other museums that opened during the first decades of the 20th century, such as the National Gallery in Washington, the Metropolitan Museum and the Frick Collection in New York, were established primarily with self-interest and class segregation in mind (Fox, 1995, p.28). As former museum director John Walker explains, Andrew Mellon, the leading founder of the National Gallery, and Henry Clay Frick were close friends from college on

and were driving a friendly competition to establish America's premiere art gallery, each striving to outshine the other's museum (Walker, 1974, p.102). These men were determined to gain social status; they sought to establish themselves as the cultural tastemakers of the country and, to a degree, profit from the benefits offered to philanthropic founders of public galleries (Walker, 1974, p.105; Fox, 1995, p.75).

The benefits extended to patrons of America's museums were numerous, including a heightened social reputation, tax exemptions, recognition for one's cultural sensibilities and tastes, as well as for the advancement of a social morality (Alsop, 1982, p.13). These benefits are comparable to those identified by American Philanthropy researcher Emerson Andrews, as motivators for America's wealthy in establishing charitable trusts (1953). In Andrews' text entitled *Attitudes Towards Giving*, he explains that absolute levels of wealth, "old money" cultural norms, individual morality and altruism, and the desire for social power and prestige contribute to the decisions of wealthy Americans to create charitable trusts (1953). Although these self-interested benefits are the main reasons for the philanthropic establishment of several non-profit organizations, the state, in granting their organizations charitable status, did not discriminate between donors with a truly charitable purpose and those with more self-interested motives. On the contrary, the state was eager to help wealthy citizens donate possessions to the public and made easy the founding of these institutions as tax-exempt. To encourage the wealthy, the state provided incentives for donors and charitable trust founders in return for their artifacts.

The most important benefits that charitable patrons receive are exemptions from federal income taxes and state property taxes. In 1924, for example, when Barnes opened

the doors of his Foundation, the tax on a personal income of \$1,000,000 was only \$80,000 (Shack, 1967, p.149). The property tax on the 12-acre estate on which Barnes' educational institution was built is estimated to have been \$7,500 (p.149). However, as legal scholar Andras Kosaras explains, when a tax exemption is extended to a charitable trust, federal and state taxpayer's indirectly make up the loss through their tax contributions (2000). Teresa Odendahl, a charitable trust specialist, explains that taxpayers living in a state in which a charitable trust is established make up the difference on the property tax, while taxpayers from the whole country cover the costs of donor's tax exemptions from personal income (1987, p.30). As a result, charitable trusts have obligations in exchange for their right to benefit from tax exemptions (Kosaras, 2000). Because of the reciprocal benefits that charitable trust donors receive from governments and the indirect costs this has on the public, the public frequently questions donors' charitable intentions and the value of the charitable Foundation to the public. Consequently, doubt surrounding the 'purely public charitable character' of a trust according to Section 501 [c] [3] of the Tax Code, and its tax-exempt activities is similarly raised (*Wiedgand v. Barnes Found.*, 374 Pa. 149; 97 A.2d 81; Pa. Supre. Crt., 1953). Moreover, when a charitable trust does not appear to be performing its chartered responsibilities in the public's interest, its right to tax exemptions may be challenged (Malaro, 1998, p.9).

When a charitable trust appears to be serving a donor's and board members' interests more than the public's interests, the trust's activities are analyzed by a state's Attorney General (Weaver, 1967, p.92). The state in which the trust is registered is the responsible for bringing actions against trusts and for remedying any harm or costs

caused to citizens by the organization's activities: "Only a member of the corporation itself or someone having a special interest therein or the Commonwealth, acting through the Attorney General, is qualified to bring an action" against a charitable trust (*Wiedgand v. Barnes Found.*, 374 Pa. 149; 97 A.2d 81; Pa. Supr. Crt., 1953).

States dispense three significant consequences as a means of remedying harms caused to the public by charitable trusts found conducting activities uncharitably. These remedies are executed by the state on the public's behalf and include: the rescinding of a charitable trust's tax-exempt status, charges brought against the trustees for breach of fiduciary responsibilities, or alteration of the trust's charter by the state, employing the legal doctrines of *cy pres* or administration deviation (*State ex rel. Heddens v. Rusk*, 139 S.W. 199, Supre. Court of Mi, 1991). The interests of the public with respect to the Barnes collection has been protected by the court's use of such legal remedies to the detriment of Albert Barnes' vision.

A Purely Charitable Foundation: The Rights of the Public

Charitable trusts are expected to provide their charitable activities to the public in a non-discriminatory fashion. The law recognizes the public as being the beneficiary of charitable trusts (*Wiedgand v. Barnes Found.*, 374 Pa. 149; 97 A.2d 81; Pa. Supr. Crt., 1953). This follows the founding principle of charity, which is to help elevate the standard of living of poor and underprivileged people, as outlined in Section 501 [c] [3] of the Tax Code (Treas. Reg. Internal Revenue Code, Section 501 [c] [3] – 1 [b] [2], amended in 1990).

Although the responsibilities of charitable trusts are that they must fulfill a ‘purely public charitable mission’ through activities for the public, donors are permitted to stipulate a more specific group of intended beneficiaries (Kosaras, 2000, p.4). However, even if a certain class of citizens is identified as the intended beneficiaries of a charity, the courts have generally interpreted that the purpose of charity is to provide for those in need (Brody, 1997). The question of who the beneficiaries of the charitable trust *should* be, and the discriminatory scope of limiting beneficiaries, has dragged charitable trusts, including the Barnes Foundation, into numerous legal cases.

When a charitable trust seems to benefit the interests of its founder or its board of trustees more than it benefits the public, the purely charitable nature of the Foundation is questioned. As Mr. Justice Musmanno stated in his post-hearing Court decision from *Wiedgand v. Barnes Found.*:

Everyone has the right to dispose of his money, property and other possessions as he chooses, but once he stamps them with a public interest to the extent that they are exempt from public taxation he divests himself of the arbitrary control which was once his. And what *he* cannot do, *his representatives* may not do (*Wiedgand v. Barnes Found.*, 374 Pa. 149; 97 A.2d 81; Pa. Supr. Crt., 1953)

The public has the right to challenge charitable trust terms that specify intended beneficiaries and can challenge whether the activities administered to these beneficiaries follows ‘charitable purposes’, as outlined in Section 501 [c] [3] (Treas. Reg. IRC, Section 501 [c] [3] – 1 [b] [2], amended in 1990). Since trusts are registered by state legislation, a state Attorney General, acting on behalf of the public, investigates a charitable trust’s administration, policies and financial records (Abbinante, 1997). If the Attorney General finds that trustees misappropriated funds, conducted activities contrary to the trust’s purely charitable mission, or limited the scope of intended beneficiaries in a restrictive or

discriminatory fashion, the state may enforce any number of the aforementioned legal remedies. To this end, an Attorney General can strip the trust of its charitable status or bring a legal action against members of the board of trustees when it is proved that the public's interests have been violated (Lerner & Bresler, 1989, p.1427).

These questions on the legitimacy of benefactors and the scope of charitable activities were raised in the early history of the Barnes Foundation: does the charitable trust benefit the public, the trustees or the donor? The limited access to the Barnes collection was the premise of the first legal actions brought against it in following: *The Barnes Found. V. Keely et. al*, in 1934, *Wiedgand v. Barnes Found.*, in 1951, in *Commonwealth v. Barnes Found.* in 1960 (*Barnes Found. V. Keely*, 314 Pa. 112, 171A. 267, 268, Pa. 1934; *Wiedgand v. Barnes Found.*, 97 A.2d 81, 81082, Pa. 1953; *Commonwealth v. Barnes Found.*, 159 A.2d 500, Pa. 1960).

Mandating that access to the art collection was to be restricted to students, Albert Barnes was accused in all three cases of limiting public access. In *Barnes Found. v. Keely* (1934) and *Wiedgand v. Barnes Found.* (1953), the claimants wanted the court to strip the Foundation of its charitable status if Barnes did not open the art gallery on a more regular schedule and permit admittance on a less discriminatory basis (Nivala, 2003). Stripped of its charitable status the Foundation would be subject to the same corporate taxes and standard of conduct as corporate trusts and would be too costly to sustain (Eisenstein, 2003).

In *Barnes Found. V. Keely*, 314 Pa. 112, 171A. 267, 268 (Pa. Super Ct. 1934), the claimants, including the local government and school board, challenged the school's

benefit as a purely public charity because of the restrictive admission policy. They claimed that

the gift was with qualifications, and that he [Barnes] intended to retain control of the property to such an extent that the privileges of the Foundation were confined to certain persons, not an indefinite public, and its continuance was "subject to his [Barnes] wishes... (*Barnes Found. v. Keely*, 314 Pa. 112, 171A. 267, 268, Pa. Super Ct. 1934)

The claimants further contended that unless the municipality was extended the right to access the collection freely, the Foundation should be stripped of its charitable status. Since the residents of Merion and Philadelphia indirectly cover the costs of the gallery through property taxes, they claimed to have the unlimited right to reap the benefits of the art gallery as a public institution. With fewer than 200 students a year having access to the gallery, the claimants argued that this limited benefit did not satisfy the purely public charitable requirement expected of charitable trusts and that the restriction was wholly irrational (Eisenstein, 2003).

The Supreme Court of Pennsylvania ruled, however, in favor of the Foundation's by-laws and admission policies. The court found sufficient evidence that the Foundation was

An educational institution, ... a purely public charity. The Foundation had its origin in a charitable impulse of its founder. It was the result of the generosity of Dr. Albert C. Barnes; all its real and personal property, including its endowment, was donated by him. Its purpose was to promote the education and cultural development of young men and women. (*Barnes Found. v. Keely*, 314 Pa. 112, 171A. 267, 268, Pa. Super Ct. 1934)

The court further stated that regardless of the artistic nature of the trust's holdings and the public's interest in the art collection, the institution's charitable intentions were clearly outlined as an educational experiment (*Barnes Found. v. Keely*, 314 Pa. 112, 171A. 267,

268, Pa. Super Ct. 1934). This mission was accordingly being delivered to public beneficiaries and was producing recognized educational benefits: “The Corporation is a recognized educational institution, holding regular classes for the instruction of students of art, and published and sold books in which were discussed views relative to art and its allied subjects” (*Barnes Found. V. Keely et al.*, 108 Pa. Super. 203; 164 A. 117; 1933 Pa Super. Ct.).

Since the institution did not discriminate against any class of persons and was aimed at improving the educational resources for the underprivileged, the court conceded that its intended beneficiaries were granted access: “the plaintiff charged no tuition, admitted students without regard to race, colour or sex, and entailed a financial loss in the publishing of books” (*Barnes Found. V. Keely et al.*, 108 Pa. Super. Ct. 203; 164 A. 117; 1933 Pa Super. Ct.). The court added that by increasing public access to the gallery would challenge the Foundation’s educational experiment by disrupting classes that were being conducted five days a week. The ruling stated:

It must be borne in mind that the gallery is used not as an art gallery as that term is ordinarily understood but that it is an integral part of a new educational experiment, and the unrestricted admission of the public would be as detrimental to the work of the Barnes Foundation as it would be to the work carried on in the laboratories and clinics of the University of Pennsylvania. (*Barnes Found. V. Keely et al.*, 108 Pa. Super. Ct. 203; 164 A. 117; 1933 Pa Super. Ct.)

The court concluded that the Foundation was accessible to the public under limitations consistent with the practices of other leading tax-free institutions that identified a certain group of individuals as the intended beneficiaries.

The court’s final decision in *Barnes Found v. Keely et al.*, upholding the Barnes Foundation as a purely public charity, was paralleled by its decision on this matter two

decades later in *Wiedgand v. Barnes Found.*, 1953. When Mr. Harold Wiedgand, Editor of *The Philadelphia Inquirer*, with the consent of Pennsylvania's Attorney General, sued the Foundation, he claimed that its administration of the collection and its limitations on public access amounted to a rejection of the charitable purposes for which the Foundation was established (*Wiedgand v. Barnes Found.*, 97 A.2d 81, 81082, Pa. 1953). However, the Pennsylvania Supreme Court denied the editor's action as it claimed the editor lacked statutory authority to delegate the conduct or control of such a suit against the Barnes Foundation (Nivala, 2003).

A dissenting justice, Mr. Justice Musmanno, contended however that the Barnes Foundation should lose its tax-exempt status because it was run as a private corporation. He stated that "building a wall of haughtiness around the gallery, through which no one may pass except the chosen few picked by the Board of Trustees is certainly not conducive to helping the 'plain people'" (*Wiedgand v. Barnes Found.*, 97 A.2d 81, 81082, Pa. 1953). Mr. Justice Musmanno objected to the court's decision not to grant Wiedgand special standing to press charges against the Barnes' restrictive admissions policy. He stated that the editor's complaint "has to do with the very heart and soul of the charitable project: giving the public a chance to see the reputedly fabulous works of art which otherwise might never come within the orbit of its enjoyment" (*Wiedgand v. Barnes Found.*, 97 A.2d 81, 81082, Pa. 1953). Notwithstanding these objections, the Court concluded that the Attorney General did not have proper evidence that the Foundation's identified beneficiaries were not benefiting from the charitable organization. The action against the Barnes was denied as the court concluded that the Foundation was administering charitable activities to a prescribed group of needy

individuals as required in Section 501 [c] [3] (Treas. Reg., IRC, Section 501 [c] [3], amended in 1990). Given the high value of the Foundation's assets, estimated by mid-century to be worth over \$25 million, the Foundation's tax burden would be crushing if it lost its tax status (*Wiedgand v. Barnes Found.*, 97 A.2d 81, 81082, Pa. 1953).

When the Foundation's tax-exempt status was again questioned in 1958, the trustees were forced to alter their administrative practices (Eisenstein, 2003). They were compelled to ensure that the Foundation was administering the minimal threshold of charitable activities required to maintain tax-exempt status as a 'purely public charity' (White, 1996, p.4). The Attorney General of Pennsylvania concluded that the restrictive admission policies enforced by the Foundation's trustees contravened the terms of the trust that had served to qualify the Barnes Foundation as a purely public charity in 1922 (Anderson, 2003, p.53). The trustees were not permitting the public into the gallery two days a week as Barnes had stipulated. Moreover, the trustees were restricting the student body to less than 100 a year. Legal scholar Ilana Eisenstein stated that, as the Attorney General claimed, the Foundation was not fulfilling the public charitable activities required to maintain its status as a charitable trust (2003).

In the 1958 litigation, the Pennsylvania Supreme Court concluded that unfulfilled public duties had justified judicial intervention. The Court claimed that, although the Foundation assumed indisputable status as a tax-exempt public charity, its officers and trustees had consistently refused public admission to its art gallery (*Commonwealth v. Barnes Foundation*, 159 A.2d 500, Pa., 1960). The decision quoted Mr. Justice Musmanno's opinion from the 1953 litigation, stating:

a painting has no value except the pleasure it imparts to the person who views it. A work of art entombed beyond every conceivable hope of exhumation would be as valueless as one completely consumed by fire... If the Barnes art gallery is to be open only to a selected restricted few, it is not a public institution... and is not entitled to tax exemption as a public charity. (*Wiedgand v. Barnes Found.*, 97 A.2d 81, 81082, Pa. 1953)

The court made explicit the link between tax exemption and serving the public welfare: “every dollar a public institution saves in tax levy becomes an extra stone in the heavy sack the Commonwealth piles on every taxpayer’s back” (*Commonwealth v. Barnes Foundation*, 159 A.2d 500, Pa., 1960). The court ruled that the public right to access to the art collection was the responsibility of the charitable trust and ordered the board of trustees to loosen the admission restrictions to the gallery (Greenfeld, 1987, p.52). The board of trustees was required to increase public access to the gallery from less than one day a week to two days a week as stipulated by Barnes in his Indenture. Similarly, trustees were to set up a regular admissions schedule with detailed provisions about the admission process (p.53). Barnes’ intended educational experiment, to provide an institution for the underprivileged to study aesthetics through first-hand access to artworks, was not to interfere with the trustee’s responsibility to provide public access to the collection’s artworks (Nivala, 2003).

Amending Charity in Charitable Trusts

In order to respect the charitable and philanthropic desires of donors, the law prescribes that trustees of not-for-profit trusts may not deviate from the explicit trust terms unless ordered by the courts (Eisenstein, 2003). Apparent in the cases mentioned above, the court decided that it is more beneficial to keep a charitable trust in perpetuity

by amending its charter or charging the trustees for mismanagement than to allow it to collapse or to take away its charitable status. As legal scholar Roy Atkinson explains, rather than stripping trusts of charitable status, whereby the assets would fall out of the public's benefit completely, courts favor the use of the doctrines of *cy pres* and administrative deviation (1993). Although courts more frequently redirect the administration and direction of charitable trusts to purely charitable activities, the application of either of these doctrines is considered as a last resort for saving charitable trusts from collapse. This follows from the premise that trustees are bound by a fiduciary duty to follow the intentions outlined by the donor in the terms of the trust. As Ilana Eisenstein claims,

In spite of wide-ranging efforts by trustees and scholars to counter strict adherence to donor intent, courts generally have allowed only narrow deviations from trust terms and, even then, only after proof that those deviations are truly necessary to fulfill the trust purposes (2003, p.4).

Unless they litigate for a *cy pres* deviation, trustees are charged with fulfilling in perpetuity the purposes of the trust for the specific class of beneficiaries and in the precise manner ordered by the donor (20 Pa. Cons. Stat. Ann. 6110; Pennsylvania's *cy pres* statute).

If it is shown, however, that it is illegal, impossible, or a severe impracticability for the trustees to perform the intended charitable mission, they may request deviation to the trust's charter through *cy pres* and administrative deviation (Atkinson, 1993). As legal scholar Chris Abbinante explains, *cy pres* applies when the issue is whether or not it is possible for the Court to modify the specific directions of a charitable Foundation in order to uphold the donor's 'general charitable intent' (1997). On the other hand,

administrative deviation is exercised when the issue concerns the manner in which the trust is managed. Deviations from the administrative terms of a trust may be permitted when adherence to those terms would disrupt the specific purposes of the trust, whether deemed as a general or specific charitable intent (Lee, 2000, p.4). In order to permit deviation from the administrative provisions of a trust, courts generally require two elements: unforeseen and unforeseeable change in circumstances, and a frustration of the settlor's main objectives by this change if strict obedience to the settlor's directions were required (*re The Barnes Found. A Corp. Fiduc. Rpt.*, 58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004).

Lawyer Chris Abbinante explains that *cy pres* comes from the shortened phrase, '*cy pres comme possible*', which is Norman French for 'as near as possible' (1997, p.5). He further claims that the main objective of this doctrine is to ensure that the donor's charitable purposes are followed as closely as possible "when the donor's specific mandates cannot be carried out" (p.5). Although trustees have attempted to use *cy pres* as a means of modifying the use of trust assets to be more 'beneficial' to the community, this does not justify the doctrine's use. As stipulated in the 1958 case, *City of Danville v. Caldwell*, the Pennsylvania Supreme Court proclaimed that the doctrine of *cy pres* could only be applied when the specified purpose of the charitable trust cannot be carried out (*City of Danville v. Caldwell*, 311 S.W.2d 561, 563, Ky. Ct. App. 1958). The court declared that only four circumstances justified trustees' appeal that they could not follow the particular purpose mandated by a donor. The four conditions justifying *cy pres* appeals identified by the Court, are: insufficient funds; impossibility; nonexistence of the named beneficiary; and unsuitability of the premises devised for the charitable purpose.

The principles outlined in *City of Danville v. Caldwell* (Ky. Ct. App. 1958), specifying that *cy pres* only be used as a means of preserving the donor's intent, was reinforced in the frequently cited case *re Estate of Buck* (No. 23259, Cal. Super. Ct. Aug 15, 1986). In this case, Mrs. Beryl Buck's estate of an unknown value was donated in 1975 for "charitable, religious, or educational purposes" to be used in Marin County, California, where she had spent her life (Eisenstein, 2003, p.8). The San Francisco Foundation (SFF) agreed to manage the trust according to Mrs. Buck's wishes (*re Estate of Buck*, No. 23259, Cal. Super. Ct. Aug 15, 1986). Three years after accepting the fiduciary responsibilities, the SFF made an application to the Court for *cy pres*. According to legal scholar Wendy Lee, the SFF claimed that Mrs. Buck did not realize how large her estate was when it was donated—it was valued in 1979 to be nearly \$260 million—the SFF further argued that she would have used the funds for purposes that extended beyond Marin County (Lee, 2000, p.5). The SFF had plans to use the funds to benefit the charitable purposes of the greater San Francisco area. The trustees advocated a position of 'distributive justice', believing that as a charity grows it should naturally reach beyond its parochial origins so as not to violate the principles of fairness (p.5). Upon the Attorney General's statement opposing the modifications, the California Supreme Court made a final ruling reaffirming the use of *cy pres* is to be reserved only for circumstances in which the purpose of a trust has become illegal, impossible, or permanently impracticable of performance (Eisenstein, 2003). The Court concluded that neither inefficiency nor ineffective philanthropy constitutes impracticability. (*re Estate of Buck*, No. 23259, Cal. Super. Ct. Aug 15, 1986). When any of the severe obstacles facing trustees—illegality, impossibility, or impracticability—is identified, a court must

further determine whether or not the trust's founder had a specific or general charitable intent for the use of the trust's assets (Atkinson, 1993). This in turn affects the applicability of the *cy pres* doctrine. If a court determines that a Foundation can still effect the general charitable intentions of the founder, it will allow the trustees to administer the trust through deviation from specified instructions of the founder, by applying the doctrine of *cy pres*. In the words of Chris Abbinante, general charitable intent is distinguishable from "the specific intent of a trust in that the former is a desire to benefit a charitable purpose or objective rather than any particular object or institution" (1997, p.6). However, as Abbinante further explains, determining whether a founder had a specific or general charitable intent is usually quite difficult because founders rarely foresee or plan for the failure of their particular intentions (p.6). To this effect, founders do not always set explicitly clear parameters for the use of trust assets. The language of a trust indenture and other supporting documents produced by the founder provide the best evidence of whether a specific charitable intent was the basis for the trust.

Whether general or specific in charitable intent, founders often provide insufficient terms in their trusts and do not foresee damage that they could cause to the maintenance of the trusts as explained in Chapter 1. This in turn often leads to financial insufficiencies or outdated social circumstances, binding trustees to follow rigid terms (Eisenstein, 2003). For example, *Trustees of Dartmouth College v. Quincy* dealt with a trust established to create and support a school for the education of women born in Quincy, Massachusetts (*Dartmouth College v. Quincy*, 258 N.E.2d 745, Mass. 1970). Because the trust did not provide enough funds to meet the costs of running the school, the trustees applied to the courts for administrative deviation. They sought to admit

women from other towns and charge them higher tuition. The court determined that this alteration was administrative in nature and subsequently approved the action (*Dartmouth College v. Quincy*, 258 N.E.2d 745, Mass. 1970).

Law professor Evelyn Brody states that financial insufficiency and unacceptable social discrimination locked into charitable trusts by the rule against perpetuities weighs heavily on taxpayers' shoulders (1997). The alienability of property and limited marketability of charitable trust assets are among potential harms to the public that Attorneys General are supposed to monitor, and modify the effect of through administrative deviation in cases of imbalance (Eisenstein, 2003). When either situation arises, Brody claims that society is protected from the associated damages and costs through the application of administrative deviation, alleviating the public from social harm or the burden of costs (1997). In *Bank of Delaware v. Buckson*, 255 A.2d 710, 712, 717, Del. Ch. 1969, the court modified a provision in a will naming that only 'white youths' were eligible for a scholarship. The court ruled that the terms of the will were written under circumstances not present when the case was heard, and that the provision was therefore not binding (*Bank of Delaware v. Buckson*, 255 A.2d 710, 712, 717, Del. Ch. 1969).

Such changes to administrative terms in a charitable trust can be instigated by an Attorney General in response to violated public interest as a means of keeping the trust afloat (Brody, 1997, p.3). Trustees can also bring forward such actions claiming that the terms of trust are socially or economically inefficient or out of date. It must be emphasized that the relief afforded by deviation is not based on mere convenience, but on the necessity of effecting a change where compliance with the terms of the trust "would

defeat or substantially impair the accomplishment of the purposes of the trust" (*Colin McK. Grant Home v. Medlock*, 292, S.C. 466, 472, 349 S.E.2d 655, 6659, 1986).

If a court rules that the general charitable intent or the specific charitable intent of the founder cannot be followed properly through the application of *cy pres* or administrative deviation, the trust faces dissolution. Considering the possibility of a trust's failure to adhere to donor's charitable purposes, founders have the right to leave instructions for the disposition of the trust's assets (Nivala, 2003). These instructions alone determine the trust's future in the case of dissolution.

Although Dr. Barnes had envisaged the possibility of his Foundation's failure, trustees did not respect the instructions stipulating the distribution of the art collection. Instead, Barnes' trustees have continually attempted to modify the trust provisions according to their visions (Toobin, 2002). Albert Barnes clearly drafted provisions in his Indenture instructing trustees what to do in the event that conditions deteriorated to the point that the collection, and Barnes' system of education, became unmanageable, as described in Chapter 1 of this thesis (Barnes Foundation By-Laws, 1922, Para. 11). He stipulated that if the trustees determine that the 'educational experiment' was a failure, they had the option of disposing of the collection by gift to another institution, school or museum (Para. 11). According to legal professor, John Nivala, the basis for this instruction was that Barnes did not want his Foundation to be transformed into a museum (2003).

With little regard for these explicit instructions, the trustees have appealed for numerous modifications of the trust's Indenture and administrative guidelines through *cy pres* and administrative deviation. According to legal scholar Wendy Lee, since 1992,

trustees have claimed that there is ambiguity as to whether Barnes' educational mission was a general or specific charitable intent (2000). Although Barnes took care in the trust indenture to ensure that his intentions would be preserved, trustees, over the last two decades, have displayed considerable disregard for the specificity of the trust's Indenture. In turn, this has created an opportunity for trustees and the courts to characterize the Barnes' trust by-laws as restrictive, impractical, or impossible to follow: in the words of professor John Nivala, "trustees remained faced with investment and other restrictions reflecting 'the rigid and peculiar nature of Dr. Barnes' persona and his philanthropic ideology'" (2003, p.6). As a result, in the case of the Barnes Foundation, and in many other instances, trustees deviate from donors' intentions, distorting the donor's unique purposes underlying charitable trusts.

Trustees' Fiduciary Responsibilities to Respect Donor Intent

Trustees of charitable Foundations struggle between their duty to fulfill the intentions of their donors, their responsibility to control the Foundation's assets for the public, and their own desires (Malaro, 1994, p.15). Legally, trustees are bound to the donor's terms through fiduciary duty (Eisenstein, 2003). The duties of a charitable Foundation's trustee include the duty to administer the charity fully and faithfully in furtherance of its purpose, and the duty to protect the interests of the beneficiaries of the trust (Abbinante, 1997). However, as lawyer Chris Abbinante explains trustees are afforded a fair amount of discretion, and "the role of the trustee often calls for judgment in the face of ambiguity or uncertainty" (p.7). As mentioned above, trustees can pass over the donor's charitable purposes through legal consent to amend the trust's by-laws.

This being said, however, as Abbinante states, deviation through the use of *cy pres* and administrative deviation “are not synonymous with discretion” (p.7).

When trustees claim that a trust’s terms have made their duty impossible to fulfill because of financial insufficiencies or other debilitating circumstances, the courts assess proper cause when trustees are advocating for *cy pres* amendments or administrative deviation (Atkinson, 1993). As the New Hampshire Supreme Court explained:

The Court will direct or permit the trustee to deviate from a term of the trust if owing to circumstances not known to the settler and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust; and in such case, if necessary to carry out the purposes of the trust, the Court may direct or permit the trustee to do acts which are not authorized or are forbidden by the terms of the trust. (*Jacobs v. bean*, 108 A.2d 559, 561, N.H. 1954)

Before enacting *cy pres* or administrative deviation, the court must examine and identify the basis of the trust’s formation, namely, the purpose of the trust and the social necessity of the charitable activities conducted by the trust. It is easier for trustees to appeal for administrative deviation rather than changing the purpose of the trust to fit within a general charitable intention through the use of *cy pres* (Lee, 2000). This had led to the general trend for a narrower use of *cy pres* by trustees and an expanded reliance on administrative deviation instead (*Philadelphia v. Heirs of Stephen Girard*, 45 Pa. 9, 28 PA. 1863; *Commonwealth v. Barnes Found*, No. 58, 788, C.P. Ct. Montgomery County, Pa., Orphan’s Ct. Div., July 21, 1992). A court may permit trustees to deviate from a trust’s terms when circumstances have changed the practicality of the trust’s administrative terms, even if adherence to the terms is deemed possible (Abbinante, 1997). As a result, Barnes Foundation trustees made their appeals for deviation through

the doctrine of administrative deviation, even though the modifications sought have more severe ramifications for the nature of the Foundation.

The Litigious Decade: Barnes Trustees' Mismanagement

Modifications to the Barnes indenture have for the most part been called for on the grounds of administrative impracticality of financial and investment restrictions (Barnes Foundation, 2004). The trustees' petitions for changes started in the early 1990s, soon after Richard Glanton, Lincoln University's legal counsel, was appointed president of the Board of Trustees (*The Barnes Found. V. The Township of Lower Merion*, 242 F.3d 151; 2001 U.S. App., Pa., 2001). The 1993 claims brought to court by Glanton and the other four board members stated that the Foundation's administrative and investment restrictions hindered the facility's maintenance and financial stability (Abbinante, 1997). Because of a lack of maintenance, Glanton claimed that the Foundation's buildings were no longer a safe environment for the housing of the art collection or for the administration of Barnes' mandated educational mission. According to reporter and biographer John Anderson, the buildings required structural refurbishing, the instillation of a security system and a sprinkler system (2003, p.118).

Notwithstanding Barnes' strict prohibition against the lending, removal, or sale of any of the Foundation's paintings, the trustees appealed to the Orphan's court to permit the sale of several of the Foundation's 'lesser' paintings as a means of raising capital for renovations (Barnes Foundation's By-Laws, 1922, Para 10, 13, 1922; Nivala 2003). When news of the proposed sale reached all corners of the art world, art professionals criticized the trustee's request to sell works from the collection (Anderson, 2003, p.93).

As explained by museum studies scholar, Jason Goldenstein, deaccessioning, the sale of artwork from a gallery's permanent collection, is not a practice endorsed by many museums in America as a remedy for an institution's financial inefficiencies (1997). Withdrawing this appeal, the trustees asked the courts for yet another amendment to Barnes' by-law against the lending, removal or sale of the collection's works. Instead of selling artworks, the trustees suggested a world tour of the collection's 80 most prominent artworks (Eisenstein, 2003).

The tour was arranged as a loan-for-profit agreement with the Museum of Western Art in Tokyo, the National Gallery in Washington, the Musee d'Orsay in Paris, as well as stops at the Art Gallery of Ontario in Toronto, the Kimbell art museum in Fort Worth, Texas, and the Philadelphia Museum of Art (Goldstein, 199, p.8). The revenues from lending the works, plus profits from the sale of associated gift-shop accessories, were said to be enough to raise the necessary capital for the renovations (Kosaras, 2000).

The Pennsylvania Supreme Court granted a one-time deviation from the indenture's terms, conceding that the deviation was administrative in nature and necessary to uphold the primary purpose of the Foundation, education (*In re Barnes Found.*, 12 Fiduciary Rptr. 2d, 349, 352 ,Pa. Ct. C.P., Montgomery County, Orphan's Ct. Div, July 21, 1992). The court stated that although Barnes prohibited the removal of art,

[it is] difficult to believe that a man of Dr. Barnes' erudition would not have anticipated that the day would have come when the structure he had created to house his collection would require such fundamental repairs and renovations as would make possible the uninterrupted display of the collection as mandated by the Indenture. (*The Barnes Found.*, A Corp., 12 Fiduc. Rpts. 2d 349, 350 (1992), aff'd, 630 A.2d 468, Pa. Super. Ct. 1993).

The court ruled that the buildings' conditions jeopardized the trust's purposes, the advancement of art education and appreciation and of the preservation of the collection and granted temporary removal of the artworks. To raise the necessary funds, the court permitted the art to tour the world for two years while the gallery and administration buildings underwent renovations and repair at a cost of \$12 million (Anderson, 2003, p.118). As author John Anderson explains, Richard Feign, a former Barnes trustee, remains convinced that the renovations could have been done for as little as \$7 million dollars (p.118). Because of the court's growing frustration with the Barnes trustees' constant appeals, it allowed the deviation for five world tour destinations with conditions: any money earned from the tour beyond the renovation costs was to be set-aside under the direct supervision of Orphans' Court to replenish the endowment which had been lost to inflation, trustee mismanagement and over-costly renovations. The judgment read:

The decree accompanying this Adjudication is so fashioned as to require the Trustees to set aside all proceeds from the two additional venues... in a separate fund or account, earmarked exclusively for basic renovations and overhauls of the Foundation's buildings and systems. (*The Barnes Found.*, A Corp., 14 Fiduc. Rptr. 2d, para 95, 1994)

The court was aware of the trustees' poor management practices, once again provided detailed instructions for the trustees and kept hearing the various proposals they put before the court to 'efficiently' run the Foundation (Eisenstein, 2003). By 1995, the tour had earned close to \$16 million, thereby leaving \$4 million in the endowment for maintenance costs after the renovations were paid for (Anderson, 2003, p.118). The Orphan's Court in Montgomery County ordered the trustees to take a more active role in resolving the Foundation's financial situation outside of the Courts. It reminded the

trustees that they had a further fiduciary duty to raise sufficient funds for the Foundation's preservation:

[t]he Trustees have engaged in no significant development efforts, aside from tour promotion, to increase the endowment fund. The tour is not a proper avenue for avoiding the fund raising, which is an integral part of any public charity's operations. (*The Barnes Found., A Corp.* (No. 4), 15 Fiduc. Rptr. 2d 54, 54, 1995).

Glanton and his fellow board members' approached the Court of Common Pleas of Montgomery County to amend their administrative bonds to Barnes' 'impractical' financial terms had started a new era for the Foundation. Although the by-laws Albert Barnes had carved caused several unforeseeable financial disadvantages for the Foundation, the trustees have also greatly contributed to its current financial crisis over the last two decades the (Eisenstein, 2003). Lawsuits relating to the donor's intent and trustees' duties plagued the institution and its trustees: the court noted that "throughout these pleading skirmishes...battles raged on in the form of endless petitions to compel, to quash, for contempt, for production of documents, for protective orders etc." (*Barnes Found. v. de Mazia Trust*, 15 Fiduc. Rptr. 2d 332, 324-25, 1995). In the words of biographer John Anderson, "the Barnes Endowment of \$9 million... had been drained of more than two million dollars in legal fees between 1990 and 1995", and incurred another \$500,000 in legal costs during the period between 1995-1996 (2003, p.118).

Glanton's 'inventive' financial remedies for the proclaimed financial despair were for the most part approved by the courts, ignoring the opposition from several former students of the Foundation, art professionals and former board members (Anderson, 2003). According to law professor John Nivala, in several appeals to permit administrative deviation from 1992 to 1996, Glanton requested permission: to alter

admission policies in order to increase the numbers of visitors; to build a parking lot on the property to accommodate more visitors; to set a higher admission fee and longer visitor hours and; to host fundraisers in the arboretum (2003, p.8). Although these requests were claimed to be of an administrative nature, repairing a financial crisis caused by investment by-laws, each request violated Albert Barnes' explicit stipulations in his Indenture (Abbinante, 1997).

Responding to the financial woes presented by Glanton, the courts allowed the trustees to use the doctrine of administrative deviation for several of these requests on the basis of financial 'necessity' (Eisenstein, 2003). In 1995 the courts permitted the trustees to build a parking lot accommodating 50 cars and to deviate from the investment by-laws but refused to increase admission prices and visiting hours as it "would transform the Foundation into a full-time museum, which goes far beyond [Dr. Barnes's] intent" (*Barnes Found., A Corp.* (No.6), 15 Fiduc. Rptr. 2d 381, 381, 1995). The Court objected to the trustees' requests to increase visitation hours for fear that:

this broad expansion.... would have adverse impact upon the educational program. The Barnes Trustees answer first that the art curriculum will not suffer, and second that allowing more people to view the collection is itself as an educational process within the scope of Dr. Barnes' indenture. These divergent views frame the philosophical chasm between the Foundation and its opponents. (*Barnes Found., A Corp.* (No.6), 15 Fiduc. Rptr. 2d 384, 1995)

Notwithstanding the ruling upholding Barnes' educational mission, in 1997, the Pennsylvania Attorney General approved the hosting of tour buses on days previously reserved for the institution's students as a means of increasing admission revenue (Nivala, 2003). The courts objected once again, stating "the group admissions policy now in place brings to mind the "hall for rent" concept which has already been rejected..."

groups willing to pay the \$500 lecture fee can sign up for a private tour" (*The Barnes Found., A Corp.* (No.8), 18 Fiduc. Rptr. 2d 33, 33, 1997). This development flew in the face of Barnes' express desire that his gift was 'democratic' and 'without special privilege' (*The Barnes Found., A Corp.* (No.8), 18 Fiduc. Rptr. 2d 33, 33, 1997). It is obvious that Barnes did not wish to have his school and gallery trivialized by the use of it as a mere rental hall or a tourist attraction.

Although Glanton was not granted his wish to host fundraisers in the arboretum, he promptly organized a grand re-opening fundraiser in 1995 (*BarnesWatch*, www.barneswatch.org, 2003). In doing so, he set a dangerous precedent: the court's decisions and Barnes' wishes were both amendable and could be overridden. Although the state Attorney General conceded that this function was permissible as a way of raising funds, the institute's followers were not convinced that this or the other deviations were 'necessary' on the basis of 'administrative impracticality' (Nivala, 2003). The court's opinion, however, liberally construed the meaning of 'necessity' and Barnes' specific charitable intentions were modified and altered by both the court and the Attorney General without due diligence: John Anderson claims that the trustees failed to produce financial records supporting their claims of financial emergency and did not attempt to raise funds from any other sources as permitted by the trust indenture (2003, p.120). On the contrary, the trustees were attempting to run the Foundation as a museum, applying fundraising practices endorsed by museums to an educational institution. Barnes, however, had explicitly outlined that his Foundation was not to be conceived or used as a museum and that it was only to be used as an educational institution with a curriculum and educational agenda (Barnes Foundation's By-Laws, 1922, Para 33).

To the Foundation's detriment, court-approved changes were not only administrative in effect, they altered the very purpose of the Foundation as an educational institution. Using the guise of administrative deviation, trustees and the state Attorney General continued to bypass the lengthy analysis of donor intent which is required to prove the necessity of applying *cy pres* to alter a Foundation's charitable purpose. Similarly, once Foundation by-laws were altered by interpreting his 'educational mission' as a general charitable object common among other museums in America, in order to fit the doctrine of *cy pres*' requirements, the precedent was set for administering the Foundation as an art museum, rather than as an educational institution. Legal scholar Wendy Lee proclaims, "the variations that the Barnes trustees and the Court characterized as necessary under the trust instrument were conveniences that suited the needs of the trustees" (2000, p. 7). Rather than interpreting Barnes' by-laws as binding to his educational mission, as professor John Nivala states, the trustees and the Court interpreted them as hurdles to overcome in their assessment of the institution as a museum (2003). As Wendy Lee claims, in effect, the court over-extended its judicial bounds by allowing the Barnes trustees to reframe the charitable purpose of the institution (2000).

Zoning Restrictions to Respect Donor Intent

Responding to this reframing of the art collection as a museum, members of the Lower Merion community raised several concerns, challenging the actions of the courts and the trustees (Nivala, 2003). Other displeased protesters included former students of Dr. Barnes and Viola de Mazia, his Foundation's education director from 1927-1989,

were displeased that Glanton was neglecting the Foundation's educational mission (Anderson, 2003, p.57).

Neighbours took their concerns to the Lower Merion Township Commissioners, and, in December 1995, the Commissioners ordered the Barnes to stop work on a parking lot on its grounds (Toobin, 2002). In turn, objections made by these residents caused further legal debate over the Foundation. Neighbours had been keeping a close watch on Glanton's questionable administration (*BarnesWatch*, Spring 2005, p.2). Twelve couples from Lower Merion had documented trustees' by-law violations and formed The Latches Lane Neighbourhood Association to monitor the activities of the Foundation (*BarnesWatch*, Spring 2003). These violations include: the admittance of tour buses during non-permitted visiting hours, the increase of weekly visitors to the institution, and attempts to host fundraisers in the Foundation's buildings, contrary to the trust provisions (Nivala, 2003). Based on this evidence, the neighbours petitioned to the Lower Merion By-Law Commissioner that the Barnes Foundation was being run in violation of the community's zoning bylaws (Nivala, 2003). The neighbours and former Barnes Foundation students also formed the *BarnesWatch* in 1994, producing newsletters and hosting a website

dedicated to preserving the art education program at the Barnes Foundation, Merion Pennsylvania as developed and intended by its founder Dr. Albert C. Barnes and to maintaining the historic and aesthetically significant arrangements of artwork in the Paul Phillippe Cret-designed galleries in Merion. (*BarnesWatch*, www.barneswatch.org, 2005).

The community's concerns focused on the management's shift in running the Barnes Foundation as an educational institution to conducting business as if it were a

tourist destination and fully accessible public collection. As Justice Greenburg stated in the opinion of the U.S. Appeal Court given during the dispute heard in 2000:

The Commissioners were concerned that the proposed use did not comply with the Township's zoning laws, which apparently zoned the Latches Lane area for residential and educational use, but not for an art gallery. The Commissioners therefore believed that the Barnes might violate the local zoning ordinances if the primary focus of its operations was the operation of the gallery, as opposed to conducting its educational programs. (*The Barnes Foundation v. The Township of Lower Merion*, 242 F.3d 151; 2001 U.S. Appeal).

Administrative deviation allowed during the mid-1990s, prompted the neighbours and individuals to voice concerns over the facility's scheduled reopening as they believed that "the reopening would cause parking, noise and pollution problems" (*The Barnes Foundation v. The Township of Lower Merion*, 242 F.3d 151; 2001 U.S. Appeal). Zoning bylaws recognized the Barnes Foundation as an educational institution, similar to the Episcopal Academy, a private school adjacent to the Barnes property, and to St. Joseph's University, a college spread throughout the Lower Merion Township (*BarnesWatch*, Spring 2005, p.3). After the art collection had returned from its world tour, the number of visitors to the Foundation increased above the prescribed 500 weekly cap imposed on the Foundation since 1961. This satisfied Glanton's goal of increased admission (Anderson, 2003, p.121). This increase, however, violated operating restrictions that the Lower Merion Township had approved when it approved the Barnes' educational institution (Nivala, 2003). The Township also claimed that the increased number of tour buses visiting the Foundation and the use of the grounds as a fundraising venue, violated zoning bylaws for educational institutions in the Township of Lower Merion (Toobin, 2002).

Community members petitioned the zoning authorities to implement further restrictions to curb the increased number of visits to the Barnes gallery (*The Barnes Foundation v. The Township of Lower Merion*, 242, F.3d, 151; 2001 P.A. Appeal). The Lower Merion Zoning Authority conceded that the increase in visits were in violation of the Barnes' property stated use as an educational facility. As a result, limits to the number of visitors were implemented. The new regulations prohibited the Foundation from permitting more than 1200 visitors a week over three days. Moreover, the township succeeded in stopping the Foundation from hosting fundraisers. Although Barnes himself did not include a cap on the number of weekly visitors, he had stipulated that under no circumstance should his Foundation be used as a museum rather than as an educational institution (Barnes Foundation's By-laws, 1922, Para. 33). To this end, the actions brought to court by the Township of Lower Merion reaffirmed the donor's intent for the Foundation's use as an educational institution.

By acting in their own interest, the Lower Merion community members inadvertently caused Barnes' original charitable purpose to once again become the central focus of the Foundation's trustees. The trustees were required to manage the Foundation to fulfill its intended purpose as an educational institution with limited public visitations (Toobin, 2002).

Not content with the cap on the number of visitors, Glanton accused the twelve couples of discriminating against the Foundation because four out of the five trustee members were African-American and because of the Foundation's ties with Lincoln University, the predominantly African-American institution (Anderson, 2003, p.139). The Township refused to approve Glanton's request for a parking lot addition, as a result

of which Glanton's launched a lawsuit under the Ku Klux Klan Act, citing violations of the equal protection and due process clauses of the 14th Amendment (Bolling, 2003). Following this, the Barnes Foundation was tied up with litigation between the Barnes' trustees and residents of Lower Merion Township for nearly six years, from 1995 to 2001. In a 150-page opinion, Judge Anita B. Brody found that "the vast majority of the Barnes's evidence has nothing to do with race, but merely details various stages of a run of the mill land dispute", as reported by *The New Yorker* magazine legal reporter Jeffrey Toobin (2002). Toobin reported that "as a strictly legal matter, the township was right and Glanton wrong—which a series of court rulings established" (2002). As part of the final settlements, the Foundation agreed to pay the township \$100,000 for charitable purposes, and its insurers covered \$400,000 of the defendants' legal fees on Glanton's behalf (Toobin, 2002). Although there was a stain on the Foundation's reputation, *Philadelphia Inquirer* reporter Edward Sozanski explained that the Township of Lower Merion bore the brunt of the bad press as the cause of the litigation and financial crisis (2003).

Even though the trustees violated their fiduciary duty by altering the terms of the trust beyond 'necessity', none has been charged for mismanagement and the ensuing consequences (Eisenstein, 2003). Staying with the Foundation as a Board member until 2003, Richard Glanton had been forced to resign as Foundation President in 1998 (Bolling, 2003). In 1998, the state Attorney General ordered the Foundation to hire an agency audit the Foundation's expenses (*BarnesWatch*, Spring 2005, p.2). Deloitte & Touche audited the Foundation from 1998 to 2000, and released its findings in 2003, as reported by *The New York Times* reporter Ralph Blumenthal (2003). With evidence

attacking Glanton's fiscal management, the audit claimed that Glanton ran up more than \$225,000 in travel and entertainment expenses, tried to barter the Foundation's banking business for support on the board, and let two women live in Foundation property under unusual circumstances at the cost to the Foundation of \$23,000 (Blumenthal, 2003). With a dismissive response, Glanton said he was proud of the money he raised for the Barnes, chiefly by engineering the tour of some of the collection's treasures to raise the capital for necessary renovations.

The same year that Glanton was dismissed, Kimberly Camp took over as Executive Director and President after it had spent its entire endowment on renovations, legal disputes and mismanagement (Barnes Foundation, 2003). Camp had the unenviable task of repairing the damage of the previous trustees after a decade of abuse and of building the Foundation back to its full capacity as an educational institution. With a quick statement addressing the wayward trusteeship of the Barnes Foundation, Camp set the dismissive attitude that prevails amongst the current board members: in the words of reporter Deborah Bolling, "the Barnes Foundation needs money. Regardless of who spent the endowment, how it happened, who was at fault, who points the finger - - the bottom line is we need money" (2003). With the same unaccountable attitude as her predecessor, Richard Glanton, Camp began her leadership at the Barnes by disregarding her responsibilities to respect Albert Barnes' intentions and bylaws, the trust's beneficiaries, and the community surrounding the Foundation. Consequently, damages caused by irresponsible and unethical employee and trustee decisions prevail, as evidenced by the appeal began in 2003 to move the Barnes Foundation to downtown Philadelphia.

Conclusion

Outcomes of battles over the Barnes Foundation caused by the trustees' breaches of fiduciary duty are a damaged reputation and a dried-up endowment. As John Anderson and John Nivala explain, legal squabbling cost the Foundation more than \$6,000,000 between 1992 and 2001 (2003, p.167; 2003, p.2). Consequently, the Foundation is in a more precarious position than ever before: it is weighed down by poor relationships with neighbours, tarnished public respect, a new heavy financial predicament, and a board of trustees that fears to tread in the murky administrative waters created by their predecessors. Court-granted permission to alter trust terms reveals that Albert Barnes' primary intentions were not given precedence over the demands made by the public and the trustees (Abbinante, 1997).

With an approach to the terms of Barnes' trust as hurdles to be overcome, the current trustees, led by Kimberly Camp, have petitioned for further amendments to the Foundation's Indenture, including the right to move the art collection (Nivala, 2003, p.1). Although there is finger pointing at the former trustees of the Foundation, the Township of Lower Merion still bears the brunt of criticism by the current trustees and the press (Sozanski, 2003). The concerns raised by the Township are the target of the trustees who now claim that the township's concerns are the primary hurdles to the Foundation's maintenance (Barnes Foundation's President's Message, 2005). Arguing in 2002 that the Foundation remains in financial despair and is therefore unable to fulfill its public responsibilities, the trustees petitioned for approval to make extreme modifications to the charter, including the location of the art collection (Sozanski, 2003).

The trustees have argued that by moving the collection to a more central and ‘accessible’ location in downtown Philadelphia, they will better respond to greater public’s interest in the art collection, by increasing exposure (Barnes Foundation, 2004). Similarly, the trustees state that their proposed charter changes will better serve Barnes’ ‘general charitable purpose’ of providing accessible art for the ‘plain and working people’, which is currently ‘strained’ by the Township’s zoning restrictions (Lee, 2000, p.2). The trustees continue to represent the Barnes Foundation as if it were a museum, thereby creating unreasonable expectations among the public for increased access to and use of the art gallery.

The following chapter presents changes that have been approved in the 13 December 2004 court ruling that alters Albert Barnes’ specified charitable purpose. How these changes violate Barnes’ specific charitable intent is examined. The next part argues that less invasive and extreme administrative deviations could have been used instead of moving the collection. It is shown throughout this chapter that the trustees and the courts overextended their judicial powers and as a result altered the nature of the Barnes Foundation.

CHAPTER THREE

Economic Exploitation of the Barnes Collection

Introduction: Evolution is Not Transformation

Despite the Pennsylvania Court of Common Pleas warnings to the Barnes Foundation's trustees that they must act according to Albert Barnes' intentions, the trustees and employees displayed disregard for this duty, as did their predecessors in the 1990s. Although trustees and employees proclaimed that they were refocusing the Foundation on Barnes' educational mandate in 2000, this chapter argues that they seem to be intent on transforming the gallery into a full-time public collection. As will be shown, management and trustees perpetuated the Foundation's financial slide, creating a 'desperate need' for outside assistance. Financial crisis was a prerequisite for either outside fiscal donations or for court approval to amend the by-laws. As a result, a highly politicized petition was approved by Pennsylvania's Montgomery County Orphan Court in December 2004, overthrowing Albert Barnes' intentions. Rather than preserving the Foundation as a focused educational institution, the by-law changes alter the core charitable purpose intended by its founder.

This chapter explains how, through financial and political manipulation by stakeholders interested in exploiting the art collection, the courts have been led to permit modifications to the by-laws thus placing financial interests above Barnes' educational intent and the terms of his will. In the first section, this chapter introduces the financial crisis created by the current management and trustees followed by an exploration of the political and economic manipulation used by trustees and patrons order to transform the

collection into an money-generating engine. Furthermore, the legal hearings over the trustees' petition to amend the Foundation's trust by-laws reveal that the court failed to uphold the Foundation's duty to protect Albert Barnes' charitable intentions by misapplying the doctrine of administrative deviation. It will also be shown that the trustees' proposed financial remedy—moving the gallery's location—was not supported by sufficient 'clear and convincing evidence' as the 'least drastic' deviation from the trust's by-laws and Barnes' charitable intentions. On the contrary, it is clear that the trustees' proposed relocation of the collection is not only a financial threat to the Foundation's survival but is also a threat to Barnes' educational mandate. It is concluded that the financial interests of the Foundation's benefactors and its political supporters were given priority over Albert Barnes' clearly defined charitable intentions and educational principles.

Creating a Financial Crisis: Management Takes Charge

Legal attempts to broaden the scope of the gallery's functions to include the role of full-time public art collection have increased since Kimberly Camp became president and Chief Executive Director. Camp's mandate was to "revive the Foundation by taking it back to its roots as a multicultural educational institution for the study of Barnes' ideas" and to cut back on excess spending devoted to expansion of the Foundation's use, according to legal reporter for *The New Yorker* magazine Jeffrey Toobin (2002). Camp claimed there was no endowment remaining: "I had the dubious pleasure of cashing in the last of the endowment" (Warner, 2002). She purportedly also planned to change the Foundation's perilous financial situation.

In 2000 Camp initiated a plan for increasing the Foundation's endowment and admissions and for improving its reputation (Salisbury, 2001). The plan included "developing stronger programs to attract a broader audience and support for the Foundation's mission" in order to generate greater revenues (*BarnesWatch*, Spring 2003, p.5). Despite Camp's countless claims that she was devoted to serving Albert Barnes' intended educational mission, her actions speak otherwise. Rather than cutting costs, the Foundation's tax returns from 1998-2003, accessible through the Internal Revenue Services and the state of Pennsylvania, show Camp's spending habits were otherwise (*The Barnes Foundation's Return of Organization Exempt From Income Tax, Form 990, Section 501(c)*, 1998-2000; www.barneswatch.org, 2005). Since she joined the Barnes Foundation, Camp and the Foundation's trustees have steadily increased expenditures (Lee, 2000).

In their efforts to use the gallery as a full-time collection, the trustees have inflated the budget and brought financial instability to the Foundation. Camp and the trustees increased the Foundation's budget starting in 1999 with a deficit of \$1,376,831 that has risen thereafter (Toobin, 2002). According to tax returns for 2000 posted on the *BarnesWatch* website, the Foundation's deficit increased \$800,000 (*BarnesWatch*, June 2003, p.1). By the end of 2000, the Foundation had accumulated an additional \$2.2 million debt (*The Barnes Foundation's Return of Organization Exempt From Income Tax, Form 990, Section 501(c)*, 2000, p.1). According to John Anderson, in 2001 Camp spent over \$900,000 more than in the previous year, racking up an additional deficit in high salaries and other costs (2003, p.214). The budget was triple the 1990 budget, which was the last time the Foundation had been financially solvent, as reported in *The Philadelphia Inquirer* by reporter Stephen Salisbury (2001). According to figures quoted on the *BarnesWatch* website, by 2003, the Foundation's reported annual expenses of \$4.5 million were four times the fiscally solid 1990 budget (*BarnesWatch*, June 2003, p.1). In response to the increased expenses, Camp's *laissez-faire* attitude was simply that "the money will come" (p.2).

Since Camp and the trustees expanded the Foundation beyond its founder's educational purposes, costs have soared. By 2001, the Foundation was paying \$72,000 per year for the Director of Development, \$60,200 for a Director of Education, \$72,100 for a Director of Finance, and \$57,304 for a Director of Merchandising (*The Barnes Foundation's Return of Organization Exempt From Income Tax, Form 990, Section 501 (c)*, 2001, p.7). Camp's own large salary was recorded to be \$170,000 a year (p.7). Furthermore, the collections staff includes a conservator, a conservator's assistant, a registrar, a registrar's assistant, a collections assessment project director, a collections assessment project director's assistant, an archivist and an art handler (*BarnesWatch*, Spring 2003, p.5). These positions are customary for an art gallery, but were restricted by Barnes in the by-laws for the specific reason of limiting the use of his gallery as a public collection (Barnes Foundation By-Laws, 1922, Para. 21).

With these staffing restrictions, Barnes was not denying his art collection from the care and oversight that is standard for artworks of comparable social and economic value. On the contrary, he specifically ruled against the increase in staff as a means of ensuring that the size of the educational institution would not grow beyond its capabilities and financing. Barnes' intention in restricting staff numbers and positions was based on his belief that if the Foundation were to remain true to its focused educational mandate, such positions would not be necessary (Barnes Foundation's By-laws, 1922, Para. 17). His restrictive organizational chart was Barnes' way of shielding the Foundation trustees who might turn it into a museum and cause financial strain: "it is further stipulated that the identity of the Donee [the Foundation] as an educational institution is to be preserved for all time" (Para.17).

In 1998, prior to Camp's arrival, no positions existed beyond those stipulated in Barnes' original organizational structure (*The Barnes Foundation's Return of Organization Exempt From Income Tax, Form 990, Section 501 (c)*, 1998, p.7). The Director of Education was the only addition to staff as amended on October 20th, 1950 (Barnes Foundation's By-Laws, 1922, Para. 21). Barnes' amendments never added marketing and publicity staff. The indenture mandates that there shall be no more than a single "art director... to supervise the gallery [and] see that the paintings are properly cared for and perform such other duties as may be necessary to carry out such educational work as comes within the purview of the Art Department of the Donee" (Para. 21). Camp violated the organizational by-laws that specify that the number of staff and positions was to remain unchanged: "no other administrative or executive officers or clerical assistants shall be engaged or employed..." (Para. 25).

In addition to directly violating Foundation by-laws and charter, Camp's staffing deviations have added a significant strain on the budget. Had the Foundation maintained the same level of staffing that it had up until 1990, its annual wage-related expenses would be at least \$900,000 lower than what it spent in 2001 (*BarnesWatch*, June 2003, p.12). Moreover, if the 1990 budget of \$1.1 million were adjusted for cost-of-living increases, the present budget would be about \$1.6 million, and result in a financially viable situation (p.2). The *BarnesWatch* reported in June 2003 that the trustees that ran the Foundation until 1990 followed Barnes' by-laws and managed to keep the Foundation financially secure with an admission fee of \$1 (as set by the Attorney General in 1958), free parking, and with no revenue generating or marketing schemes such as a gallery store (p.7). Unlike these predecessors, as legal scholar Ilana Eisenstein explains, Camp and other trustees have tried since the early 1990s to create excess revenue by expanding the Foundation's use beyond its educational mandate (2003, p.9).

While increasing spending, Camp claimed it was “impossible” to meet expenses on the Foundation’s 2001 income, and that the Foundation needed to undergo severe changes to the by-laws and receive outside funding to ensure its survival (*Memorandum of Law in Support of the Barnes Foundation’s Petition to Amend Its Charter and Bylaws at 11-12, In re Barnes Found.*, No.58,788, Pa. Ct. Com. Pl. Montgomery County Orphans’ Div. Sept. 24, 2002). Camp and the trustees propagated that the cause of the Foundation’s ‘dim’ and ‘dire’ financial situation was the restrictions placed on the number of visitors permitted by both its founder and the Township of Lower Merion. By pointing fingers to restricted public access as the cause of the Foundation’s potential collapse, the management proclaimed that modifications and spending increases were instituted to ensure greater public access and preservation. Nonetheless, the increased spending from 1998 to 2004 did not improve the preservation of the Foundation or its financial instability. On the contrary, by administering the Foundation with unlimited public access, Camp and the trustees steadily increased expenses and created an unprecedented deficit (Eisenstein, 2003, p.3). As a result, the rising debt strengthened management’s proclaimed need for modification of the by-laws that would include moving the art collection:

On March 6, 2001, Pennsylvania Governor, Edward Rendell, told *The New York Times*:

If it [Barnes Foundation] continues to have fiscal problems then I think this talk of moving will ripen and it will be something that needs to be taken seriously... If their reform plan doesn’t work, then moving to the city becomes a viable option (*BarnesWatch*, Spring 2003, p.4).

The Governor's foresight moved closer to reality in 2002 when the trustees made a partnership agreement binding the Foundation to the Pew Charitable Trust, the Lenfest Foundation and the Annenburg Foundation (Blumenthal, 2002). As will be shown in the following, these three organizations, while asserting that they are intent on preserving a part of America's cultural heritage, actually have ambitions other than preserving the Foundation according to Barnes' educational and aesthetic wishes. As with the Barnes trustees, the actions of these organizations against the survival of the Foundation speak louder than their charitable claims of saving a part of America's cultural heritage.

Fairy Godmothers

Camp and the trustees accepted an offer made by the Pew Charitable Trust, the Annenburg Foundation and the Lenfest Foundation to help the Barnes Foundation with \$150 million in donations (Eisenstein, 2003, p.3). Although the offer appeared to lift the heavy financial cloud hanging over the Barnes, the full amount was available on condition that changes be made to several of the Foundation's by-laws, including by-laws on the location of the art collection. The conditions also included broadening the terms of the Trust to increase the trustees' autonomy and "self-sufficiency in administering the Foundation" ("Summary of the Barnes Foundation's Petition to Amend its Charter and By-laws", Barnes Foundation, 2002).

The offered was for \$80 million in direct financial assistance and resources to help the Foundation raise the remaining \$70 million once the trustees had successfully gained approval for four dramatic by-law modifications (*Memorandum of Law in Support of the Barnes Foundation's Petition to Amend Its Charter and By-laws at 11-12, In re*

Barnes Found., A Corp., Fiduc. Rptr., No.58, 788, Pa. Ct. Com. Pl. Montgomery County Orphans' Div. Sept. 24, 2002). Although the financial assistance is proclaimed to be for preserving Barnes' aesthetic and educational mandates, the four modifications alter the Foundation's organizational principles and administrative structures.

The four proposed by-law changes required that:

1. the main collection was to be moved from Merion to downtown Philadelphia;
2. restrictions on public access and social gatherings at the new location had to be abandoned;
3. the number of board members would be increased from five to fifteen with Lincoln University still nominating only four trustees;
4. the trustees were to have greater discretion in management of the Foundation including the authority to set the admission prices, hours of operation, and to determine the type of development and fundraising projects (*Memorandum of Law in Support of the Barnes Foundation's Petition to Amend Its Charter and By-laws at 4-5, In re Barnes Found.*, A Corp. Fiduc. Rptr., No.58, 788, Pa. Ct. Com. Pl. Montgomery County Orphans' Div. Sept. 24, 2002).

The three charitable donors proclaimed that the only way of preserving Dr. Barnes' educational and aesthetic beliefs was to divide the Foundation's physical assets among the three campuses and adopt the other by-law modifications. The Barnes Foundation was to be broken up into three parts: the arboretum which would remain active; Ker-Feal, Barnes' farm estate, was to be turned into a full-time museum; and the

art collection was to be stripped from the gallery's walls and hung in Philadelphia (*Memorandum of Law in Support of the Barnes Foundation's Petition to Amend Its Charter and By-laws at 4-5, In re Barnes Found.*, A Corp. Fiduc. Rptr., No.58, 788, Pa. Ct. Com. Pl. Montgomery County Orphans' Div. Sept. 24, 2002).

Rather than helping the trustees refocus on delivering Albert Barnes' educational programs, the three financial backers sought to expand the Foundation's roles. The charities' financial interests, political alliances and efforts to control the art collection of the Barnes Foundation threaten the preservation of the Barnes Foundation, a significant part of America's cultural heritage. The three charitable Foundations that extended their financial assistance to the Barnes Foundation are more intent on using the art collection for their own political financial gain.

Soliciting Public Support

Although several generations of trustees pushed the Foundation to the brink of insolvency, according to author John Anderson, the current trustees and the press presented the Barnes story to the public and potential donors in a very different light (2003, p.218). Media reports of the Foundation's 'dire' financial condition became an inescapable reality in the public's eyes. In the words of the *BarnesWatch* "the media has swallowed the story, which now represents the "truth" (June 2003, p.12). Rather than questioning the trustees' management decisions, Albert Barnes' limiting and impractical by-laws were targeted as the cause behind the Foundation's financial instability (Eisenstein, 2003, p.3). According to legal scholar Wendy Lee, the admission restrictions and other by-laws were pegged as Barnes' egotistical attempt to extend control over his

property through his ‘dead hand’ (2000, p.10). In the same way, the media presented the Lower Merion Township zoning restrictions as another primary factors contributing to the financial crisis. Such claims were supported by stories such as one written by reporter Ralph Blumenthal in *The Legal Intelligencer* in 2002, stating “potential donors, who could save the Foundation, are reluctant to make major commitments to Barnes so long as the gallery is in Lower Merion where public access is limited by township zoning restrictions”. Although the Township was alleged to have limited the number of visitors, the number had actually consistently exceeded limits imposed by Albert Barnes since 1995.

Meanwhile, as legal reporter Hilton Kramer explained, Camp and the current trustees were hailed for altering Albert Barnes’ ‘idiosyncratic by-laws’ that “needed to be changed once and for all”, increasing public access to the art collection (2003). According to John Anderson, with most media on their side by 2000, the trustees were able to undo the damage to reputation that befell the Foundation when Richard Glanton petitioned the Court for approval to deaccession artworks in 1993 (2003, p.218). Camp and the trustees drummed up public approval for the Court appeal to amend Barnes’ ‘outdated’ by-laws. Camp repeatedly exclaimed, “He’s dead. He’s *been* dead for fifty years!” (p.216). With the public on their side, a court appeal to change the public charity’s by-laws was within reach.

Legal reporter Jeffrey Toobin wrote that, although no formal petition had been presented until September 24, 2002, speculation had been circulating beforehand with opinionated fervor in the art world as to possible by-law modifications (2002). The most heretical by-law modification rumored was the relocation of the art collection. As

speculation on relocation rose, opposition increased. Barnes supporters, neighbours, and former students, did not want to see the collection undergo such a drastic modification to save it from its financial crisis. As a result, the trustees were once again faced with the art world's accusations of fiduciary mismanagement (Kramer, 2003). Nicholas Tinari, a former Barnes student and current President of the *BarnesWatch* told reporter Ralph Blumenthal of *The Legal Intelligencer*, "it [relocation] flies in the face of what trustees are supposed to do. Trustees are supposed to honor the donor's intent" (2002).

To avoid further allegations, the trustees rallied political and business leaders within Philadelphia to support the by-law modifications by approaching them with the economic potential of the Barnes collection (Anderson, 2003, p.218). The purpose of gaining political clout was to create the opportunity for exploiting Barnes' art collection. The trustees and their allies were intent on persuading the court to modify the by-laws for reasons beyond the preservation of America's cultural heritage. The following reveals several of the questionable alliances and interests that stood to benefit from moving the art collection to central Philadelphia.

With a Little Help From Friends: Political and Financial Persuasion

In 2003, with the fate of the collection and its potential for economic exploitation in their hands, the trustees were able to persuade influential donors and politicians to support their interests in moving the art collection (Andreae, 2003; Anderson, 2003, p.219). The financial potential of the art collection is undeniable: it can be used as a tourist resource and as an economic engine for the city in which it is housed. John Anderson recounts that the donors and political leaders in Pennsylvania were "thrilled

with the news – especially at the economic potential of it. Just think of all the out-of-town visitors pouring into the Parkway! All the extra tourist dollars!” (p.220). Presenting the economic opportunity to political and economic leaders of Philadelphia and Pennsylvania, the trustees and their backers knew that public and political support would influence the court’s approval of the three charitable Foundation donors’ conditions (Kramer, 2003). As a result, the by-law modifications became a primarily political appeal rather than an appeal to preserve the Foundation and its mission.

When the trustees’ petition to amend the trust was first proposed in 2002, *The New York Times* cultural reporter Carol Vogel explained that the main threat to approval was Lincoln University’s Board of Trustees (2003). Under the new proposed plan for the Barnes, Lincoln University would be allowed to nominate five trustees, but the board would expand to 15, with 10 other trustees being nominated by the Pew Charitable Trust, and the Annenberg Foundation and Lenfest Foundation (*Memorandum of Law in Support of the Barnes Foundation’s Petition to Amend Its Charter and By-laws, In re Barnes Found., A Fiduc. Corp.*, No.58, 788, Pa. Ct. Com. Pl. Montgomery County Orphans’ Div. Sept. 24, 2002). Lincoln’s share of board nominees would be reduced from 80 per cent to 33 per cent. The Barnes Foundation trustees and their financial backers argued that the Foundation would be better positioned to attract new donors with a restructured Board (Blumenthal, 2003).

The New York Times reporter Carol Vogel wrote that, without notifying Lincoln University of the Barnes Foundation’s board’s decision to accept the offer from the three charities, Camp and the trustees petitioned the court to immediately change Lincoln University’s control over the Barnes Foundation’s Board of Trustees (2003). Upon

hearing of the petition through the media, the Board of Lincoln University was shocked with the decision to drastically reduce its role and change the use of the art collection (Vogel, 2003). The Lincoln Board opposed both changes to the Board of the Barnes Foundation and the proposed relocation of the art collection. The Lincoln Board of Trustees publicly claimed that the modifications would unnecessarily and inappropriately alter Albert Barnes' charitable intentions (*re The Barnes Found. A Corp. Fiduc. Rpt.*, No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004).

To support their claims, the Lincoln Board referred to Camp's statement, made only a few months earlier, that such a move would *not* be considered a viable option to remedy the Foundation's financial problems:

Moving the gallery will change the Foundation forever -- there's no way to get around that. The trees in the arboretum... are not just ephemeral, but an essential part of our collection. [If it moves to the Parkway] it is not going to be replicated. You can't replicate an arboretum... Barnes talked about this as an experiment in education (Bolling, 2003).

Without any further explanation from Camp of her changed opinion, Lincoln University saw the financial support from the Pew, Lenfest, and Annenburg trusts to be "suspect at best", according to legal reporter Michael Rubinkam (2003). The Lincoln Board accused Camp and the Barnes Foundation trustees of negligently and wrongfully following the wishes of their financial backers to diminish Lincoln University's role and to change the collection's location. The trustees' proposed changes were telling: "the proposed new by-laws no longer include Dr. Barnes' Indenture of December 6, 1922 as part of the by-laws" (*Memorandum of Law in Support of the Barnes Foundation's Petition to Amend Its Charter and Bylaws at 11-12, In re Barnes Found.*, No.58, 788, Pa. Ct. Com. Pl. Montgomery County Orphans' Div. Sept. 24, 2002). Moreover, Lincoln's board

members accused the Barnes' board of expanding the prescribed educational use of the art collection, and turning it into an economic resource for Philadelphia (Bolling, 2003). By June 2003, the 2,012-student institution won court standing to challenge any proposed change to the Barnes Foundation's charter (Blumenthal, 2003). At that time, the University was the only legitimate dissenting voice that could oppose the trustees' proposed move and by-law modifications in court.

As the Barnes Foundation's trustees were persuaded by the political power of Pew, Lenfest and Annenburg trusts, so too were the board members of Lincoln University. In September of 2003, as the Lincoln Board debated the pros and cons of their diminished role at the Barnes, Pennsylvania's Governor Ed Rendell offered his conditional financial assistance to the University, linking the school's future funding with their interest in the Barnes (Bolling, 2003). Governor Rendell, himself a Lincoln University trustee, offered the school his fundraising powers, with the support of the Pew, Lenfest and Annenburg trusts, the same charities supporting the Barnes Foundation's relocation (Rubinkam, 2003). Rendell said the three philanthropic organizations had jointly pledged to contribute \$1.25 million to the university in order to expand its art education program by strengthening collaborations with the Barnes Foundation, according to reporter Deborah Bolling (2003). Rendell also offered to help the university raise \$150 million for two new buildings, and to help the school raise a \$100 million endowment, as claimed by reporter Joel Rose (2003). With such a heavy decision on their hands, the trustees of Lincoln University gave their support to the Barnes Foundation trustees' petition, thereby securing the state's funding for their own

institution. The Lincoln Board withdrew their dissenting appeal from the Courts (Rubinkam, 2003).

As commented by Julian Bond, the son of Lincoln University's late president, Horace Mann Bond, the fate of the Barnes was clearly being dominated by economic and political interest rather than genuine preservation concerns for the Barnes:

This is an awful thing... Albert Barnes left definite directions about how and where his art would be displayed -- plus, he had a lifelong enmity towards the Philadelphia art community. That's why he entrusted it to Lincoln University. With a wink, a smile and a handshake, Lincoln has traded away an [multibillion-dollar] art collection. (Bolling, 2003)

By persuading the trustees of Lincoln University to support the Barnes Foundation trustees in their proposed diminished role of the university in the trusteeship and the removal of the art collection, the trustees' first petition to amend Barnes' by-laws would face no opposition in court (*re The Barnes Found. A Corp. Fiduc. Rpt.*, No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004).

The timing of Lincoln University's trustees' withdrawal of their opposition to the Foundation's move and the timing of Governor Rendell's financial 'rescue' is no coincidence. It is only one chapter in the well-orchestrated political manipulation by the Barnes Foundation trustees and the Pew, Lenfest, and Annenburg trusts to turn Albert Barnes' art collection into a tourist destination for the benefit of the three trusts and for the Barnes Foundation's financial interests. As Christopher Knight, art critic for the *Los Angeles Times*, concedes: "So far to date [2003], the combined cost of moving the Barnes Foundation, and of getting Lincoln University on board, approaches \$250,000. Cultural tourism is big business." (Rose, 2003) The Lincoln deal attests that the move has more to do with economics and politics than art appreciation and preservation. Reporter Hilton

Kramer describes the manipulative influence of the Pew, Annenburg and Lenfest charities, as a “carnival of power and money” (2003).

The ‘carnival of power’ did not stop with getting the Lincoln trustees on the Barnes Foundation Board to agree to change the Foundation. To facilitate their exploitation of the Barnes Foundation art collection, the Pew, Lenfest and Annenburg trusts bound their interests with those of leading Philadelphia and Pennsylvania politicians. The *BarnesWatch* noted that Governor Rendell’s re-election campaign was heavily supported by the Pew, Lenfest and Annenburg trusts and Lincoln University (*BarnesWatch*, June 2003, p.4). He received more than \$300,000 in donations from the Pew, Lenfest and Annenburg trusts (p.4). *The Philadelphia Inquirer*, in an unrelated story, reported that the founder of the Annenburg Foundation and his wife gave Rendell’s campaign a contribution of \$225,000 (p.15). Similarly, the founder of the Lenfest Foundation donated \$52,500 to Rendell’s office (p.15). At the financial whims of his campaign backers, Governor Rendell’s concession to channel millions to Lincoln University, and to support the relocation of the Barnes art collection is yet another example of politics influencing the Barnes Foundation’s fate according to reporter Joel Rose (2003).

As with Lincoln University, the Pew, Lenfest and Annenburg trusts used their public reputation and financial clout to shape media coverage of the trustees’ petition and manage the opposition to it (Anderson, 2003, p.220). By avoiding negative media coverage in Philadelphia and the unspoken desire of the Pew, Lenfest and Annenburg trusts to exploit the art collection, the sponsors’ efforts proved to be successful (*BarnesWatch*, Spring 2003, p.8). The Barnes Foundation trustees received help from

Pew, Lenfest and Annenburg trusts when they hired the Kreisberg Group, a public relations firm based in New York, to manage the Barnes Foundation's media relations (Blumenthal, 2002; "Summary of the Petition", 2002). Furthermore, once the Barnes Foundation filed its petition, *The Philadelphia Inquirer* buried coverage of the story in its business section, where mergers and acquisitions are normally featured (*BarnesWatch*, Spring 2003, p.8). This media and public relations strategy was not by chance: *The Philadelphia Inquirer*'s founding publisher, the late Walter Annenburg, endowed the Annenburg Foundation (Anderson, 2003, p.51). Moreover, Walter Annenburg was the individual who pushed Harold Wiedgand in 1951 to petition the Attorney General for greater access to the Barnes Foundation (p.51). Harold Wiedgand, whose name was used in the suit against the Barnes, was the editorial page Editor and Annenberg's closest associate (p.51). The lack of coverage of the Barnes trustees' petition by *The Philadelphia Inquirer* is no doubt linked with the Annenburg family's battle to eliminate Albert Barnes' restrictions.

According to reporter Deborah Bolling, with similar self-interest, officials of the Pew Charitable Trust announced that in anticipation of the Barnes' proposed move to Center City, they had successfully petitioned for a change in the Barnes Foundation's IRS filing status from 'private Foundation' to 'public charity' in November 2003 (2003). As a result, the Pew Charitable Trust may take charge of administering the Barnes' hefty endowment to be raised once the art collection is relocated. Control of the Barnes projected \$50 million endowment, and the potential to exploit the multi-billion dollar art collection through sales and tourist related activities, will also resolve the Pew Charitable Trust's own current financial instabilities and increase its status as one of America's

leading charitable trusts (Bolling, 2003). As the Pew's Chief Executive Officer Rebecca Rimel commented, the economy has negatively affected the finances of the Pew Trust: "Everyday I wake up hoping that we've hit bottom, but I don't think we have" (The News Journal, April 21, 2003). If the Pew Trust gains control of the Barnes collection's estimated \$6-\$15 billion dollar value and its endowment, it will become one of the top five charities in the United States, and one of the largest private or public trust funds (Lee, 2000, p.2; <http://fdncenter.org/grantmaker/trends/top100assets.html>).

Legal scholar Wendy Lee, and charitable trust researcher Teresa Odendhal, have commented that affluent charitable Foundations have real and palpable power and influence over capital and society, making them into mega-corporations (Lee, 2000, p.2; Odendhal, 1987, p.3). Controlling one of the greatest art collections in America would contribute to the Pew, Lenfest and Annenburg trusts' reputations and financial power. This financial interest is the true motivation behind aid to the Barnes Foundation, more than a genuine concern for preserving America's cultural heritage. For this reason, as John Anderson stated, notwithstanding the charitable context of the organizations behind the Barnes Foundation's fundraising efforts, the use of their political and economic power to save the Foundation parallels a corporate takeover. Anderson is quoted in Carol Vogel's article in *The New York Times* as stating: "It's a corporate takeover in the guise of a white-knight rescue effort led by many of Philadelphia's leading philanthropic figures" (2003). What is purported to be a rescue in the name of cultural preservation is actually a scheme for the charitable donors to gain control over one of the world's greatest collections in order to exploit its potential as a tourist attraction.

Selling the Barnes as a Cultural Tourist Attraction

The City of Philadelphia and the State of Pennsylvania stand to benefit economically from the Barnes collection as tourist destination. Once the collection is moved to downtown, Philadelphia, it is expected to act as a renewed economic resource for the State and for the City of Philadelphia. Governor Rendell claims that once the gallery moves, “there isn’t a person interested in art who wouldn’t come to Philadelphia” (*The New York Times*, Sept. 25, 2002). Likewise, the Mayor of Philadelphia, John Street, supports the relocation of the Barnes’ art collection to a central location (Bolling, 2003). His office identified the obvious economic and tourist benefits, and proposed two possible sites for the Foundation’s location (*re The Barnes Found. A Corp. Fiduc. Rpt.*, No.58, 788, Orphan’s Ctr. Div. Ct. C.P., PA, December 13, 2004).

The sites proposed are both on the Benjamin Franklin Parkway that courses through the heart of the Center City district. A map showing the cultural facilities located in the Parkway Museum District can be seen in Appendix B, Figure 9. One proposed site, the Von Colln Memorial Field is a recreational complex with two baseball fields next to the Philadelphia Museum of Art. The second site is a to-be-demolished juvenile detention center on 20th Street between the Free Library and the Rodin Museum (Vogel, 2004). Both locations are less than a mile from the Philadelphia Museum of Art. The city’s Director of Communications, Barbara Grant, attests to the benefit the Barnes art collection would create for Philadelphia in terms of cultural tourism:

We would do anything to get the Barnes here... then we would have the Calder (a forthcoming sculpture museum), the Rodin museum, the Philadelphia Museum of Art, The Franklin Institute. It doesn’t get any classier than that” (Bolling, 2003).

According to Patricia Horn in *The Philadelphia Inquirer*, Paul Levy, Executive Director of the Center City district, added that the move will boost revenues for other cultural institutions along The Parkway (2004). With similar tourist and economic benefit, Levy claims “it would give The Parkway a cluster of art institutions unrivaled outside a European capital” (Horn, 2004). The City’s commerce director, Stephanie Naidoff, also acknowledged that the move to the city’s cultural district would benefit the economy: “I keep calling it the ‘Museum Mile’... the potential for our tourism marketing effort having a real shot in the arm is just great” (Klein, 2005).

The fact that the city and the state have economic interests as their primary concern does not conflict with their public leadership positions. However, by moving the Barnes collection to what is being called a future “Miracle Museum Mile” in downtown Philadelphia, the political leaders have supported the Foundation’s petition to transform Barnes’ intended educational use of his art collection into a full-time museum (Sozanski, 2004). In supporting the gallery’s relocation, the state and city’s leaders have encouraged the trustees’ petition to keep regular museum hours, and provide additional amenities and attractions at the new institution (*Memorandum of Law in Support of the Barnes Foundation’s Petition to Amend Its Charter and By-laws, In re Barnes Found., A Corp.*, No.58,788, Pa. Ct. Com. Pl. Montgomery County Orphans’ Div. Sept. 24, 2002). Since all these amendments contravene Barnes’ original intentions and the Foundation’s by-laws, the city and the state support the overhaul of the Barnes Foundation. By doing so, however, they indirectly violate trust administration laws by facilitating their own economic betterment, and the conditions presented in the Pew, Lenfest, and Annenburg trusts’ offer at the expense of Barnes Foundation’s mission (Brody, 1997). The city’s and

the state's positions on the relocation of Barnes' art collection gives priority to economics over law and the tradition of donor intent.

The Pennsylvania Attorney General's Questionable Approval

The Attorney General of Pennsylvania, charged with the duty to supervise charitable Foundations, did not investigate the true causes of the Barnes Foundation financial crisis and the influence of the trustees' political alliances on the Attorney General are apparent. Without conducting any of the investigations required by law before a public charity's by-laws can be modified, namely trustees' management and administrative decisions, Pennsylvania's Attorney General, Mike Fisher and his Deputy Lawrence Barth allowed the Barnes Foundation trustees' petitions to be filed in court on 5 June, 2003 (*BarnesWatch*, June 2003, p.3). However, as political alliances described in the previous section confirm, Fisher and Barth's turning a 'blind eye' to the Foundation's increased expenses and the rising deficit created by Camp and the current trustees, is not surprising. According to the *BarnesWatch*, before the by-law modifications were approved by the Attorney General, Barnes Foundation trustees were not questioned on their spending, including \$4.2 million in legal fees between 1997 and 2001 and \$8.3 million in deficit spending for the same period (Spring 2005, p.3).

Furthermore, having acknowledged that the educational and aesthetic essence of the Barnes Foundation would be greatly challenged by the proposed by-law changes, Fisher stated:

We're satisfied that the resources available for the Barnes are at a point that it's perilously close to making them insolvent. We think this is far preferable, and I

believe if Albert Barnes were alive today, he would put his stamp of approval on this (Rose, 2003).

Contrary to the Attorney General, anyone familiar with Barnes, his philosophies and his aesthetic theories and his disregard for the casual use of art as entertainment, would argue otherwise. As highlighted in Chapter 1, Barnes' intentions to maintain his art collection and arboretum intact as symbiotic educational tools for the study of aesthetics and art appreciation were explicit: "This means specifically that the Barnes Foundation is to be maintained perpetually for education in the appreciation of the fine arts and aesthetics" (Barnes Foundation's By-laws, 1922, amended 1946, Para. 34). According to legal scholar Chris Abbinante, Barnes' strict management guidelines were designed to keep the Foundation's trustees from the 'self-profiteering' behavior displayed by the current management employees and their allies (1997, p.2).

With little regard for Barnes' specific wishes and the laws of public trust administration, the trustees and management have persistently veered from their fiduciary duty of loyalty. The trustees' and management's decisions are more consistent with their own economic and political desires than those of Dr. Barnes. Moreover, the trustees' decisions and media releases reveal that they pledge their loyalty to administering the Foundation according to their new patrons' directions in order to satisfy their economic and political interests. Attorney General Fischer, however, did not question the trustees' loyalty, as outlined in the trustees' statement:

While the Pew and Lenfest have assured The Foundation that they are committed to maintaining its independence and its 80-year old mission concentrating on education and art appreciation, they have also made clear that they would carry out their offer only on the condition that The Foundation better sustain its mission by moving the Gallery collection out of Lower Merion and eliminating those

elements of its governing documents that restrict its service to its public and educational purposes. ("Summary of the Petition", 2002)

The reality is that supporters of moving the collection are not concerned with preserving America's cultural heritage, nor are they concerned with saving Barnes' aesthetic and educational missions. Contrary to the claim that "this [three-campus] vibrant model for the Foundation thus would build on and expand the vision of Barnes and his experiment in education", Albert Barnes' educational and aesthetic principles are the very elements that stand to be threatened by the three-campus model ("Statement of the Petition", the Barnes Foundation, 2002; Nivala, 2003, p.10).

It can be seen through the trustees' proposed development plans, presented to the Orphan's Court to support their argument for by-law modifications, that the trustees' broader vision in the three-campus model is exploitation of the art collection as a fundraising tool and tourist attraction. The trustees and their financial backers, the Pew, Lenfest and Annenburg trusts, are intent on using the art collection as the primary resource for a full-time museum. Moreover, the proposed by-law changes presented in the trustees' court appeal, including relocation of the art collection to a 120,000–150,000 square foot museum in central Philadelphia, will grossly alter the Foundation's intended educational mission, as well as Barnes' aesthetic vision (Bolling, 2003; *re The Barnes Found. A Corp. Fiduc. Rrpt.*, No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004, p. 7).

As described in the following, Albert Barnes' charitable intentions appear secondary to the economic and political interests of those favouring the collection's move. It can be concluded that the economic and political interests are transforming the

Barnes art collection into the very type of institution that Albert Barnes spent his lifetime opposing.

The Barnes Trustees and the Charitable Alliance

After gaining political support, including that of the media and the Attorney General's office, Barnes Foundation trustees appealed in Pennsylvania' Montgomery County's Orphan's Court to amend by-laws on 24 September 2002 (Anderson, 2003, p. 218). As the doctrine of administrative deviation is granted more frequently than the more severe doctrine of *cy pres*, the trustees presented their appeal under the rules of administrative deviation (*Memorandum of Law in Support of the Barnes Foundation's Petition to Amend Its Charter and By-laws at 3-4, In re Barnes Found.*, A Corp., Fiduc. Rptr., No.58, 788, Pa. Ct. Com. Pl. Montgomery County Orphans' Div. Sept. 24, 2002). The petition stated that Barnes Foundation by-law restrictions and the Lower Merion zoning restrictions led to "impractical and impossible conditions for the Foundation's primary purpose to be fulfilled" (*re The Barnes Found.* A Corp. Fiduc. Rptr., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004). Claiming first that no part of the Foundation "will change... any central purpose for which the Foundation was founded" the petition went on to state that if modifications did change the central purpose of the Foundation, they could be justified under the doctrine of *cy pres* ("Statement of the Petition", 2002):

The doctrine of *cy pres* would justify a modification to ensure that the Foundation's indisputably paramount purpose – advancing education and the appreciation of fine arts – can be accomplished fully ("Statement of the Petition", the Barnes Foundation, 2002).

Although the severity of the modifications sought by the trustees suggests that *cy pres* was the appropriate legal doctrine, the Court considered that the proposed changes constituted administrative deviations and therefore authorized the application under administrative deviation (Eisenstein, 2003, p.9; *re The Barnes Found. A Corp.*, Fiduc. Rptr., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004). Without presenting alternative remedies for the Foundation's financial crisis, the trustees appealed to the Court stating that the four by-law modifications, conditions of the Pew, Lenfest, and Annenburg trusts' donation, were necessary for the survival and for the preservation of the Barnes Foundation.

The Trustees' Petition Goes to Court

Although the trustees and the Pew, Lenfest and Annenburg trusts had aligned the political support necessary to influence the Orphan's Court, the Court did not accede to the trustees' first petition to alter the by-laws in the first hearing in September 2003. The Court denied most of the proposed amendments, including relocation of the collection in January 2004 (*re The Barnes Found. A Corp.* Fiduc. Rptr., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004, p.2). The one amendment that the presiding judge, Mr. Justice Stanley Ott, did permit was to increase the number of members of the Board (Horn & Blanchard, 2004). The Court denied the petition to relocate the art collection and create the three-campus model on the basis that the trustees had not presented sufficient evidence that the move was a 'necessary' remedy to the Foundation's deficit (*re The Barnes Found. A Corp.* Fiduc. Rptr., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004, p.2). The Court did not completely disapprove of the

trustees' proposals but gave them the opportunity to gather more evidence and witnesses to support the plea of 'necessity'.

Following the Court note in its January 2004 *Memorandum Opinion*, Mr. Justice Ott affirmed that any deviation from the terms of the trust indenture that the Court would approve must be the "least drastic solution necessary to advance the trust's central purpose" (*Post Hearing Brief of the Amicus Curiae, in re The Barnes Found. A Corp. Fiduc. Rptr.*, No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, October 20, 2004, p.4). By September 2004, the Court had heard the trustees' second appeal (p.1). These hearings assessed the various petitions presented by Barnes Foundation trustees to determine whether or not there were alternatives less drastic than relocating the art collection to Philadelphia (p.2). The trustees had the burden to show by "clear and convincing evidence" that the move to Philadelphia is "the least drastic of all available alternatives to preserve the Barnes Foundation" (*Post Hearing Brief of the Amicus Curiae, in re The Barnes Found. A Corp. Fiduc. Rptr.*, No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, October 20, 2004, p.2).

In order to make its decision, the Court demanded proof from the trustees that the gallery's move and the other proposed modifications were 'necessary' (*re The Barnes Found. A Corp. Fiduc. Rrpt.*, No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004,p.2). Moreover, the trustees had to demonstrate that alterations would not disrupt the balance between the gallery's use for Barnes' educational programs and the time reserved for public visits beyond 'necessity' (*Post Hearing Brief of the Amicus Curiae, in re The Barnes Found. A Corp. Fiduc. Rptr.*, No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, October 20, 2004, p.2). The Court sought evidence from the trustees by posing four

questions (*re The Barnes Found. A Corp.* Fiduc. Rptr., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004, p.2):

1. Can the Foundation raise enough money through the sale of its non-gallery assets to keep the collection in Merion and achieve fiscal stability;
2. are there ethical and or legal constraints on such a sale of assets;
3. can the facility envisioned in Philadelphia be constructed on the proposed \$100 million budget and;
4. is the Foundation's three-campus model feasible with a new facility housing the art education and public gallery functions, Merion as the site of the administrative offices and the horticulture program, and Ker-Feal, the Chester County farmhouse on 137 + acres, operating as a living museum of American history? (p.2).

Generating over 1,200 pages of testimony from several expert witnesses, the Court considered the various opinions and the proposed remedies for the Barnes' financial crisis (p.2).

Although several remedies existed, such as the sale of non-gallery assets, increased public access to the gallery, de-accessioning or lending of non-gallery artworks, the trustees presented only two options to the Court: either move the art collection to Philadelphia and create a three-campus model of the Barnes Foundation, or sell non-gallery assets (*Post Hearing Brief of the Amicus Curiae, in re The Barnes Found. A Corp.* Fiduc. Rptr., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, October 20, 2004, p.30). The trustees' financial and development projections that argued the pros and cons of these two options, concluding that the three-campus model for the Barnes was the

better one (*re The Barnes Found. A Corp.* Fiduc. Rptr., No.58, 788, Orphan's Ctr. Div.

Ct. C.P., PA, December 13, 2004, p.10). Deloitte & Touche prepared the cash-based, multi-year analysis of the three-campus model (p.10). Most of the trustees' claims are based on this analysis.

The parameters of the financial proposal for the three-campus model were outlined as follows: the gallery in Merion would be recreated within the Philadelphia facility; the art education program would continue to have dedicated hours; there would be expanded hours of operation; the horticultural education program in Merion and the public access to the grounds would continue; the gallery in Merion would be renovated to house the archives, a library and a research center; and Ker-Feal would be developed, as funds became available, to further apply Barnes' educational philosophies and increase public access to the estate (p.2).

The projected income from proposed revenue sources, including increased fundraising and income generated through the three-campus model, envision all the programs running at full capacity, beginning one year after the collection is moved to Philadelphia (*re The Barnes Found. A Corp.* Fiduc. Rprt., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004, p.13). To test the reasonableness of the projections, Deloitte & Touche performed two levels of 'benchmarking'. The first level developed a custom survey of financial operations; the second other sought out industry-level data for comparison (p.13). Rather than comparing the Barnes Foundation to other educational institutions, even though the Foundation is chartered as an educational facility, the trustees compared it with other full-time museums, thus revealing their intentions of transforming the Barnes into a museum (Barnes Foundation's By-laws, 1922, Article I).

As a result, the industry-level data used to support the trustees' three-campus model, including projected revenue targets, related statistics, and ethical standards, represents figures relevant to the full-time museum industry in America.

Evidence presented by the Barnes trustees and their opponents reveal that the trustees' proposed by-law modifications are not the 'least drastic option' for saving the Barnes Foundation, nor can they be said to be a 'necessity' as supported by 'clear and convincing' evidence. In addition, as several witnesses at the hearing argued, the "aggressive" fiscal return projected by the trustees' three-campus model is based on unqualified funding and admission estimates. Furthermore, numerous art professionals and legal reporters have also argued that the Court's decision to relocate the Foundation's artworks is based on several imponderables (*Post Hearing Brief of the Amicus Curiae, in re The Barnes Found. A Corp. Fiduc. Rpt.*, No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, October 20, 2004; Sozanski, 2004). In the following, it will be argued that the trustees' three-campus model will increase the Foundation's financial burden while also deviating from Barnes' intended educational mandate.

Raising Opposition to the Trustees' Petition

In opposition to the trustees' moves to convert the Barnes Foundation into a full-time museum, three past Barnes students, represented by their legal counsel, Terrance Kline, argued against the petition to alter the Foundation (Vogel, 2004). The dissenters were permitted legal standing at the hearings as 'friends of the court', or *Amicus Curiae*, and could call witnesses and submit briefs. The Foundation's opponents challenged the petition to change the collection's location. In the words of reporter Julia Klein, their goal

was to save “the cultural jewel from cultural homogenization” (2005). They argued that the petition to amend the charter and by-laws to “allow relocation of the art collection and elimination of the terms setting the balance between public visitation and educational use of the Merion gallery” should not be approved (*Post Hearing Brief of the Amicus Curiae, in re The Barnes Found. A Corp.* Fiduc. Rptr., No.58, 788, Orphan’s Ctr. Div. Ct. C.P., PA, October 20, 2004, p.2). They challenged claims that the move and its ancillary modifications to Barnes’ by-laws was the ‘least drastic remedy’ for the Foundation’s financial crisis, stating that, “other alternatives and revenue sources exist that are far less drastic and less risky than the grossly expensive plan to move the gallery to the City of Philadelphia” (p.5).

Presenting alternative financial assessments and reports, including various appraisals of the collection and other assets, and other professional witnesses, the *Amicus Curiae* disputed the trustees’ financial projections (p.10). The *Amicus Curiae* challenged the severity of the supposed ‘dire’ financial situation. In their post-hearing brief, they stated:

If the hearings before this Court in September 2004 demonstrated anything, it is that sufficient revenue can be generated by other means, and equally importantly, the state of financial exigency is far less dire than the Court has been led to believe. (p.2)

They claimed that the current structural deficit, confirmed by two of the Foundation’s witnesses, is less than half that what was stated in December 2003, or roughly \$1 million, plus or minus a \$100,000 (p.7). Similarly, they recalled statements made by Foundation witnesses who admitted that the current structural deficit would be eliminated by income earned from a \$20-\$25 million endowment (p.8). Rather than the \$85 million presented

by the trustees and Deloitte & Touche as the required amount of money for the Foundation's endowment, the *Amicus Curiae* noted that only \$20-\$25 million would be required to cover the deficit (Tobin, 2002; *re The Barnes Found. A Corp.* Fiduc. Rptr., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004, p.13). The *Amicus Curiae*'s arguments were based on the \$20-\$25 million figure.

Following this argument, the *Amicus Curiae* disputed the 'necessity' of the trustees' proposed three-campus model, which would require an additional \$130 million to cover the costs of building a new facility and expanding other ancillary programs. They disagreed with the trustees' claim and 'proof' that no ethical and fiscal options could alleviate the Foundation's deficit other than relocating the gallery (p.10). They argued that the proposed modifications added superfluous expenses (p.22). Although the trustees' attested that \$20 million could be raised from the sale of the 138-acre Ker-Feal estate, they claimed that the financial crisis "could not be resolved" with the sale of Ker-Feal alone (*re The Barnes Found. A Corp.* Fiduc. Rptr., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004, p.13). Legal counsel for the *Amicus Curiae* argued that selling 120-130 acres of land belonging to the Ker-Feal estate and other non-gallery assets would generate the needed \$20-\$25 million required to replenish the Foundation's endowment and keep the collection intact and in the Merion gallery (p.17).

The *Amicus Curiae* also argued that the sale of non-displayed artworks belonging to the Barnes Foundation would not violate ethical or legal guidelines as the trustees had claimed (p.20). The *Amicus Curiae* brief stated: "All three witnesses who testified on the subject of the museum community's view towards selling artwork agreed on one point – there is no legal impediment to selling the non-gallery artwork" (p.20). Marie Malaro, a

witness for the *Amicus Curiae* and an acclaimed specialist in legal and ethical standards of museums, was unequivocal that the Barnes’ “non-gallery art is not subject to museum community deaccessioning rules” (p.21). Her explanation of the Barnes Foundation’s exemption from the museum industry’s ethical standards was as follows:

For that to happen, you have to have a museum, you have to have a mission and you have to have collecting goals... None of this applies to the non-gallery objects of the Barnes. There is no museum. Nothing about the gallery is a museum...the main work of that organization is to teach the students. (p.21)

Malaro further commented that the trustees’ treatment of the Barnes art as if it were a museum collection was wrong, and that Albert Barnes did not appear to have ever wanted his collection to be viewed as a museum (p.21).

The sale of these alternative revenue sources, the *Amicus Curiae* claimed, did not violate Barnes’ bylaws, as there are no restrictions on such sales: “The legal reality is that these properties are not alienated from sale by the express terms of the Indenture or by Dr. Barnes’ will” (p.17). The *Amicus Curiae* further argued that since these alternative revenue sources could provide the funds to generate a sufficient endowment, and they similarly did not violate the Barnes’ Foundation indenture, they were “less drastic” than the trustees’ proposed relocation of the art (p.18). Furthermore, the *Amicus Curiae* raised doubts about the trustees’ dedication to upholding Barnes’ charitable intentions to preserve the Foundation as an educational institution. Arguments advanced by the *Amicus Curiae* were also supported by former Foundation President Richard Glanton, who opposed relocating the art collection. Glanton told *The Philadelphia Daily News* in 2003 that

The Barnes Foundation was not created to promote tourism in Philadelphia...If you balance Barnes’ wish of promoting education and cultural diversity against

the city of Philadelphia's desire to bring in revenue by increasing tourism, it becomes clear that Barnes' intentions should prevail and that the responsibility of promoting tourism should not be hoisted on the back of Albert Barnes. (Bolling, 2003)

Reported in the *BarnesWatch*, former President of the Philadelphia Museum of Art, Robert Montgomery Scott, said "it would be better for the Foundation to focus on its core missions – the art and education program – and exclude ideas of expansion until financial stability was achieved" (*BarnesWatch*, June 2003, p.2).

Supporting the claim that the trustees' by-law modifications do not guarantee the preservation of the Barnes Foundation, and that the three-campus model does not offer a remedy for the Foundation's financial crisis with the least drastic alterations to Barnes' intentions, several short-comings in the trustees' arguments will be explored. It will be argued that the trustees' fundraising budget, the construction budget, and projected revenues are unrealistic and present great risks to the success of both the educational program and to the Foundation as a whole.

Financial Viability of the Trustees' Three-Campus Model

Based on the trustees' projections, in order to generate revenues expected from a new location, the Foundation's 'museum-type activities' focused on generating revenue would have to significantly keep increasing (Weil, 2002, p.31). As a result, increased public access would disrupt Barnes' stated goals of using the collection for the "advancement of education and appreciation of the fine arts" (Barnes Foundation's By-laws, 1922, Article 2). The Court's permitting the trustees to increase public visiting hours, the display of non-Barnes artwork, and increased admission prices with unfettered

discretion, would in effect alter the Foundation's core charitable purpose. As stated by Matthew Schwenderman, one of the Deloitte & Touche principals responsible for the trustees' financial projections, "taken collectively, the effect of these changes will be to really transform the organization" (*Post Hearing Brief of the Amicus Curiae, in re The Barnes Found. A Corp.* Fiduc. Rpt., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, October 20, 2004, p.24).

In addition to violating Albert Barnes' intent, the trustees' plan to relocate the collection as a remedy to the financial crisis is faulty (Horn & Blanchard, 2004). Financial problems that may affect the success of the three-campus model are based on unrealistic fundraising projections and the speculative admission numbers. The trustees' estimates can be challenged, and it can be argued that they unnecessarily alter the Barnes Foundation's educational mandate without improving its financial security.

Against the Donor's Will: Broadening Sources of Revenue

As mentioned in Chapter 1, Albert Barnes strictly prohibited the use of the art collection for fundraising (Schack, 1963, p.178). More specifically, he prohibited the Foundation from running fundraising events and disapproved the use of his art collection as a 'backdrop' for society functions for individuals with "special privileges" including, affluence (Barnes Foundation's By-laws, 1922, Para. 33). Nonetheless, in 2002, the Orphan's Court approved the trustees' appeal to alter the fundraising provisions that were "inhibiting the Foundation's financial stability" (*Memorandum of Law in Support of the Barnes Foundation's Petition to Amend Its Charter and By-laws at 11-12, In re Barnes Found.*, No.58,788, Pa. Ct. Com. Pl. Montgomery County Orphans' Div. Sept. 24, 2002).

By accepting the trustees' claim that relocation of the art collection was a fundraising 'necessity', in order to attract donations from other affluent 'alpha donors' and philanthropists, the Court permitted a change that contravened the terms of the original trust (*re The Barnes Found. A Corp.* Fiduc. Rrpt., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004, p.11). Notwithstanding the by-laws and previous court decisions to bar fundraising, the Court concluded that the move was a 'necessary' modification to meet "projected revenues" by attracting the "all important alpha-donors" (p.38).

The trustees' projections grossly overestimated fundraising revenues, and therefore the Court's decision to allow relocation of the art collection is not based on 'clear and convincing evidence'. The projections are hypothetical and overly optimistic, and would be difficult for even the most experienced fundraisers to achieve. The trustees' projections estimated that development and fundraising efforts would garner \$2,393,000 for the year before the move, \$1,478,000 for the year of the move, \$5,123,000 for the opening year, and \$4,250,000 for the two following years (*re The Barnes Found. A Corp.* Fiduc. Rrpt., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004, p.11). The projected development income of \$4,250,000 is estimated to cover 37 per cent of the Foundation's budget for the Philadelphia art gallery after its opening year (p.12). To reach these fundraising goals, John Callahan Jr., a consultant in institutional fundraising, testified "that the Board of trustees would have to be aggressive and totally committed" (p.16). He stated that the Board would have to be "very swift out of the blocks" and that public relations staff would have to be added to the Foundation to meet these expectations (p.16). In his final comment on the trustees' ability to raise

\$4,250,000, Callahan stated it is “not a walk in the woods...not a job for neophytes... aggressive by definition. It’s audacious” (*Memorandum of Law in Support of the Barnes Foundation’s Petition to Amend Its Charter and Bylaws at 11-12, In re Barnes Found.*, No.58,788, Pa. Ct. Com. Pl. Montgomery County Orphans’ Div. Sept. 24, 2002, p.27).

In addition to ‘audacious’ fundraising demands, the projections also speculate that the three-campus model will create modest surpluses each year, based on annual budgets of \$12,275,000 for the opening year, and \$11,300,000 for two years thereafter (*re The Barnes Found. A Corp. Fiduc. Rptr.*, No.58, 788, Orphan’s Ctr. Div. Ct. C.P., PA, December 13, 2004, p.13). If achieving a \$4,250,000 fundraising goal requires ‘aggressive’ and ‘audacious’ conduct, and is ‘not a walk in the woods’, it is clear that the trustees’ estimated surpluses are unrealistic. The trustees will have to be even ‘swifter off the block’, and more prudent in their expenses in order to achieve Schwenderman’s estimated surplus from the three-campus model. The previous spending record of Camp and the current trustees suggests that the likelihood of the three-campus model achieving a surplus is neither ‘clear’ nor ‘convincing’. Acknowledging these doubts, the Court referred to the trustees report as “very aggressive” in its estimates of financial success (*re The Barnes Found. A Corp. Fiduc. Rptr.*, No.58, 788, Orphan’s Ctr. Div. Ct. C.P., PA, December 13, 2004, p.38).

Moreover, it was not supported in court that the trustees’ projected three-campus model, including its needed fundraising revenues, is ‘necessary’ for the survival of the Foundation. The trustees’ three-campus scenario requires an \$130 million more than the \$20-25 million estimated by the *Amicus Curiae* and others as necessary to replenish the Barnes’ endowment and stabilize its finances (*Post Hearing Brief of the Amicus Curiae*,

in re The Barnes Found. A Corp. Fiduc. Rprt., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, October 20, 2004, p.23). Opponents to the petition for changes to the trust argue that, since it would cost the three charitable patrons only an estimated \$25 million to revitalize the Barnes in its current location rather than the \$150 million stipulated by the trustees, it suggests that the other trusts are more interested in trying to control Philadelphia's cultural community than in saving the Barnes Foundation (Vogel, 2003). The lower figure estimated by the *Amicus Curiae* and verified by two of the Foundation's own witnesses is more readily attainable than the trustees' \$150 million, presented as a 'necessity' to establish the Foundation's three-campus model (*Post Hearing Brief of the Amicus Curiae, in re The Barnes Found. A Corp.* Fiduc. Rprt., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, October 20, 2004, p.8).

Despite skepticism about the trustees' evidence, Mr. Justice Ott stated "the Foundation is raising the bar enormously above both its own fundraising abilities in the past and those of non-profits in general" (*re The Barnes Found. A Corp.* Fiduc. Rptr., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004, p.38). After such public acknowledgement that the projected fundraising revenues were ambitious, it is surprising that Mr. Justice Ott did not question the validity and necessity of the trustees' over-projections further (Vogel, 2004). Mr. Justice Ott further commented on the uncertainty in the potential income growth in the trustees' fundraising goals: "Of serious concern are its fundraising goals...there is a real possibility that the development projections will not be realized" (*re The Barnes Found. A Corp.* Fiduc. Rptr., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004, p.38). Mr. Justice Ott's decision to allow the trustees' to amend Barnes' by-laws when the three-campus model clearly did

not guarantee a more stable and successful future for the Barnes is curious. On the contrary, it revealed flaws in the three-campus model that might not necessarily resolve the Foundation's financial problems.

Disputing the need to relocate the art collection, the dissenting alumni, the Township of Lower Merion and several others, rejected the trustees' claims that fundraising and revenues could not be sufficiently increased if the collection remained in Merion (*BarnesWatch*, Spring 2005, p.2). The trustees have undertaken no fundraising efforts since the partnership with the Pew, Lenfest and Annenberg trusts that was established in 2002. In the meantime the pressure to meet the aggressive fundraising goals has been increased: "Not only has the petition to move affected fundraising, but it has held up the process of selecting new board members that can only improve the current fundraising results" (*Post Hearing Brief of the Amicus Curiae, in re The Barnes Found. A Corp. Fiduc. Rptr.*, No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, October 20, 2004, p.11). Evidently, the trustees did not protect fundraising efforts in Lower Merion, raising suspicions that efforts have been focused on a move supposedly needed to attract the 'necessary alpha donors'. The *Amicus Curiae* claimed that by "rejecting Dr. Barnes' express wishes, the trustees have temporarily alienated some donors" (p.11). For example, the president of the Kelly Foundation, who testified that his organization had pledged \$100,000 to the Barnes Foundation, said it was conditional upon the Foundation keeping its collection in Merion (p.13). The move's dissenters further explained that an expanded Board of Trustees should be able to have the same positive effects on the Foundation's fundraising capabilities if it stays in the Merion location (p.12; *BarnesWatch*, Spring 2005, p.4).

This viable option of increasing fundraising in Merion was not adequately explored by the Barnes trustees or presented to the Courts, leaving in question the claim of ‘necessity’ to justify relocating the art collection. When questioned in passing about this option, the trustees argued that restrictions imposed by the Township of Lower Merion impinged upon their ability to partake in broader fundraising initiatives (*Memorandum of Law in Support of the Barnes Foundation’s Petition to Amend Its Charter and Bylaws, In re Barnes Found.*, No.58,788, Pa. Ct. Com. Pl. Montgomery County Orphans’ Div. Sept. 24, 2002). The trustees have always used the collection’s location in the Township of Lower Merion as a scapegoat for their limited success: “The Merion facility’s neighbors and township sought to restrict access through zoning citations and lawsuits” (“Statement of the Petition”, the Barnes Foundation, 2002). The perception that this was the truth was left unquestioned in the 2004 hearings regardless of the fact that several of the Lower Merion neighbours disapprove of the proposed move of the art collection (Appendix B, Figure 10).

Contrary to the common perception presented in court in January 2004, all 14 Township Commissioners passed a unanimous resolution supporting efforts to keep the art collection in Merion (*Post Hearing Brief of the Amicus Curiae, in re The Barnes Found. A Corp. Fiduc. Rptr.*, No.58, 788, Orphan’s Ctr. Div. Ct. C.P., PA, October 20, 2004, p.12). One of the three significant resolutions made by the Lower Merion Civic Association states that they would “welcome a process by which all [interested] parties could... work toward a goal of maintaining The Barnes Foundation in its present location” (*BarnesWatch*, Spring 2005, p.3). Joseph Manko the president of the Board of

Commissioners of Lower Merion Township, explained in court that the January 2004 resolution was

to explain to the public, and I assume that the Judge would be able to take judicial notice, that the Township wished to have the Judge explore all feasible alternatives since it was not the Township's intention that the Barnes move to Philadelphia. (*re The Barnes Found. A Corp.* Fiduc. Rpt., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004, p.31)

The Township agreed to allow the trustees to build an entrance with an additional parking lot with direct access to the facility by way of Lancaster Avenue or City Line Avenue (p.23). This would resolve neighbours' complaints and lessen traffic on Latches Lane, the street from which the main entrance to the Barnes property is currently reached. At the same time, this would have satisfied the Foundation's request to increase admissions and thus resolve both parties' concerns.

Manko and James Ettelson, another Lower Merion Commissioner, testified that the Township does support the Foundation in hosting more visitors (p.31). If the trustees did take advantage of this resolution and thereby increase admittance, the increased revenue would put the Foundation on the road to fiscal stability (*re The Barnes Found. A Corp.* Fiduc. Rpt., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004, p.31). This appears to discredit the trustees' claim that the relocation is a 'necessity'. A former trustee, Mr. Harmelin, proclaimed that after the resolution to petition for the move was passed, the Foundation took no affirmative action to secure relief from the restrictions placed by the Township on Foundation operations (p.23). The possibility of increasing admissions and revenue in Merion suggests that options other than relocation do indeed exist and were not presented by the trustees as requested by the Court (p.1).

The Court acknowledged the positive efforts initiated by the Township of Lower Merion to repair the damaged relationship with the Barnes Foundation (p.35). Moreover, Mr. Justice Ott expressed discontent with the trustees' inaction in resolving the long-standing disagreement. Regarding the trustees' refusal to participate amicably with the Township, he stated:

It is also clear that the Foundation has no interest in reaching out for the olive branch extended by the Township, and absent this first step, no resolution is possible. (p.36)

Although the Court's final decision indicated satisfaction that all the possible alternatives to the gallery's move had been explored, these statements suggest otherwise. The option for the Foundation to increase fundraising in its current location with the help of the Township was not adequately explored and undercuts the argument of 'necessity'.

The Court's acknowledgement that it has "limited judicial powers" to force the trustees to explore a resolution with their Merion neighbors does not justify the application of administrative deviation as the 'necessary' remedy to the Barnes' financial crisis. Mr. Justice Ott stated: "this Orphan's Court has no jurisdiction to broker or impose any changes in the unfortunate situation between the Foundation and the Lower Merion Township" as he claimed that it was a matter for the two parties to decide themselves (p.35). However, changing Albert Barnes' intentions, and accommodating the Foundation's benefactors over the donor's intents, is not a rectification that is justified by the Court's inability to mediate a resolution between the two parties. A more appropriate resolution that the Court might have proposed would have been to decline the trustees' appeals until they had proven with 'clear and convincing' evidence that an 'olive branch' alternative had been fully explored. As Mr. Justice Ott stated himself, the

trustees have yet to pursue this alternative, one that evidently bears ethical and legal benefits over the art collection's relocation to Philadelphia (*BarnesWatch*, Spring 2005, p.2). The most notable benefit in keeping the art gallery in its current location is that Barnes' charitable intentions would not be altered and the Foundation's unique mandate would have been preserved.

Threatening Education Without the Benefit of Financial Stability

The trustees professed the 'necessity' of their proposed by-law changes, proclaiming that they would help realize Barnes' educational intentions:

With the proper funding and support, the acclaimed collection now in the Foundation's Merion gallery could be displayed in a larger, more user-friendly gallery, offering... a welcome viewing experience for students and seasoned and novice visitors alike (*Memorandum of Law in Support of the Barnes Foundation's Petition to Amend Its Charter and By-laws at 11-12, In re Barnes Found.*, No.58,788, Pa. Ct. Com. Pl. Montgomery County Orphans' Div. Sept. 24, 2002).

Furthermore, Mr. Justice Ott claimed he had a "clear conscience" in his decision to permit these modifications based on "the Foundation's absolute guarantee that Dr. Barnes' primary mission—the formal education programs—will be preserved, and indeed, enhanced as a result of these changes" (*re The Barnes Found. A Corp.*, Fiduc. Rptr., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004, p.38). Regardless of the overt alterations that the modifications will cause to the Foundation's form and function, the Court permitted the amendments as 'administrative necessities' for the trustees' fundraising and development projections (p.37). In addition to relocating the art gallery, several other by-law modifications that the Court permitted to assist the trustees' 'aggressive' revenue projections drastically altered Barnes' core intentions.

These modifications included increases in admission fees, longer public visiting hours and an increase in the number of permitted visitors. The following shows that the Court approved by-law amendments that gave greater consideration to the demands of the Foundation's benefactors, the Pew, Lenfest and Annenburg trusts, than to the preservation of the Barnes Foundation.

More than Raising the Admission Fee

Albert Barnes' desire to make art accessible to all social groups without discrimination was one of his primary purposes in creating his Foundation:

the students enrolled in our classes have come from all parts of the world, have comprised all strata of society from college professors to truck drivers, all races, and all shades of political and religious beliefs. (Plaque at the Barnes Foundation, visited March 18, 2005).

Barnes' provision against admission fees was to ensure the gallery's affordability to every 'strata of society' "democratically" and "without special privilege" had already been amended (Barnes Foundation's By-laws, 1922, Para. 30). Until 2004, admission was \$5, which had been raised from \$1 in 1997 (*in The Barnes Found.*, A Corp, No. 8, 18 Fiduc. Rptr. 2d 33, 33, 1997). In a 1997 appeal to raise the admission fee, the trustees sought the permission to increase the fee to \$10. However, the Court concluded that to increase the admission fee beyond \$5 was "unnecessary" and that the fee was already a significant deviation from Barnes' original intentions (*in The Barnes Found.*, A Corp, No. 8, 18 Fiduc. Rptr. 2d 33, 33, 1997). Furthermore, the 1997 increase was permitted only on the grounds that admission fees should be increased in order to match inflation

since the Attorney General imposed the \$1 admission fee in 1958, as covered in Chapter 2.

Ignoring this precedent, the proposed by-law changes of September 2004 petitioned the Court for “unfettered discretion to set admission fees” (*Memorandum of Law in Support of the Barnes Foundation’s Petition to Amend Its Charter and By-laws at 11-12, In re Barnes Found.*, No.58,788, Pa. Ct. Com. Pl. Montgomery County Orphans’ Div. Sept. 24, 2002). This amendment, approved by Mr. Justice Ott, permits raising admission fees an additional \$5 to \$7, bringing it in line with the \$10 to \$12 fees of similarly sized, full-time museums (Toobin, 2002). Legal reporters Jeffrey Toobin and David Zucchino wrote that the trustees claimed that it costs the Barnes \$60 for every visitor to gallery and that the increased admission price to \$10-\$12 is ‘necessary’ to balance the Foundation’s budget (Tobin, 2002; Zucchino, 2002).

Unlike the modest increases permitted in the past, when admission fees were adjusted only to cover inflation, this decision was a gross deviation from Barnes’ clear intentions to keep admission accessible for the benefit of ‘plain and working people’ (Barnes Foundation’s By-laws, 1922). In Barnes’ words, tuition and admission “has always been free”, according to a plaque at the estate as of 18 March 2005. Although the trustees claim they will raise admission fees to about \$12, there is no guarantee or legal restriction that they will not raise them further. The trustees’ decision to raise fees beyond the \$12 allowed by the Court is a likely possibility in order that the trustees meet their ‘audacious’ fundraising goals.

The Foundation presented no evidence that the by-law modification to raise admission fees to \$12 per visitor would affect visitor levels any differently in Merion

than in Philadelphia. As the *Amicus Curiae* claimed, this single deviation, if it were allowed at Merion without any other changes, would eliminate over one third of the present running \$1.2 million annual deficit (*Post Hearing Brief of the Amicus Curiae, in re The Barnes Found. A Corp.* Fiduc. Rptr., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, October 20, 2004, p.13). According to the *Amicus Curiae*, if applied at the current Merion location, the Court would have been more justified in permitting the admission increase under the doctrine of administrative deviation (p.13). The Orphan Court's approval of extensive by-law modification is demonstrably "more drastic" than an increase in admission fees in Merion. Mr. Justice Ott's approval for the trustees' "unfettered discretion to set admission fees" is another example of how the Court permitted by-law modifications beyond the necessity of preserving the Foundation.

Operation Hours for Public Visits

As much as the trustees' relied on increased revenues from higher admission fees, the projections for the three-campus model significantly rely on dramatic increases in admission numbers (*re The Barnes Found. A Corp.* Fiduc. Rpt., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004, p.11). However, in order to reach the numbers required to meet revenue expectations, the trustees would have to severely modify the Foundation's focus on education. John Nivala and Hilton Kramer explain that, regardless of the claims made by the trustees that the three-campus model would 'increase' the Foundation's educational programs, their plan was fundamentally to use the art collection to attract tourists and museum visitors (Nivala, 2003, p.3; Kramer, 2003). Matthew Schwenderman, the primary Deloitte & Touche principal involved in the

three-campus model financial plan, testified that of the approximately 200,000 general visitors predicted per year (after the opening year), 180,000 would visit the collection in the Philadelphia gallery (*re The Barnes Found. A Corp. Fiduc. Rrpt.*, No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004, p.11). The other 20,000 general visitors and 20,000 students would be divided between the campuses at Merion and Ker-Feal's living history museum (p.12).

At the hearings, when Kimberly Camp was asked about the validity of these projections, she acknowledged "the Foundation envisions an aggressive schedule, including night hours and a 7-days a week operation" (*Post Hearing Brief of the Amicus Curiae, in re The Barnes Found. A Corp. Fiduc. Rrpt.*, No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, October 20, 2004, p.28). However, the trustees' assurance that 27 hours out of the 69 weekly operating hours at the Philadelphia gallery would be devoted "exclusively" to Barnes educational programme is contradicted by several of the by-law modifications themselves, including the rise in public visitation hours, the new museum's structural design, as well as the estimated admission numbers (Rose, 2003). The gallery's public visitation and education use intended by Dr. Barnes was to be over 80 per cent of the art gallery's operating hours (Barnes Foundation's By-laws, 1922, Para. 29). The same by-law stipulates that "the Donor makes these provisions and stipulations for the reason that said *art gallery is founded as an educational experiment* under the principles of modern psychology as applied to education" (Para. 29, emphasis added). With the Court's approval of the trustees' proposal for longer admission hours, and the other by-law changes required to increase public accessibility, the Foundation's primary educational focus was supplanted by a focus on public visitation.

As a result of the Court's approved modifications, Barnes' educational system has been 'drastically' altered; public visitation hours far outweigh the time devoted to art education (*re The Barnes Found. A Corp. Fiduc. Rptr.*, No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004, p.28). Although increasing the public's access to its cultural heritage, namely the visual arts, is a positive action that benefits the majority of society, the Court's decision to improve public accessibility to the Barnes collection would seem to contravene the approved use of the doctrine of administration deviation (*Post Hearing Brief of the Amicus Curiae, in re The Barnes Found. A Corp. Fiduc. Rpt.*, No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, October 20, 2004, p.3). The use of the doctrine of administrative deviation is restricted to the Courts' amendment of by-laws that *do not threaten the core charitable purpose of the Foundation*:

A court may vary specific instructions given by a testator in his will in order to accomplish the end which he had in view, provided such a departure does not impair the interest of any beneficiary or violate the testator's primary purpose (*In re The Barnes Foundation, A Corp.* No.58, 788 April 21, 1971, Op. and Order, Taxis, J.).

The provision settling the balance between educational programs and public visitation in the gallery, outlined in Paragraphs 29 and 30 of the Foundation's by-laws, is one that has a direct impact on the intended beneficiaries of the trust, the students of Barnes' educational programs (*Post Hearing Brief of the Amicus Curiae, in re The Barnes Found. A Corp. Fiduc. Rptr.*, No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, October 20, 2004, p.6).

The trustees' claims that "art classes will be housed in the new gallery where the collection is housed" and that "the artworks will continue to be used in connection with the education program" does not correlate with the trustees' structural plans for the new museum's design and layout (*Memorandum of Law in Support of the Barnes Foundation's Petition to Amend Its Charter and By-laws, In re Barnes Found.*, No.58,788, Pa. Ct. Com. Pl. Montgomery County Orphans' Div. Sept. 24, 2002). The trustees presented plans in court for a 120,000 to 150,000 square foot "more user friendly" museum with "added classrooms" in which Barnes' aesthetic and art appreciation courses will be taught (Bolling, 2003). The plan to build and use classrooms where classes will be held while tourists mill about in the user-friendly galleries, does not suggest that the art will be incorporated in the curriculum of Barnes' aesthetic principles as he established in his Merion gallery (*BarnesWatch*, Spring 2003, p.3). The negative impact this modification will have on Dr. Barnes' intended education mission is profound. As museum attorney Marie Malaro testified:

A large museum will overwhelm or, at least, put in the background Dr. Barnes' purpose... I find it strange that the Trustees are suggesting that they are going to put up a very large traditional museum and then have the gallery in one corner, because it will be lost, and also it will put such a burden on the Trustees to maintain that building. They won't have much time for Dr. Barnes' core purpose. (*Post Hearing Brief of the Amicus Curiae, in re The Barnes Found. A Corp. Fiduc. Rptr.*, No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, October 20, 2004, p.23)

The Foundation's reliance on further public visitation to the art gallery is evidence of the 'drastic' nature of the plan to move the gallery to the City of Philadelphia.

Dramatic Estimation of Admission Numbers

The estimated number of visitors projected in the trustees' feasibility report, is crucial to the three-campus model's success in resolving the Barnes' financial crisis (*re The Barnes Found. A Corp. Fiduc. Rptr.*, No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004, p.13). As Matthew Schwenderman attested, "the accuracy of Deloitte's projections for the Foundation's three-campus operation is largely dependent on the accuracy of the attendance projections" (p.13). It is surprising that the estimates confidently project 240,000 visitors a year, *triple* the current rate of 64,000 (Vogel, 2004; Klein, 2005). Rebecca Rimel, President of the Pew Charitable Trusts, predicted even greater success for the three-campus model: "The new Barnes gallery in downtown Philadelphia would make the art accessible to an estimated 300,000 to 350,000 visitors a year" (Rose, 2003). To meet projected admission numbers, the trustees will have to divert attention from Albert Barnes' original educational programs and increase the hours for public access. According to museum director and lawyer Stephen Weil, to attract crowds of this size, the Foundation's focus will have to parallel that of full-time museums' 'marketing activities' (2002, p.31).

Patricia Horn and David Blanchard reported in *The Philadelphia Inquirer* that in Boston, New York and Washington, public art collections similar in scope to the Barnes collection, draw more than 150,000 visitors a year because of their active participation in diverse ‘museum type activities’ that generate extra revenue and attract greater crowds to their institutions (2004). According to legal scholar Andras Kosaras, these activities include renting the venue as a “hall for hire”, hosting traveling ‘blockbuster’ exhibits, high admission fees (up to \$30), selling merchandise modeled on their collections, and other forms of entertainment other than the display of art (2000, p.6). The Phillips Collection, for example, draws 150,000 to 170,000 visitors a year, the Frick Collection in New York attracts 275,000, and the Gardner Collection in Boston, which also hosts musical events and educational programs, reports 185,000 (Horn & Blanchard, 2004). Both the Association of Art Museum Directors (AAMD) and the American Association of Museums (AAM) approve the above listed activities as ethical and legal means of increasing revenues, and the majority of successful commercial museums in America participate in these activities to varying degrees (Merryman & Elsen, 1987, p.649).

Although these activities are permitted for full-time museums, Albert Barnes specifically prohibited such activities (Barnes Foundation’s By-laws, 1922, Para. 33, 34). In addition, Paragraph 34 of the Trust indenture states that

at no times after the death of the Donor shall the art gallery be used for exhibitions of paintings or other works of art, or of any work whatsoever, that are not the property of the Barnes Foundation (Para. 34).

Furthermore, Barnes iterated that the institution is to “be maintained *perpetually for education* in the appreciation of the fine arts” (Para. 34, emphasis added). Participating in loans, touring exhibitions, and the other ‘museum-type activities’, as carried on at the

Phillips, the Frick, and the Gardner, violates more than the Barnes Foundation administrative stipulations; the core educational purpose of the Barnes Foundation would be altered by the trustees' plans to undertake revenue-generating activities (Kosaras, 2000, p.11).

According to art law specialists, John Merryman and Albert Elsen, there is little dispute that blockbuster exhibitions increase admissions, and, if hosted at the Barnes Foundation, would help the trustees meet their admission projections (1987, p.649). Nonetheless, the so-called 'blockbuster' exhibition, used by museums to attract visitors "who normally don't go to museums" and who are made to "stand in line for hours to see an exhibit", was one of Albert Barnes' major criticisms of full-time museums (p.649). In his own words, posted on a plaque on Foundation property in Lower Merion, the use of art as 'cultural entertainment' is inappropriate: "Art is not a phase of life apart from work-a-day world, to which one may turn in moments of leisure, or perhaps in the name of so-called 'culture', or in a spirit of worship" (Plaque at the Barnes Foundation, visited March 18, 2005). The terms of the Barnes Foundation trust indenture do not support the use of art as entertainment and thereby reject the very basis of blockbuster exhibits. Blockbuster exhibits do not focus on art as "education and the appreciation of fine art...in the true meaning of those words" (Barnes Foundation's By-laws, 1922, Article II & Para. 33).

To the contrary, blockbuster exhibits accentuate the entertainment value of art and 'high culture': in the words of Andras Kosaras, "sensationalize art and they will come" (2000, p.12). These events are used as performance measures for museums in order to

secure greater levels of funding from current and potential donors. John Merryman and Albert Elsen attest that

a blockbuster's success can create *unfair or intolerable pressures* on a director and staff to maintain a succession of such shows in order to increase and hold membership, attract gifts of art and money, maintain the goodwill of the local politicians, Chamber of Commerce, and business community. (1987, p.649, emphasis added)

As noted by Merryman and Elsen, blockbuster exhibits run counter to Barnes' intentions to keep his Foundation "democratic and educational", void of political and pecuniary influences (Barnes Foundation's By-laws, 1922, Para. 33). The expectations placed on museums once they participate in blockbuster exhibitions as a means of increasing admissions, would be an additional pressure facing the Barnes Foundation once it embarks on museum-type activities (Elsen, 1980, p.24). The Philadelphia Art Museum, for example, recorded 800,000 visitors a year over the past three years and reported the attendance was influenced by three popular special exhibitions, as reported by Edward Sozanski of *The Philadelphia Inquirer* (2004). The blockbuster tour of Thomas Eakins' work brought in 100,000 visitors. Even greater numbers, 220,000 and 318,000 visitors respectively, saw Edgar Degas and Vincent van Gogh's works (Sozanski, 2004).

By disregarding Barnes' instructions and his objections to loans and special exhibitions, and by disregarding the inherent pressures of such activities, the Barnes trustees plan to display touring exhibits as one of its primary means of meeting its high visitor projections. Attesting to this claim, the *Amicus Curiae* claim that the trustees seek to

take advantage of opportunities to enhance its collection through strategic purchases of works of art that would compliment its current possessions, and borrow... works that, when added to its own works of art would offer unique

special exhibits that could attract both donors and public visitors (*Post Hearing Brief of the Amicus Curiae, in re The Barnes Found. A Corp.* Fiduc. Rptr., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, October 20, 2004, p.24).

Additionally, Mr. James Abruzzo, a museum specialist called as a witness by the *Amicus Curiae*, attested that the Barnes Foundation will have to continuously showcase blockbuster exhibits in order to maintain the trustees' expected visitor levels (p.14). This sets high expectations on the Foundation's staff which is supposed to focus on educational programs and the interests of Barnes' primary intended beneficiaries, the Foundation's students. Kosaras claimed that, "since exhibitions are related to an art museum's charitable purposes, yet seem to be operated in a commercial manner, profitable exhibitions run afoul of the commerciality doctrine" (2000, p.12). As evidenced in this thesis, Albert Barnes was opposed to the commercial use of art, and it is a far stretch by the current trustees to argue otherwise.

If the Barnes Foundation does not participate in museum-type activities, namely loans and 'strategic purchases', it is unlikely the three-campus model will be able to collect and maintain its projected revenues based on the estimated of more than 200,000 visitors. As a result, its financial stability will be threatened yet again. Attesting to this claim, reporters Patricia Horn and Mathew Blanchard opine that if museums do not display touring exhibitions to attract 'blockbuster' crowds, annual admissions will not even near the 100,000 mark (2004). Andras Kosaras explains that the lure of tax-free revenues only exacerbates this money-seeking tendency (2000, p.11). Horn and Blanchard provide examples of the fate that befell two new museums within the last decade for lack of profit-seeking activities: the City Museum of Washington and the Bellevue Art Museum in Seattle (2004). In less than two years, the City Museum of

Washington went from a grand opening to a penurious closing. Its backers projected that it would draw 100,000 visitors in 2003, less than half the projected numbers envisioned by the Barnes' trustees. Notwithstanding the more realistic projections estimated by the City Museum, by "failing to participate in crowd-pleasing commerce, the crowds never came to Washington" (Horn & Blanchard, 2004). The Bellevue Art Museum in Seattle was forced to close after 24 months for lack of funds. Low admission numbers did not meet the expectations of its donors and they withdrew their funding (Horn & Blanchard, 2004). From these examples, it can be seen that the pressure upon the Barnes to keep elevated admission numbers for the long-term is high. The pressure to meet visitor estimates is especially strong for the proposed Philadelphia gallery, which is expected to draw over 90 per cent of the three-campus model's projected visitors (*re The Barnes Found. A Corp.* Fiduc. Rptr., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004, p.11). The need for the Barnes Foundation to participate in museum type activities in order to meet the trustees' projected revenues is inescapable.

Ker-Feal: Creating Another Revenue Opportunity

Concerns over the proposed Philadelphia location serve to underscore the drastic deviation of the trustees' three-campus model from the Barnes' educational mandate. If the projected fundraising and admission figures are to be met, the trustees will have to divert their attentions completely away from education to increasing admission through museum-type activities. Moreover, the trustees' attempts to extend the Foundation's revenue-seeking activities is evidenced in their inclusion of Ker-Feal as an additional 'campus'. By turning Ker-Feal into a full-time museum, the trustees alter the

Foundation's core educational focus, administering the resources endowed to the Foundation contrary to their fiduciary responsibilities. As the trustees did in the Buck Trust, described in Chapter 2, the Barnes trustees are seeking to broaden the charity's purpose beyond the intentions of its donor (*re Estate of Buck*, No.23, 259, Cal. Super. Ct. Aug 15, 1986).

Ms. Robin McClea, the Foundation's director of education, described the proposed use of Ker-Feal's collection and its surrounding grounds to the Court (*re The Barnes Found. A Corp.* Fiduc. Rptr., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004, p.24). She 'related' the trustees' 'vision' for Ker-Feal to the educational philosophy employed at Merion:

Ker-Feal is the site for the study of American decorative arts...it is a collection...that can be studied aesthetically, the same way the gallery collections can be studied. The grounds can be utilized for study in the same manner that the horticulture program can utilize the arboretum in Merion. (p.24)

The evidence that the trustees brought forth, that Albert Barnes was planning on converting his recreational estate into an additional educational facility for aesthetic and art appreciation programs, was documented by a letter he had written to the *House & Garden Magazine* (p.24). The letter described Ker-Feal as an "historic monument which carries out the pre-Revolutionary spirit and also exemplifies the principles of art and education to which the Foundation is devoted" (p.24).

The trustees' intentions to incorporate Ker-Feal as a 'living history museum' are based on Barnes' correspondence with the magazine, 'proving' that he was planning on developing Ker-Feal into a 'living-history' museum (p.25). The trustees referred to another letter from Barnes to the magazine as evidence that supports their claims:

Ker-Feal is not our home, but... an outgrowth of the educational program of the Barnes Foundation exemplifying the aesthetic principles and educational practices carried out in our gallery at Merion (p.27).

As admitted by McClea, Barnes made no direct statement that he intended to expand his educational programs to Ker-Feal, nor are there direct statements that he envisioned it to be used as an additional campus or as a living-history museum (p.25).

What is clear from the trustees' approach is that they are set on exploiting Barnes' property to meet the ambitious admission and revenue projections. During cross-examination, McClea admitted "the inference [was] that Ker-Feal was not an integral part of Dr. Barnes' vision and the attempts currently to emphasize its importance [were] solely for the purposes of these proceedings" (p.25). The inference made by the trustees with respect to Barnes' intentions, however, fails to address why Barnes took less pains to add or amend his 'future intentions' for Ker-Feal in the Foundation's by-laws as he had in so many other instances in order to make his intentions clearly understood.

In effect, the trustees wanted to exploit Ker-Feal as a commercial venue in their vision to turn the Barnes Foundation into an economic engine. Repeating the court decision in *re Estate of Buck*, "neither inefficiency nor ineffective philanthropy constitutes impractically" (No.23, 259, Cal. Super. Ct. Aug 15, 1986). If the Barnes trustees believed that Barnes' neglect of Ker-Feal was inefficiency or ineffectiveness in his charitable mission, the court should not permit the farm's inclusion as an additional campus or 'living history museum'. Its inclusion violates Barnes' core charitable purpose to keep his Foundation specific and focused on art education in Merion (Barnes Foundation's By-laws, 1922, Article I). To the detriment of Barnes' educational mission, when a museum "disavows a part of [its] mission when [it chooses] to entertain rather

than educate, when every visitor is thought of as a customer, when success is measured by numbers”, the Foundation abandons its not-for-profit spirit by assimilating the values of the business sector as part of its mission (Kosaras, 2000, p.16).

It is clear that the assimilation of Ker-Feal for generating revenues transforms yet another aspect of the Barnes Foundation into a ‘for-profit attraction’. If the educational mission of the Barnes Foundation, the basis for its charitable and not-for-profit status, is replaced by for-profit activities, the Foundation’s tax-exempt status may be threatened (p.6). In this event, the trustees would be forced to pay taxes on the art collection, creating an economic burden on the Foundation that it could not withstand (p.11). The financial ‘remedy’ of including Ker-Feal as a ‘campus’ creates the possibility of greater deficits and of financial expectations that outweigh the benefits as presented by the trustees (*re The Barnes Found. A Corp.* Fiduc. Rpt., No.58, 788, Orphan’s Ctr. Div. Ct. C.P., PA, December 13, 2004, p.24).

Philadelphia: Entering the Museum Ghetto

The proposed Philadelphia sites present several obstacles to achieving and maintaining the anticipated high numbers of visitors. The proposed locations have numerous inherent problems that were not properly assessed by the Court and that threaten the success of the three-campus model (*re The Barnes Found. A Corp.* Fiduc. Rptr., No.58, 788, Orphan’s Ctr. Div. Ct. C.P., PA, December 13, 2004, p.11). As *Philadelphia Inquirer* reporter Edward Sozanski explains, if a ‘museum ghetto’ is expected to generate exceptional tourist appeal, “the Court did not account for the fact that currently such a phenomenon on ‘Museum Mile’ does not exist” (2004). For

instance, over the last three years, the Rodin Museum, one of the proposed neighboring institutions, has logged an annual average of only 55,450 visitors (Sozanski, 2004). Moreover, the Pennsylvania Academy of Fine Arts, a few miles from the two proposed sites for the new Barnes, only records close to 69,000 annual visitors. The admission levels of the institutions located on ‘Museum Mile’ are only marginally more or slightly less than the Barnes attendance levels currently recorded in Merion (Vogel, 2004).

The Benjamin Franklin Parkway does not boast the commercial establishments such as shops and restaurants that could provide walk-in traffic (*Memorandum of Law in Support of the Barnes Foundation’s Petition to Amend Its Charter and By-laws, In re Barnes Found.*, No.58,788, Pa. Ct. Com. Pl. Montgomery County Orphans’ Div. Sept. 24, 2002). The trustees’ projected admissions do not take into account the Parkway’s limited commercial and tourist appeal, thereby threatening the educational mandate of Foundation without providing any guarantee of financial stability. On the contrary, the Parkway is described by Edward Sozanski as “a commuter-congested boulevard with ten lanes of continuous traffic that discourages pedestrian traffic” (2004).

Although the Barnes collection is expected to be an economic engine for redevelopment of the ‘Museum Mile’, it will be done at the cost of preserving the traditions of the Barnes collection. Altering the location and use of the Barnes collection by displaying it in a museum destroys its unique personality, one of its most attractive features. Without the unique setting in Lower Merion, the Barnes collection has the potential to lose visitors. In the words of Edward Sozanski, “the Barnes might not be such a hot ticket if it becomes a more crowded, more conventional museum” (2004). With similar doubt about the success of the trustees’ three-campus model, Robert Bailey,

a national arts consultant, said, “I’ve yet to see facilities growth as an answer to underlying structural fiscal problems. Projects of this size exacerbate financial woes” (Horn & Blanchard, 2004). There is no guarantee that the three-campus model will solve the Barnes’ financial crisis.

Conclusion

Notwithstanding the evidence presented in court claiming that alternative remedies exist to solve the Barnes’ current financial crisis that would require altering the core charitable mission intended by Barnes, the Orphan’s Court approved the trustees’ by-law modifications. Even though lawyers for the *Amicus Curiae* and two appraisals of Ker-Feal’s value argued that the Foundation could raise more than twice the value presented by the trustees’ appraisal, these facts did not persuade the Court. Similarly, the Court accepted the trustees’ claims that de-accessioning the non-gallery artworks would raise insufficient income to cover the Foundation’s deficit and endowment needs. Mr. Justice Ott, accepting the trustees’ appraisal values and assessments for Ker-Feal and 19 different artworks, wrote that, “history and the evidence presented at these hearings showed this amount would not halt the Foundation’s downward financial spiral” (*re The Barnes Found. A Corp. Fiduc. Rptr.*, No.58, 788, Orphan’s Ctr. Div. Ct. C.P., PA, December 13, 2004, p.35).

Even with the Court’s acknowledgement that the trustees’ proposed by-law changes greatly alter the Barnes Foundation, including its current educational programs and aesthetic principles, the decision concluded that the art gallery’s move was “the least drastic remedy” for the financial crisis (*re The Barnes Found. A Corp. Fiduc. Rptr.*,

No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004, p.38). At the outset, Mr. Justice Ott proclaimed:

The Foundation was on the brink of financial collapse, and the provision in Dr. Barnes' Indenture mandating that the gallery be maintained in Merion was not sacrosanct, and could yield under the "doctrine of deviation". (p.1)

Moreover, the Court determined that there was no other feasible option that "represented a less drastic modification" from Barnes' charitable intentions that would also cover the Foundation's increased expenses (p.37).

In the judicial summary, the Court justified the decision stating that the alternative revenue sources proposed by the *Amicus Curiae* did not offer the same "*significant opportunity* to advance the educational process championed by Albert Barnes" as the three-campus model did (*re The Barnes Found. A Corp. Fiduc. Rpt.*, No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004, p.34, emphasis added). The Court's stated preference for the trustees' three-campus model as the more appropriate remedy for the Foundation's financial crisis was based on the assumption that it had "*prospects of generating additional revenue through development*" (p.34, emphasis added). However, by siding with the trustees' appeal to relocate the artworks because this offered 'significant opportunity' and 'prospects of additional revenue', Mr. Justice Ott's reasoning took liberties with the appropriate uses of the administrative deviation doctrine.

As stated in Chapter 2, it has been held in administrative trust law cases that deviation from a trust's provisions cannot be permitted for mere convenience. In the words of the Pennsylvania Superior Court in a previous hearing over the Barnes Foundation, "it must be emphasized that the relief afforded by deviation is not based on mere convenience, but on the necessity of effecting a change" (*in Barnes Foundation, A*

Corp.- Estate of Violette de Mazia, Deceased, 453 Pa. Super, 436, 451-52, 684 A.2d 124, 130-21, 1996). Nonetheless, Mr. Justice Ott's decision to permit the artworks' removal to a new downtown location was a matter of convenience rather than necessity (*re The Barnes Found. A Corp.* Fiduc. Rrpt., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004, p.34). Administrative deviation should not be permitted to conveniently facilitate 'prospects of generating *additional* revenue from development', as stated by Mr. Justice Ott in the Court's decision (p.34). On the contrary, the use of the legal doctrine of administrative deviation "should be reserved for situations where compliance with the settler's intention is impossible or illegal, or substantially impairs the accomplishment of the purposes of the trust" (Restatement (Second) of Trusts 381, 1959). A 'significant opportunity', as estimated by the Court, does not satisfy the burden of impossibility, illegality or impracticability. The Court's argument that the use of the administrative deviation to "generate excitement among potential benefactors or attract the all-crucial 'alpha donors' to the Barnes", is a matter of convenience, not necessity (*re The Barnes Found. A Corp.* Fiduc. Rrpt., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004, p.35).

In contradiction to the Court's conclusion, evidence provided throughout this chapter supports the claim that the trustees did not provide sufficient 'clear and convincing' evidence that the proposed three-campus model and its deviations from Barnes' educational mandate were 'necessities' for the Barnes Foundation's survival. Evidence presented by the *Amicus Curiae* and other opponents reveals that the trustees' proposed deviations stray from Albert Barnes' original educational mandate and the preservation of Barnes' vision for the Foundation. Rather than saving and preserving the

Foundation, the Court used administrative deviation to facilitate economic exploitation of the art collection by political and business interests, rather than ensuring public access and preservation of the collection.

Public acknowledgement and revelations that the Pew, Lenfest and Annenburg trusts and political stakeholders stand to benefit from the Court's approval of the by-law modifications, to the detriment of cultural heritage preservation, suggests a perfuming of the Court's decision. Albert Barnes' educational and charitable intentions have been completely overthrown, threatening his legacy and his contribution to cultural heritage. The Court's decision to amend the by-laws transforms the Barnes Foundation from a focused educational institution into an economic engine (*re The Barnes Found. A Corp. Fiduc. Rrpt., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004, p.35*). These court-approved alterations, however, have severe ethical, legal, and aesthetic consequences for the preservation of the Foundation as well as all art collections as elements of America's cultural heritage.

By breaking up the Barnes collection, the Court placed more value on its individual parts than on Barnes' broad vision. Alternatives that would keep the Barnes Foundation intact, preserve its educational and aesthetic principles and offer a financial resolution to the Foundation's deficit are presented in Chapter 4. In exploring these options, it becomes clear that the Court's decision to allow the relocation of Barnes' art collection threatens public access, cultural heritage, and the American tradition of art philanthropy.

CHAPTER FOUR

Transforming the Barnes Foundation: Threatening Cultural Heritage

Introduction: Truth and Authenticity in Cultural Heritage Matters

The benefits that the Court emphasized in agreeing to move the Barnes art collection to Philadelphia were twofold: greater public access to the art collection and improved conditions to relieve the Foundation from its current financial crisis. However, as demonstrated in the previous chapter, the three-campus model is based on several imponderables and ‘aggressive’ assumptions based on unrealistic financial projections. Moreover, because the three-campus model requires such severe modifications to the Foundation’s by-laws and uses, the unique character of the Foundation is transformed beyond mere administrative deviations (*Post Hearing Brief of the Amicus Curiae, in re The Barnes Found. A Corp.* Fiduc. Rpt., No.58, 788, Orphan’s Ctr. Div. Ct. C.P., PA, October 20, 2004). Not only are the physical displays of Albert Barnes’ educational, social and aesthetic theories challenged in the three-campus model, the authenticity and integrity of the Barnes Foundation are threatened as well. As a result, the benefits of the Foundation, namely education and sharing of cultural heritage, are lost as the collection is transformed into a full-time tourist destination (Merryman, 1989).

Once the art is removed from the Lower Merion gallery, future generations will be deprived of the experience of viewing the art collection in its natural setting according to Barnes’ unique vision (Nivala, 2003, p.2). The proposed new gallery on ‘Museum Mile’ does not include the integral elements of the Barnes Foundation: namely, the 12-acre arboretum that Barnes’ emphasized in the appreciation and understanding of the fine

arts, and the aesthetic ensembles and display systems that Barnes created in the Lower Merion gallery (*re The Barnes Found. A Corp.* Fiduc. Rrpt., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004, p.10). Moving the collection distorts the cultural heritage Barnes had so carefully preserved.

As will be shown in this chapter, relocation of the collection contravenes America's accepted historic preservation theories, norms and regulations. By creating the downtown museum, the trustees will present a false representation of American cultural heritage, alter Barnes' artistic ensembles, remove the purpose of Paul Cret's original gallery design, and separate the artworks from their arboretum context. The outcome will be the destruction of visual history, aesthetic memory, social history, and a unique cultural ensemble.

In the second part of this chapter, it will be argued that rather than fragmenting and scattering the collection, it should be preserved as part of a landmark cultural ensemble protected and be protected from dismemberment, defacement and destruction. The Barnes Foundation is an invaluable piece of artistic and cultural heritage and should therefore be preserved as are other historic landmarks throughout America. By exploring the federal, state, and local legislation and precedents, arguments can be drawn to support the Barnes Foundation's designation as a historical landmark. Other cases where the integrity and authenticity of significant historic and cultural landmarks were upheld will support the claim that the Barnes should be protected against dismemberment or alterations under the Pennsylvania Historic Preservation Act as a significant landmark. This designation would protect the Barnes collection from undergoing the trustees'

destructive relocation plans, thereby serving the public interest in preserving the national cultural heritage.

The concluding section of this chapter proposes alternative revenue-generating activities that the Foundation could explore in order to stabilize its financial situation and remain in Lower Merion. These proposed alternatives to the three-campus model could strengthen the claim that the Foundation's by-laws were unnecessarily and severely modified, resulting in the opposite of the effect of preservation sought by the Court.

Unity is Greater than Separate Parts

There is great public interest in keeping the Barnes Foundation afloat. The Barnes collection is indisputably a significant example of cultural property: "cultural property refers to objects that have artistic, ethnographic, archaeological, or historical value" (Merryman, 1985). Legal scholar Nicole Wilkes and Professor John Merryman identify the public interest in cultural objects from three perspectives: the expressive value, the politics and religion, and the utility of cultural objects for society (Wilkes, 2001, p.1). Since cultural objects nourish a sense of community, and of participation in a common human enterprise, they deserve and require protection (Moustakas, 1989, p.2). The authenticity of a historic or cultural place can excite deep emotional reactions and memories of historic figures, events, and social periods (Costonis, 1989, p.16). Legal scholar Albert Manwaring provides a summary of the criteria which landmarks and structures must meet in order to be considered worthy of cultural preservation efforts: they must be associated with important cultural and historic trends or events; or they must

be associated with important figures in history; or they must provide high quality examples of artistic or architectural techniques and styles (1990, p.6).

In its original form, the Barnes Foundation is an important example of both cultural trends and social experiences. It provides “a link to our past, an embodiment of our moral values and religion, a nourishment of our sense of community and a source of inspiration, wealth, science and information” (Osman, 1999, p.970). As Professor John Nivala explains, the public interest in the Barnes collection transcends any interest in an individual piece: “The collection itself is a work of art, incorporated into the building designed to house it, dependent upon its environment for full meaning” (2003, p.10). The senselessness of the Barnes trustees’ gallery relocation can be compared with moving the interior furnishings of the Versailles Palaces to the middle of Paris, and trying to replicate and preserve the serenity, beauty, and significance of the original collection and setting. This parallel highlights how altering several of a cultural site’s parts destroys its cultural and aesthetic significance as well as its ability to communicate cultural truth (Sweicimski, 1989, p.204).

When a cultural artifact or landmark is removed from its intended or original setting, its context can be lost and outside of its setting, the heritage is lost and it becomes “isolated and de-contextualized, and may not be appreciated for its intrinsic value” (Harding, 1999, p.23). Preservation theorists, such as Cultural Property Professor Sarah Harding, agree that if a custom, a story or a ritual has a living context it should remain in or be returned to that context if we are to accord it the respect it is due. In the same way, if an artifact or landmark has a living context and setting, it should remain there in order

to preserve its complete cultural significance. As argued by Professor John Merryman, the de-contextualization of cultural heritage lessens its meaning:

Every cultural object is to some extent part of a larger context from which it draws, and to which it adds, meaning. Separated from its context, “de-contextualized”, the object and the context both lose significance. At the extreme the object becomes anonymous, an orphan without reliable indication of its origin, its significance, its place and function as part of something else. (1989, p.356; *quoted in Rand, 1993, p.8*)

In order to preserve a cultural object or landmark and its social context, certain elements must be protected: authenticity, integrity and originality.

Cultural property specialist Robertson Davies wrote in his 1985 text, entitled *What's Bred in the Bone*, that “the modern passion for the art of the past is part of our terrible yearning for certainty”, and John Merryman exclaims that authentic and original works of art and cultural artifacts are the best means of communicating truth and certainty (1989, p.3). Merryman explains that truth, certainty, and accuracy are closely related and may express the same fundamental need:

when we discover that the original of the Digest manuscript is kept elsewhere for protection and we have actually been looking at a reproduction, we feel cheated, no matter how accurate the reproduction might be (p.3).

The magic that can only be created through an exploration of an authentic object or setting is dissipated when it is altered or replicated and represented as the truth.

In the same way when an artifact or art *in situ* is pulled from its intended location and separated from other integral parts it loses its integrity (Merryman, 1985). By preserving the integrity of art or a landmark, preservation theorists refer to keeping it intact or in its intended site or setting (Costonis, 1989, p.2). For example, when friezes on religious temples are defaced and separated from their original setting, the integrity of

the art is destroyed and its associated contexts and beauty are devalued (Harding, 2003, p.23). Likewise, when a historic site is altered with changes to its layout or landscape, the integrity of a historic setting is lost (Costinos, 1989, p.39). In the case of the Barnes ensemble, the Court claimed that it was permitting the Barnes trustees to relocate the art gallery and establish the three-campus model in order to ensure the Foundation's preservation. Both the integrity and authenticity of the collection, however, will be threatened.

Orphaning Complementary Halves: Art and Arboretum Belong Together

The greatest violation of preservation principles that threatens the integrity of the Barnes ensemble is the separation of the art collection from the arboretum. As evidenced in the hearings, the move's supporters see the arboretum only as a decorative element and as a separate entity from the art collection (*Post Hearing Brief of the Amicus Curiae, in re The Barnes Found. A Corp.* Fiduc. Rpt., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, October 20, 2004). Despite the trustees' belief that the arboretum and the art collection can be separated, these two elements are in fact complementary (Barnes Foundation's By-Laws, 1922). Barnes believed that the art collection and the arboretum were equals in serving his educational and aesthetic missions: "the trustees of the Donee shall control both the art gallery and the arboretum of the Donee, *both of which are integral parts* of the educational resources of the Donee" (Barnes Foundation's By-laws, 1922, amended 1950, Para. 17, emphasis added). Furthermore, Barnes' holistic approach to utilize the arboretum in the education of art is described on a plaque hanging in the Foundation's entrance hall, stating:

we [the Foundation] teach them [students] how to learn to see; that is, to perceive the meanings in the events of everyday life, as well as in paintings, sculpture, music, furniture, objects in wrought iron, trees and flowers (Plaque at the Barnes Foundation, visited and viewed March 18, 2005).

It was to create opportunities to develop such comparisons that Albert Barnes originally chose the Lower Merion site (Anderson, 2003, p.26). An educational pamphlet available at the gallery in 2005 and produced by the Foundation, describes the arboretum as "a paradise of well-known ornamental plants artistically landscaped, reflecting concepts from the installation of art in the gallery ensembles".

Together, the art collection and the estate produce a synergy that testifies to the Foundation's distinctive and seductive *genius loci*. Nivala describes *genius loci* as "the distinctive character or atmosphere of a place with reference to the impression that it makes on the mind: the spirit of place" (1996, p.1). Edward Sozanski explains that the power of a special spirit or *genius loci* is real—it's what makes a person's house feel like 'home' (2004). The personality of Albert Barnes pervades every square foot of the gallery building, the art collection and the arboretum, creating an unique *genius loci* (Nivala, 2003, p.3). Once the art gallery is uprooted from its intended location and role, the historic significance of the Merion arboretum, founded by Joseph Lapsley Wilson in 1887, and further developed by Albert Barnes and his wife Laura will be altered (Barnes Foundation, 2003). Furthermore, there is little contention that either of Philadelphia's proposed Parkway locations on the busy 10-lane parkway will *not* offer a comparable opportunity for the *genius loci* of Barnes' lush arboretum with its 1,700 species of plants and trees (Bolling, 2004). 'Museum Mile' lacks the "trees, greenery and ambient beauty found in the Lower Merion arboretum", and will not be able to serve the same comparative role that the settings of the arboretum provided" (Appendix B, Figures 5 & 6; Plaque at the Barnes Foundation, March 18, 2005).

Although Mr. Harmelin, a Barnes trustee, testified that the Foundation plans to install the art and other objects in exactly the same way the ensembles are currently displayed in Lower Merion, the artistic, intellectual and emotional experience is impossible to replicate (*Post Hearing Brief of the Amicus Curiae, in re The Barnes Found. A Corp.* Fiduc. Rrpt., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, October 20, 2004, p.23). As a result, the visitor experience that Barnes valued so much will be altered

to the detriment of the creative aesthetic comparisons he tried to emphasize between art and nature (Barnes, 1965, p.49). Following Barnes' principles, "the galleries were used as a laboratory", and the lesson and comparisons that were intended will not be possible in the new gallery (Barnes Foundation, 1993, p.13). For example, no longer will the sharp edges in Jacques Lipchitz' garden sculptures surrounded by Cypress trees, accentuate the angular elements in African masks that hang in the gallery between windows and canvases painted by Modigliani and bring the artworks to life (Barnes Foundation, 1993, p.12). Visitors will not be able to compare Renoir's garden scenes and his ability to capture lighting and movement in trees with the sun's rays falling on the same type of trees that are visible from a gallery window (p.89). As a result, the historic and cultural truths of the Barnes collection, including the collector's vision, his aesthetic principles and his social philosophies, will be supplanted by the current trustees' plan to satisfy the demands of mass cultural tourism; "the gallery collection will become one part of an ever-changing environment where the bottom line will be revenue and not the donor's original mission". (*Post Hearing Brief of the Amicus Curiae, in re The Barnes Found. A Corp.* Fiduc. R rpt., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, October 20, 2004, p.25).

Changing the Historic Value of the Art Gallery

In addition to the loss of the Lower Merion estate's special aesthetic qualities, the building Cret designed around Barnes' art collection will lose a part of its historic and aesthetic significance once the art is removed and the gallery is used for administration. Undeniably, Cret's gallery is an evocative period piece and a visual anchor of its time and

should be preserved as such (Sozanski, 2003). This architectural legacy adds another ingredient to its authentic *genius loci* and now stands threatened.

As the arboretum plays an integral role with the art, so do the architectural installations that were installed so that similarities could be drawn between Western and African art in the collection (Barnes Foundation, 1993, p.10). Removing the interior artworks disconnects the installations from their intended environment, creating disunity in the remaining elements of the gallery. Artistic elements installed in the building, such as Matisse's *La Dance*, the Baule door, the mosaic entrance-way, and Jacques Lipchitz' friezes, will lose part of their educational function (Appendix B, Figures 1,2, and 8). As a result, their context and aesthetic features may never again be understood; "it is one thing to admire a structure as exemplary architecture and quite another to experience it as an anchor of individual or collective identity" (Costonis, 1989, p.70). The aesthetic unity and integrity of the Barnes estate in Lower Merion will be lost in the poor historical rendition of its artistic elements (Rand, 1993, p.4).

Rather than duplicating the 23-room gallery that Barnes and Paul Cret designed for the Lower Merion estate—an aesthetic crime in itself—the trustees plan is to create a new design for the Philadelphia “walk-through” museum with more “visitor friendly” space (*re The Barnes Found. A Corp. Fiduc. Rrpt.*, No.58, 788, Orphan’s Ctr. Div. Ct. C.P., PA, December 13, 2004, p.22). The trustees’ decision, however, to abandon Paul Cret’s design that incorporates several elements central to fine arts education and replace it with a more utilitarian and accommodating design is another violation of the cultural preservation value of authenticity (Merryman, 1989). In general, the loss of authentic

things and places is a loss of “world,” and a loss in certainty, truth, and cultural belonging (Nivala, 1996, p.3).

Reporter Roberta Smith (2004) claims that “our perceptions of artworks shift when the setting changes”, and this de-contextualization and re-contextualization of the Barnes collection that will inevitably occur in the Barnes’ Philadelphia setting. Museologist J. Clifford explains that the primary purpose of art exhibitions and heritage sites is to present objects of authentic artistic or historic value and transmit appropriate knowledge to various visitors (Clifford, 1994, p.259). The representations of art and heritage in exhibitions and displays are conceived as a didactic instrument, functioning in similar ways to a living textbook. Cultural and heritage theorist Jerzy Swiecimski explains that the role of aesthetics is subordinated to the exhibition or site’s didacticism. The aesthetic form of the exhibition or heritage site thus becomes ‘the form of the exhibition content’, and a means of communication (1989, p.203). Therefore, in order to fulfill its communicative purposes authentically, art and heritage exhibitions and displays should be representations of truth (Clifford, 1994, p.263).

Notwithstanding the fact that perceptions of truth change, when a collection is presented in the form of an exhibit or a heritage site, it should be presented as closely as possible to the founder’s perception of truth. From the founder’s perception of truth, the viewer can build his/her own interpretations, without de-contextualizing the artworks from their original context as an exhibited collection (Clifford, 1994). Presenting untruths, such as recreating a replica of the Barnes gallery and breaking up the integral parts of the complete collection, essentially contradicts the purpose of heritage and historical exhibition. Because the trustees are leaving the new gallery’s design open to

the complete discretion of architects and their proposals, there are no guidelines or restrictions for the architects to follow. With the planned change in design, there is little dispute that the installations will destroy the relationship that Cret's architectural legacy and the artworks shared (*BarnesWatch*, Spring 2003).

The Threat to Art Collecting and to Charitable Art Donating

In addition to the loss of authenticity and integrity of the Barnes collection that with the three-campus model will produce, the social legacy of the collection's founder will be threatened. The expression of a personal or cultural set of values through the creation of artwork, an installation of artworks, an artistic ensemble, or a charitable art Foundation, are equally valuable in the education of cultural and social values (Fox, 1995, p.27). Adding to this argument, Chris Abbinante explains, "a charitable Foundation is a tool for creativity in giving...it allows a person to commit funds to programs that express that individual's personalized set of values" (1997, p.13). Since Foundations perpetuate the visions and philosophies of their donors, the preservation of these historic figures' creativity and artistic foresight is a valuable resource for future generations (p.13).

Institutions like the Barnes Foundation, show us how individuals and cultures expressed both norms and unconventional ways. For example, Dr. Barnes believed in the value of collecting unconventional art and displayed his belief in idiosyncratic ensembles as a means of educating present and future generations on aesthetics, education, and democracy:

art is not a phase of life apart from the work of a world to which one may turn in moments of leisure, or perhaps in the name of so-called “culture”, or in the spirit of worship. In the Foundation’s courses, art is taken out of its usually detached, esoteric world, and is linked up with life itself. (Barnes, 1942, radio address, Barnes Foundation, 2003).

Furthermore, Barnes had a larger social message behind his unique style of displaying art: he publicly challenged racism towards African-Americans that was dominant in Philadelphia and America during his lifetime (Anderson, 2003, p.5). As legal reporter Jeffrey Toobin acknowledges, “He [Albert Barnes] wanted to use his art to redress issues of inequality, particularly racial prejudice against African-Americans” (2002). Barnes tried to reduce the segregation of African-Americans and Anglo-Saxon Americans by displaying African masks and artifacts alongside European and American paintings, educating the viewer that equal value can be found in both (Barnes Foundation, 1993, p.12).

The cultural ensembles and collections of private collectors are worthy of study, understanding and protection, as they embody more than art: a great collection represents a vision and an effort to create a meaningful aesthetic and cultural message (Perry, 1994, p.78). However, if the donor’s intent is severely altered, the future of such great collections and of cultural heritage philanthropy throughout America will be threatened (p.10). Moving the Barnes collection sets a dangerous precedent for the preservation of charitably donated art collections, as explained by legal scholar Ilana Eisenstein (2003, p.12). If donors see that there is no guaranteed respect for their collections once they die, they may decide to keep their collections private, leaving them to family rather than setting up charitable trusts (Fox, 1995, p.27).

Moving the Barnes collection and developing additional tourist attractions is not the best way of protecting cultural meaning or ensuring the public's access to authentic cultural inheritance. Nonetheless, the preservation of the collection in its authentic and original location in Lower Merion is still possible since the collection has not yet been moved.

The following proposes a solution for preserving the Barnes Foundation property as a historic landmark and prevent its dismemberment. Preservation legislation and precedents at federal, state and local levels, examples of how designations as landmarks have protected objects and sites against mutilation, dismemberment and de-contextualization, will be examined. After analyzing the similarity between the Barnes Foundation properties and various historic landmarks, arguments for advancing the Barnes' landmark designation claim will be presented. To support the designation of the Barnes collection and site as a historic landmark, the argument will be advanced that the Barnes Foundation should be preserved as a historic landmark under the Pennsylvania Historic Preservation Act. Subjecting the Barnes Foundation to a historic designation is the most effective guarantee of public access for present and future generations and the preservation of this unique collection.

Preserving the Barnes Foundation as a Historic Landmark

Despite a vigorous history of private property rights in America, recent jurisprudence has increased the regulation of property, such as arboretums, private residences, institutions, and art collections for environmental preservation, land use management, and historic conservation (Eisenstein, 2003, p.12). In the same way, artistic

creations, whether moveable or permanently installed *in situ*, have increasingly been subjected to preservation regulations (Harding, 1999). This is supported by the idea that “art, like historic buildings or environmentally sensitive land, has sufficient impact on the public welfare to allow the state to invoke regulation” to protect the public interest in cultural property (Eisenstein, 2003, p.12). By protection, it is generally meant that there are measures taken by some level of government to preserve something by keeping it safe from harm, damage or loss (Merryman, 2001, p.3). Professor John Merryman explains that the “protection” of cultural objects, refers to their preservation from physical damage or destruction, the preservation of the meaning and information that would be lost by removal of an object from its context, and the preservation of integrity in complex objects, by preventing their dismemberment (p.3). These protection theories, outlining the state’s responsibility to protect its national, cultural and historic landmarks are the basis for cultural heritage preservation legislations at the federal, state and municipal levels (Rand, 1993, p.3). Upon analyzing the various governmental efforts aimed at protecting historic landmarks, including their social and environmental contexts, it is apparent that the Barnes Foundation and its setting should be protected as a historic landmark.

The Government of the United States recognized its duty to lead in the preservation and protection of cultural and historic landmarks throughout the nation, notably in the *National Historic Preservation Act* (NHPA) of 1966. National historic landmarks are identified as

exceptional places. They form a common bond between all Americans. They are buildings, sites, districts, structures, and objects that have been determined by the

Secretary of the Interior to be nationally significant to American history and culture. (National Historic Landmark Program, 36 C.F.R. Part 65)

National historic landmarks are included in the National Register, which is the official list of historic properties worthy of preservation and protected under the NHPA (NHPA, 16 U.S.C. 470a (a) (1) (A)). The NHPA is American's most comprehensive federal preservation legislation and grants regulatory authority to the Secretary of the Interior to expand and maintain a National Register of Historic Places composed of districts, sites, buildings, structures and objects significant in American history, architecture, archeology, engineering and culture" (NHPA, 16 U.S.C. 470a (a) (1) (A)).

The NHPA is responsible for the protection of the public's interest in national landmarks, stating that "the historical and cultural Foundations of the Nation should be preserved as a living part of our community, life, and development, in order to give a sense of orientation to the American people" (NHPA 16 U.S.C. 470 (b) (2)).

In order for a property or historic site, such as that managed by the Barnes Foundation, to be identified and designated as a national landmark, it must possess an exceptional value in representing or illustrating an important theme in the history of the nation (National Historic Landmark Program, 36 C.F.R. Part 65). There are six different criteria that must be met for national historic landmark designation and for the quality of national significance to be ascribed to a historic site.

The criteria that a site, building, district, structure or object must satisfy in order to be designated a National Historic Landmark include:

- 1) That it is associated with events that have made a significant contribution to, and are identified with or that outstandingly represents, the broad national patterns of United States history and from which an understanding and appreciation of those patterns may be gained; or

- 2) That it is associated importantly with the lives of persons nationally significant in the history of the United States; or
- 3) That it represent some great idea or ideal of the American people; or
- 4) That it embody the distinguishing characteristics of an architectural type specimen, exceptionally valuable for the study of a period, style or method of construction, or that represent a significant, distinctive and exceptional entity whose components may lack individual distinction; or
- 5) That it is composed of integral parts of the environment not sufficiently significant by reason of historical association or artistic merit to warrant individual recognition but collectively compose an entity of exceptional historical or artistic significance, or outstandingly commemorate or illustrate a way of life or culture; or
- 6) That it has yielded or may be likely to yield information of major scientific importance by revealing new cultures, or by shedding light upon periods of occupation over large areas of the United States. Such sites are those which have yielded, or which may reasonably be expected to yield, data affecting theories, concepts and ideas to a major degree. (National Historic Landmark Program, 36 C.F.R. Part 65)

The Barnes Foundation meets several of the criteria listed above by contributing to the historic, cultural, artistic and social representation of America's heritage (Nivala, 2003, p.1). For example, as described in previous sections and chapters, Albert Barnes incorporated social philosophy on racial issues during his lifetime in the creation and layout of his Foundation, as well as an *avant-garde* aesthetic and art appreciation theories (Barnes Foundation, 1993, p.10). His foresight in the collection of American and European Modern art also made a 'significant contribution' to the pattern of development of modern art appreciation in America, thereby 'yielding data affecting theories, concepts and ideas to a major degree'. As the greatest collector of Modern art in America, he is significant as a 'national leader in the history of the United States' (Sozanski, 2004). The Barnes Foundation's architectural legacy and unique setting satisfies the fourth criteria

for their representation as ‘a significant, distinctive and exceptional entity’ and have ‘distinguishing characteristics’ of form, style and construction. Finally, as the Barnes Foundation is greater than the sum of its parts, it ‘collectively composes an entity of exceptional historical or artistic significance, or outstandingly commemorate or illustrate a way of life or culture’ (Nivala, 2003, p.2).

Since most of the existing federal landmark and preservation programs are limited to natural and historic properties determined to be exceptionally “nationally significant”, only a limited number of properties meet this requirement (Wilkes, 2001). Even though the Barnes Foundation meets several national historic landmark criteria, the restricted number of national landmarks in America means that it still may not satisfy the Landmark Commission’s stringent requirements. Only 2,300 of the 75,000 historic sites listed on the National Register are designated as national landmarks. The others have greater state and local significance than they do for all Americans (Advisory Council on Historic Preservation, April 26, 2002, p.3). Many renowned historic properties in America include highly publicized sites such as Pearl Harbor, the Apollo Mission Control Center, Alcatraz, and Plymouth Rock (National Historic Landmark Program, 36 C.F.R. Part 65). They are recognized by most Americans and considered to be nationally significant as taught in schools, and refer to highly publicized and particular historic events (36 C.F.R. Part 65). With the more limited and art-founded basis of the Barnes collection, it may be more difficult to convince the Secretary of the Interior that the Barnes Collection has comparable ‘exceptional national significance’ as more recognizable historic landmarks.

While it would be beneficial to have the Barnes properties on the NHPA's list of National Historic Sites as a means of protecting it in the national public interest, the NHPA has no authority to enforce preservation (NHPA of 1966, Pub. L. No.89-665, 80 Stat. 915, codified as amended, 16 U.S.C., 470, 1988). The intent of such guidelines, summarized in the Standards of Rehabilitation, is to help in the long-term preservation of a property's significance through the preservation of materials and features (NHPA, Standards for Rehabilitation, 36 C.F. R. 67, Federal Historic Preservation Tax Incentives Program). The intimate relationship that historic objects and properties have with their setting is recognized by the National Advisory Council on Historic Preservation (NACHP), identifying: "historic properties are now understood and appreciated as part of – not isolated from – the landscape to which they belong" (Advisory Council on Historic Preservation, April 26, 2002, p.3).

This concept is reinforced in the Standards of Rehabilitation, which states that both the integrity of the 'building site' and its 'setting' must be included as essential components in the preservation of historic properties (NHPA, Standards for Rehabilitation, 36 C.F. R. 67, Federal Historic Preservation Tax Incentives Program).

The Standards of Rehabilitation state that

the area or environment in which a historic property is found...the elements of settings, such as the relationship of buildings to each other, views, driveways, trees, walkways, gardens and yards... are important in defining the historic character of the setting (NHPA, 36 C.F.R. 67).

Similarly, the building site, or "the landscape surrounding a historic building and contained within an individual parcel of land" is considered an integral element in the preservation standards (NHPA, 36 C.F.R. 67). Furthermore, a "designated historic

landscape significant in the field of landscape architecture requires a more detailed analysis of their character" in the preservation of a historic site (NHPA, 36 C.F.R. 67). The NHPA's Standards of Rehabilitation emphasize the importance of keeping a historic building, such as the Barnes gallery, intact with its intended setting, such as the surrounding arboretum.

The Standards of Rehabilitation are used by the Federal government as the primary incentive for private historic property owners to keep up with required maintenance (Manwaring, 1990). When private owners meet all the Standards of Rehabilitation, they receive tax credits and grants for maintenance and rehabilitation (NHPA, 36 C.F.R. 67). However, property owned by a charitable Foundation, such as the Barnes Foundation, is already exempt from taxes and the incentive to meet the Standards of Rehabilitation lose their persuasive effect.

An additional challenge that may prevent the Barnes Foundation from being designated as a national landmark, is the fact that the trustees' plans clearly oppose the purposes of such a designation. Since 1980, if the proprietors of a proposed National Landmark or proposed National Historic Site do not want a site to be designated as a landmark, there is no legal way of forcing the owners to accept designated historic site status (Manwaring, 1990, p.1). On the other hand, unlike federal preservation legislation, state legislation can enforce the protection of cultural properties and associated artistic creations. The federal government encourages state and local historic preservation efforts by funding programs that are conducted in accordance with the standards and criteria for preservation outlined in the NHRA. For this reason, it is beneficial to press the landmark

designation claim for the Barnes properties with reference to other state precedents and legislation.

Through State Historic Preservation Officers (SHPOs) in each state, appointed by the Governor of each State, the federal government ensures that national preservation standards are met by permitting regulatory authority to SHPOs (Manwaring, 1990). In addition, local Historic Architectural Review Boards (HARBs) receive funding from the federal government to monitor preservation of local landmarks according to the NHPA standards (NHPA of 1966, Pub. L. No.89-665, 80 Stat. 915, codified as amended, 16 U.S.C., 470, 1988). Each state also has the authority to protect the public interest in a broader array of cultural landmarks as discussed below (Wilkes, 2001, p.5).

State Preservation of Historic Landmarks

With over fifty states having some form of legislation to protect the nation's cultural, historic, aesthetic, and architectural assets, precedent cases similar to the Barnes' preservation needs can be considered (Manwaring, 1990, p.3). Legal scholar Albert Manwaring claims that state preservation legislations have less restrictive criteria in the designation of historic landmarks and cultural properties than those outlined in the National Historic Landmark program. Legislations and precedents emphasizing the importance of preserving cultural ensembles that have protected creative artworks in their intended setting and landscape will be explored. Moreover, as Manwaring explains, the most important aspect of state preservation law for which no federal role model exists, is the state-enabling legislation that authorizes the establishment of local landmark commissions and empowers municipalities to enact preservation ordinances that protect

historic districts and individual landmarks pursuant to the regulatory power of the state (1990, p.3).

Each state has the power to impose greater land use restrictions on designated historic and cultural landmarks than the federal government, and to prevent their dismemberment with greater regulatory force, thereby more effectively preserving historic landmarks (Wilkes, 2001, p.8). In order for a government regulation to be considered legitimate and within the scope of its policing powers, it must have objectives that promote the health, safety, morals or general welfare of the community. In the case of the Barnes Foundation, for Pennsylvania to identify Barnes Foundation properties as historic landmarks, the public welfare requirement would have to be satisfied (Manwaring, 1990, p.6). As argued in the following, preserving the Barnes ensemble in Lower Merion benefits the public welfare and a designation would not constitute an unauthorized extension of Pennsylvania's regulatory powers.

The Supreme Court of the United States uses a two-step process to determine whether a government regulation is invalid as a 'takings' of private property (U.S. Const. amend. V; Wilkes, 2001, p.8). Unconstitutional 'takings' contravenes the Fifth Amendment of the Constitution of the United States where it is written that, "nor shall private property be taken for public use, without just compensation" (U.S. Const. amend. V). However as legal scholar Nicole Wilkes explains,

a preservation law directed at the protection and maintenance of art objects, justified in terms of the public interest, is limited by the Takings Clause, with the public interest in art preservation weighed against the burden on the individual who seeks to use his property in the way that is contrary to that interest (2001, p.8).

Manwaring states that the legitimacy of a government objective in enacting land use restrictions that further the concerns of historic preservation has consistently been upheld, but the reasonableness of the regulation can only be determined as applied to a particular set of facts (1990, p.3). Protests over the application of local landmark ordinances are most frequently over restrictions on the use of private property and how it may affect profitability.

In an important preservation case, *Penn Central Transportation Co. v. New York City*, the New York Supreme Court found that the application of New York City's Landmarks Preservation Law to block the construction of a 40-store office building on top of Grand Central Station in 1976 was not an 'unconstitutional taking' (N.Y.C. Admin. Code, ch. 8-A, 205-1.0-207-21.0, 1976). Pursuant to the City's Landmark Law, the Landmarks Preservation Commission designated the Grand Central Station a landmark in 1967 (N.Y.C. Admin. Code, ch. 8-A, 205-1.0-207-21.0, 1976). New York City's Landmark Law has the objective of protecting the existing "urban fabric of the city" to benefit its citizens. Thereby, landmarks are protected against destruction in order to:

foster "civic pride in the beauty and noble accomplishments of the past"; protect and enhance "the city's attractions to tourists and visitors"; "support and stimulate business and industry"; and promote "the use of historic districts, landmarks, interior landmarks and scenic landmarks for the education, pleasure and welfare of the people of the city" (*Penn Central Transportation Co. v. New York City* N.Y.C. Admin. Code, ch. 8-A, 205-1.0 (b), 1976).

The New York State Supreme Court upheld the station's landmark designation in its 1978 decision to forbid any alteration to the building (Manwaring, 2001, p.5). The Court implicitly accepted the protection of the existing layout of the city as a valid rationale for

preserving Grand Central Station against its owner's plans to build an office tower. The Court stated that, "the preservation of aesthetic values satisfies the public purpose standard" (Wilkes, 2001, p.6). Furthermore, as reported by Nicole Wilkes, the Court determined that the designation did not interfere with Penn Central Transportation Co.'s "primary expectation concerning the use of the property and thus the transportation company would continue to obtain a reasonable return from the property" (p.6).

According to the *Penn Central* ruling, the public's right to preserve historic landmarks outweighs private owners' rights to alter and modify a historic property and landscape for their own financial interests. As for the Barnes Foundation, designating the Lower Merion estate as a landmark would not run antithetical to or challenge its intended financial use, since it is a charitable institution. Furthermore, imposing a landmark designation in order to protect it against modifications or alterations would not deprive 'the owner' (the trustees) the 'viable economic use of his property', since public visits and educational public programs could still continue.

The *Penn Central* decision has additional significance for the Barnes Foundation, since it concludes that “landmarks cannot be divorced from their settings - - particularly when the setting is a dramatic and integral part of the original concept” (Rand, 1993, p.6). Iconic urban design, historic architecture and cultural landmarks are important to a community’s sense of familiarity and social belonging (Costonis, 1989, p.77). Preserving cultural objects and their settings, such as the Lower Merion estate, protects strong cultural and social bonds between generations past and those of the future. Therefore, the authenticity and integrity of historic sites are beneficial and important for the public’s welfare.

Preserving Interiors as Historic Landmarks

While the *Penn Central* case only addresses the importance of preserving the exterior of a landmark, an interior, such as the interior of the Barnes gallery, is equally important. In determining a historic site’s landmark status, the distinction between the exterior historic or cultural elements of a building and those in the interior are deemed to be the same (Nivala, 1996). The NHPA treats building interiors as equally significant as exteriors and provides grants and preservation standards for both interior and exterior preservation (NHPA of 1966, Pub. L. No.89-665, 80 Stat. 915, codified as amended, 16 U.S.C., 470, 1988). Moreover, municipalities throughout America have increasingly designated interiors as historic landmarks as a means of preserving the memory of historic monuments or cultural trends associated with the building’s interior (Wilkes, 2001, p.9). The interior of Faneuil Hall in Boston, for example, “was the site of meetings pivotal in the movement to establish a new nation” and is considered a landmark (*Brief*

for Defendant at 76, Society of Jesus v. Boston Landmarks Comm'n, Nos.87-3138, 87-4751, 87-6586, Mass. Sup. Ct., Oct. 11, 1989). Similarly, George Washington's home at Mount Vernon and Theodore Roosevelt's home at Sagamore Hill are important not only because of a distinctive exterior but also because of the people who lived inside (*Brief for Defendant at 76, Society of Jesus v. Boston Landmarks Comm'n, Nos.87-3138, 87-4751, 87-6586, Mass. Sup. Ct., Oct. 11, 1989*). Both of these homes are designated landmarks for historic reasons and the figures associated with their interiors. As with these homes, the Barnes gallery in Lower Merion is historically significant for housing America's greatest collection of modern art. In addition to the historic and cultural significance of buildings' interiors, several interiors are designated for great architectural merit, or for representing excellence in technical skill, which is important for study and worthy of admiration. The Barnes collection consists of several architectural elements worthy of study, including Cret's innovative gallery layout, his incorporation of natural lighting, his incorporation of fixtures such as Matisse's mural, *La Danse*, and his design of individual rooms as showcases (Barnes Foundation, 1993, p.10).

The objectives of preservation laws set forth by state and local governments for designating building interiors as landmarks are the same as the objectives conclusively established by the New York State Supreme Court in *Penn Central* (Manwaring, 1990, p.7). The greatest number of precedent cases in interior landmark designation history is found in New York City. One of New York City's purposes for preservation regulations is to "promote the use of... interior landmarks... for the education, pleasure and welfare of the people of the city" (N.Y.C., N.Y., Charter & Admin. Code 25-301 (b), 1992). New York City's Landmark Law describes a landmark interior as

An interior, or part thereof, any part of which is thirty years old or older, and which is customarily open or accessible to the public, or to which the public is customarily invited, and which has a special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation, and which has been designated... pursuant to the provisions of this chapter. (N.Y.C., N.Y., Charter & Admin. Code 25-301 (b) (g), 1992).

An interior is also considered the “visible surfaces of the interior of an improvement”.

An “improvement” is “any building, structure, place, work of art or other object constituting a physical betterment of real property, or any part of such betterment” (N.Y.C., N.Y., Charter & Admin. Code 25-302 (m), 1992). It is a violation of the New York City Code to remove or alter a “significant portion of a protected feature of an interior landmark”, unless the Landmark Preservation Commission approves the action (N.Y.C., N.Y., Charter & Admin. Code 25-302 (x) (1) (b), 1992).

The most significant interior landmark preservation decision in New York City was the New York Landmarks Preservation Commission’s designation of the Seagram Building, its outdoor plaza, the lobby, and the interior of the Four Seasons restaurant located in the building (*Teachers Ins. & Annuity Ass’n. of Am. V. City of New York*, 623 N.E.2d 526, 528, N.Y. 1993). Disputing the landmark designation of the Four Seasons restaurant, one of the building’s owners argued that the restaurant’s designation was too far-reaching and that the items “appurtenant to the interior of the restaurant cannot properly be included in the designation” (*Teachers Ins. & Annuity Ass’n. of Am. V. City of New York*, 623 N.E.2d 526, 528, N.Y. 1993).

The interior of the Four Seasons restaurant was created by one of America’s most renowned architects, Philip Johnson (Nivala, 2003, p.11). He worked closely with internationally acclaimed architect, Mies van der Rohe, who designed the Seagram

building (p.11). The two collaborated on the Four Seasons' design to ensure that it reflected and complemented the building. In addition to the interior in general, the Landmark Commission identified several installed features in the restaurant as 'integral historic elements'. The New York City Landmark Commission accorded

interior landmark status to the restaurant's entrance lobby, Grill Room, Pool Room and balcony dining rooms, and included the marble pool, walnut bar, wall surfaces, floor surfaces, ceiling surfaces, doors, railings, metal draperies and two hanging metal sculpture commission by Johnson from the artists (*Teachers Ins. & Annuity Ass'n. of Am. V. City of New York*, 586 N.Y.S.2d 262, 263 App. Div., 1992).

Furthermore, the Commission found that the restaurant interior has "special character, special historical and aesthetic interest and value as part of the development, heritage and cultural characteristics of New York City" (*Teachers Ins. & Annuity Ass'n. of Am. V. City of New York*, 586 N.Y.S.2d 262, 263 App. Div., 1992).

After the Appellate Division did not support the owner's arguments against the restaurant's landmark status and its designation of 'appurtenant fixtures', the Court of Appeals upheld the Four Season's designation. It rejected the owner's claim that the Commission could only designate items that could be classified as fixtures at common law, or real property (*Teachers Ins. & Annuity Ass'n. of Am. V. City of New York*, 623 N.E.2d 526, 528, N.Y. 1993). The Court agreed with the Appellate Division that the Commission could designate "items appurtenant to an interior" and to the integrity of the interior space as they contribute to the special character of the room (Nivala, 2003, p.12). The parallel with the importance of keeping the art collection amassed by Barnes in its intended gallery can therefore be drawn.

Pennsylvania's Preservation of Landmark Interiors

In 1996, Pennsylvania established its Historic Preservation Act to protect cultural objects and properties deemed to be of significant cultural and historic value (PA, Code 37, 1996). The Pennsylvania Historical and Museum Commission (PHMC) is responsible for identifying and protecting the architectural and archaeological resources of Pennsylvania:

Our responsibility is to work with individuals, communities, local governments and state and federal agencies to educate Pennsylvanians about our heritage and its value, to build better communities through preservation, to provide strong leadership, both individually and through partnerships, and to insure the preservation of Pennsylvania's heritage.

In addition to following preservation objectives, Philadelphia has been active for decades in preserving its historic landmarks. Philadelphia's Historic Object Preservation Act

declares as a matter of public policy that the preservation and protection of... objects... of historic, architectural, cultural, archeological, educational and aesthetic merit are public necessities and are in the interests of the health, prosperity and welfare of the people of Philadelphia (Philadelphia, PA., Code 14-2007, 2000).

Furthermore, the Act protects that cultural objects that "may be, by nature or design, moveable yet related to a specific setting or environment" (Philadelphia, PA., Code 14-2007(1)(a), 2000). To this end, Philadelphia set a precedent for the preservation of historic interiors and artistic installations as landmarks within the state of Pennsylvania.

The Pennsylvania Commonwealth Court upheld the Philadelphia Historical Commission's designation of the interior and exterior of the Boyd Theatre in 1989, pursuant of the Philadelphia's Preservation Act, in *Sameric Corp. v. City of Philadelphia*, 125 Pa. Commw. 520, 525, 558 A.2d 155, 158, 1989. In *Sameric Corp.*, the theater

owners challenged the validity of the state exercising its powers under Article I, Section 27 of the Pennsylvania Constitution. The relevant article reads that

The people have a right to clean air... to the preservation of the natural, scenic, historic, and esthetic values of the environment. Pennsylvania's natural resources are the common property of all the people, including generations yet to come.... the Commonwealth shall conserve and maintain them for the benefit of all people (Pennsylvania Constitution, article I, section 27).

The plaintiff argued that the designation of the private theatre was not substantially related to Article I, Section 27, because the theatre is not regularly open to the public (Manwaring, 1990, p.8). The owner further claimed that since a substantial public interest in the theatre's preservation could not be established, the state's powers did not satisfy the public welfare requirement. The Court of Common Pleas rejected the plaintiff's arguments however, stating that even if the owner barred the public from viewing the theatre's interior, the Commonwealth should not be deprived of the opportunity to protect its historic resources for present or future generations (*Sameric Corp. v. City of Philadelphia*, 125 Pa. Commw. 520, 525, 558 A.2d 155, 158, 1989). The designation of the Boyd Theatre as an interior and exterior landmark was upheld and the precedent was set that regardless of current public accessibility, preserving an interior landmark for future generation's enjoyment of cultural heritage is a priority.

Protecting Artworks in Their Intended Setting

In addition to the *Sameric Corp.* precedent, Philadelphia also regulated against the removal of adjunct cultural objects installed in a building as a means of preserving its intended cultural and artistic significance. This precedent was set in the 1998 Court decision to keep the *Dream Garden*, a historic mosaic installation intact as cultural

property *in situ* (*Estate of Merriam v. Phila. Historical Comm'n*, 777 A.2d, Pa. Commw.

Ct. 2001). The *Dream Garden* an element of rare artistic design was designed by Maxfield Parrish and Louis Comfort Tiffany and is in the lobby of the Curtis Publishing Building in downtown Philadelphia (Nivala, 2002, p.2). Curtis and Edward Bok, editors of the *Saturday Evening Post* and the *Ladies Home Journal*, commissioned the artists to create the *Dream Garden* in 1916 (p.2). John Merriam purchased the building in 1968 from Curtis and Bok, and remained the owner until his death in 1994. After his passing, his widow Elizabeth Merriam became responsible for his estate and decided to sell the *Dream Garden* mosaic (p.4).

By April 1998, negotiated sale and removal of the mosaic from the building was being negotiated between the Merriam Estate and casino owner Steve Wynn (p.4). Wynn planned to remove the mosaic to a Las Vegas hotel lobby. One week after the pending sale was made public, the Philadelphia Historical Commission sent notice of its intent to designate the *Dream Garden* as an historic cultural object according to the City's Preservation Act (*Estate of Merriam v. Phila. Historical Comm'n*, 777 A.2d, Pa. Commw. Ct. 2001). Designation as a historic cultural object would prevent its removal from its original and intended location. Elizabeth Merriam contested the designation saying that it contravened her right to profit from private property, arguments similar to those in *Penn Central* and the *Boyd Theatre* cases. Nonetheless, the Court ordered that the *Dream Garden* was to remain in its current location, once again placing greater emphasis on the preservation of historic objects *in situ* over private owners' economic interests. Moreover, the Court's decision recognized that the environment in which an artwork is installed creates an indivisible part of its historic value and cultural

significance. The Court identified the *Dream Garden* as public art *in situ* in a public space that was “undeniably an integral element of the design of the interior”, and thus protected from disassembly and removal.

The need to protect settings of the artworks has similarly been addressed by the State of California (Wilkes, 2001, p.6). California has the broadest legislation regarding the preservation and protection of artworks from destruction or alteration. Thus, it provides greater protection of public interest in publicly or privately owned artworks than any other American State. The 1982 California Art Preservation Act (CAPA) recognizes the “public interest in preserving the integrity of cultural and artistic creations” (p.1). In order for an artwork to be protected under CAPA, it must first be considered an artwork of “recognized quality”, as determined by expert opinion of curators, collectors and other art professionals (Cal. Civ. Code, 987). Second, the artistic creation must be “of substantial public interest” (Eisenstein, 2003, p.12). CAPA’s Civil Code 989 states that site-specific art, which “cannot be removed from real property without substantial physical defacement, mutilation, alteration, or destruction”, will be protected under the statute (Cal. Civ. Code 989).

In addition to granting artists the right to their artwork over anyone who intentionally defaces, mutilates, alters, or destroys it, CAPA ensures the public an opportunity to protect artworks threatened by destruction (Cal. Civ. Code 989). CAPA establishes the right for not-for-profit arts organizations to “act in the public interest” by initiating “an action for injunctive relief to preserve or restore the integrity of a work of art from defacement, mutilation, alteration, or destruction” (Calif. Civil Code, 989). Although CAPA’s Section 989 has not yet been activated, it does recognize the value of

preserving the intended setting of both moveable and immovable works of art (Wilkes, 2001, p.5).

By referring to CAPA here, the intent is not to claim that all moveable artworks should remain hung according to their owners' wishes, but to draw upon the legislation's priority given to the preservation of an artworks' *integrity* against alteration. Moving the artworks that Albert Barnes assembled and hung as a collection from the Lower Merion gallery alters the integrity of the ensemble of the collection, the gallery and the arboretum. As argued above, preservation beyond the protection of an object from physical harm includes the protection of a cultural object's context (Wilkes, 2001, p.13). The Barnes Foundation Lower Merion properties *as a whole* should be regarded as an 'artistic creation' of 'recognizable quality' and protected as such.

Designating the Barnes Foundation Lower Merion Properties as a Historic Landmark

Cases and legislation presented above show that states value the preservation of cultural objects and buildings in their intended settings. Courts have upheld this value by protecting unique interiors, exteriors, settings and landscapes of important landmarks. Moreover, the theories of cultural heritage, underpinning New York City's Landmarks Laws, Philadelphia's Historic Object Preservation Act, and CAPA, protect the cultural, historic and social contexts of landmarks. Recognizing that there is 'special character' to be found in historic landmarks, Grand Central Station, the Four Seasons Restaurant, the Boyd Theatre and the *Dream Garden* were protected from alterations or mutilations by municipalities and states.

Although these precedents conflict with the Philadelphia Orphan Court's decision to separate elements of the Barnes Foundation, there is little argument as to the value of preserving cultural property in its most authentic, complete and original form (Nivala, 2003, p.10). Even a well-intentioned displacement or alteration of the collection would change the cultural meaning of the Barnes collection and therefore should be stopped. Removing the art gallery from the Lower Merion estate is like removing the jewels from a crown: once separated, both the crown and jewels irreplaceably lose beauty, significance and context (Harding, 2002, p.3). As an ensemble the Barnes properties have cultural significance and represent and integrated unique, authentic, historic property and landmark (Nivala, 2003, p.2). Therefore, the argument put forth here proposes that landmark designation would protect and preserve the Barnes Foundation as a cultural ensemble *in situ*.

Provided that it follows a constitutionally proper process, as John Nivala proposes, the Township of Lower Merion's could act to preserve the Barnes properties (2003, p.10). However, the Township of Lower Merion's Historical Architecture Review Board (HARB), the sole agent in Lower Merion with authority to designate the Foundation as a landmark, currently only extends protection to the exterior of landmarks (Historical Architectural Review Board, Township of Lower Merion, 2005). The HARB describes its role as being to

help protect the distinctive and historic character of Lower Merion Township by considering the effects of proposed changes to buildings and properties within historic districts and on the Historic Properties List... and by ruling on their appropriateness. (Historical Architectural Review Board, Township of Lower Merion, 2005)

Therefore, as Nivala argues, the first step for the Township to designate the Barnes properties as a landmark would be to legislate to protect the interiors of cultural properties (2003, p.10). Pursuant to the preservation theories and principles referred to in the preservation legislations of other jurisdictions, the Township of Lower Merion would not be over-extending its legal powers in order to protect historic interiors or installed artistic creations. The broadening of Lower Merion's HARB regulatory powers could facilitate the designation of the Barnes properties as a historic landmark, thereby protecting it against disruption, dismemberment or alteration, and preserving it as a cultural ensemble for generations to come.

Ensuring the Public Interest in the Barnes Foundation

As argued above, designating the Barnes Lower Merion property as a historic landmark would preserve the collection and increase public access to its cultural

inheritance, two of the main problems that the Court tried to remedy by permitting the trustees to relocate the art collection to downtown Philadelphia (*re The Barnes Found. A Corp.* Fiduc. R rpt., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004). If, however, the Barnes Lower Merion property were to be designated and protected as a historic landmark, the Foundation's bleak financial situation would still pose a threat to the survival of the Foundation and the integrity of the site. Therefore, revenue-generating activities need to be added to the Foundation's activities to secure financial stability.

As was demonstrated in the Chapter 3, the Barnes Foundation needs more income than it currently has been generating. Although several alternative solutions to the Foundation's financial crisis were presented in court, including the sale of Ker-Feal, the sale of non-displayed artworks, increased admission charges and number of visitors to the Lower Merion estate, the Court dismissed them as insufficient (*re The Barnes Found. A Corp.* Fiduc. R rpt., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004, p.27). There are, however, other revenue-generating activities that would both increase public access and provide revenues that would eliminate the deficit and sustain the Foundation in the long term.

Two proposed additional revenue-generating solutions that uphold the integrity and authenticity of the collection include: remunerated long-term loans to other museums and increased e-commerce sales of reproductions and educational materials. While these two methods of increasing cash flow are viable, they do not represent an exhaustive list of potential solutions, the complete study of which is beyond the scope of this thesis. These two proposed revenue-generating activities are suggested as alternatives to the plan to relocate the art collection, still the greatest threat to the preservation of the Barnes

Foundation. An exploration of these remedies, strengthens the argument that the trustees' three-campus model severely alters Barnes Foundation by-laws beyond the necessary administrative deviations required to ensure its preservation and survival.

Long-Term Loans

With a collection of more than 1,200 artworks, more than half of which have not been displayed in over the last 50 years, the Barnes Foundation could start using its art collection to generate income (Kelly, 2004). Although the *Amicus Curiae* suggested selling several of the works, which is generally considered ethical for public collections, de-accessioning artworks has several drawbacks (Sax, 1999, p.65). One of the primary arguments against a public collection de-accessioning art is that once the artwork is sold it leaves the collection forever (Goldstein, 1997, p.3). Moreover, since public collections enjoy tax exemptions for providing a charitable service to the public, they have a duty to preserve and protect the property (Odendahl, 2001, p.14). The risk of losing one of the Barnes pieces to private ownership does not comply with the argument claiming that the Barnes Foundation must be preserved as cultural heritage with authenticity and integrity.

There is unanimous agreement in the art world that directors of public collections should consider the redistribution of works through means other than a permanent sale, in other words, through sharing works among institutions. As Jennifer White claims, "sharing may be the most economically sound means of allocating resources among museum" (1996, p.2). The proposed remedy of lending non-displayed works and periodically the works of art in the Lower Merion gallery for remunerated long-term

loans provides all the benefits of de-accessioning artworks without permanent consequences (Kosaras, 2000, p.12).

Lending for profit generates income while preserving a cultural ensemble from permanent dismemberment and is ethically supported throughout the art world (Malaro, 1998). The Barnes Foundation, for example, earned nearly \$16 million in 1993 from the world tour of 80 of its most important works. Two types of remunerated loans are used in the art community: short-term loans primarily in connection with arranging large and specialized exhibitions, and long-term loans to expand the borrowing museum's repertoire and the lending museum's exhibition space (Malaro, 1998, p.275). While short-term loans for blockbuster exhibitions tend to generate more revenue for the borrowing museum, there are more risks and higher immediate costs involved for the lending museum (Prott & O'Keefe, 1989, p.187). The cost of transporting works of art and of insuring it when on loan is high and the risk of damage increases with every move. Therefore, the potential damage and costs for short-term loans are too great for the Barnes Foundation. Similarly, short-term loans tend to emphasize the entertainment value of art, a purpose that Dr. Barnes did not endorse.

On the other hand, long-term remunerated loans can be safer for artworks since they travel less and generate significant profits for the lending institution. For example, in 2000 the Boston Museum of Fine Arts (MFA) arranged a long-term loan-for-profit agreement with the City of Nagoya in Japan (Kosaras, 2000, p.13). In return for a twenty-year commitment to share their collection with the City of Nagoya, the MFA will receive \$50 million over 20 years that will be used to subsidize its operating costs and special projects. The City of Nagoya's plan is to present one five-year loan exhibition

and two smaller exhibitions each year drawn from the MFA's permanent collections.

Similarly, the Whitney Museum of American Art in New York City negotiated an eight-year loan with the San Jose Museum of Art in California to install four exhibits in San Jose from the Whitney's permanent collection (Malaro, 1998, p.275). In return, the Whitney will receive \$4.4 million.

The solution of long-term loans as a means of stabilizing the Barnes' finances was suggested by the Getty museum (Anderson, 2003, p.95). The recommended solution was presented to the current trustees shortly after the Foundation's financial woes were publicized in 2000. Niara Sudarkasa, a Barnes trustee, claims that Richard Glanton had been negotiating with the Getty for a long-term loan (p.95). The Getty purportedly offered the Barnes \$100 million to be paid over a 100-year period in exchange for the loan of Matisse's *Joy of Life* (p.95). The *Joy of Life* canvas currently hangs alone over the staircase in the Lower Merion Gallery.

In addition to supplementing income, long-term loans would endow the Barnes' collection its cultural significance with greater authenticity than a gallery in Philadelphia. Without replicating the Lower Merion exhibition, Loans would provide a 'sampling' of what is in store at the Lower Merion location and the public could be drawn to visit the cultural ensemble in its authentic form. Furthermore, as a way of ensuring the authenticity of the exhibit, loan agreements could stipulate that the borrowing institution must hang present the works according to Barnes' aesthetic and educational principles (Swiecimski, 1989, p.204). To preserve the social context of the Barnes gallery, for example, the Getty would be required to display the *Joy of Life* along with other art from the Barnes collection to parallel the Lower Merion gallery displays.

A second condition in loan agreements could be that an educational program be run for the public as a means of making available the social and aesthetic context of Barnes' collection. Barnes' theory on art interpretation could be taught in lectures, courses, audio-guides or guides with interpreters so that visitors could discover, understand, discuss and react to the collector's theories (Machin, 1989, p.150). To provide both past and present social contexts, the guides and courses would be required to discuss both the merits of Barnes' art theories and the criticisms that have been raised on the collector's educational and aesthetic principles. Through these activities, the public is not misled to believe they have experienced the 'authentic' replica of the collection, as a recreated gallery in Philadelphia has the potential to claim (Machin, 1989, p.150). On the other hand, such discussions would offer visitors a greater understanding of the social context in which the collection was formed, exciting their curiosity to visit and experience the authentic, preserved Lower Merion gallery.

The scope of the influence that Barnes' educational theories could have through loan agreements is greater than what they would have in a Philadelphia gallery. Based on the crowds that the 1993 tour generated, people in various parts of America and the world want to see Barnes' collection and long-term loans generating income for the Foundation are likely to be successful. "Special exhibitions of works and tours increase the availability of art to the viewing public", thereby serving the public's interests and increasing the communication of cultural heritage (White, 1996, p.8). The interests of future generations would also be secured by the fact that loans are only temporary, and as the Foundation secures its finances, it would have the option to renew loan agreements or recall the works upon expiry.

E-Commerce of Art Reproductions and other Educational Materials

Although Albert Barnes forbade reproduced images of artworks from his collection and commercial operations from being run on the Foundation's premises, the Court has approved both activities as consisting of laudable administrative deviations. In 1993, following the world tour of the Barnes collection, the Foundation produced a catalogue, *Great French Paintings from The Barnes Foundation*, one of the few publications presenting the breadth of the Barnes Collection (Barnes Foundation, 1993). A decade later, the Foundation produced a CD-Rom with images and virtual tours of various rooms in the Lower Merion gallery (Barnes Foundation, 2003). Although the trustees have not pursued opportunities to reproduce images of the artworks by licensing and producing educational materials on-line, the sale of such items could generate considerable income (Weil, 2002, p.243).

Museums worldwide reproduce images of artworks and sell collection-related educational materials (Weil, 1995). Public demand for these as posters, in books, Internet pages, and on CD-Roms has steadily increased (Kosaras, 2001, p.8). As reported by Judith Dobrzynski in *The New York Times*, in the past three decades, sales from museum shops have increased from about one per cent to about thirty per cent of a museum's total revenue (1997). In 1987, the Metropolitan Museum of Art earned \$9.2 million from merchandise sales and royalties, 14 per cent of its \$68.1 million operating income (Feder, 1988). By 1994, the Metropolitan Museum of Art had earned \$22.7 million in sales through mail-order catalogs, including on-line catalogs (Dobryznski,

1997). With similar profitability, 16 per cent of the Boston Museum of Fine Art's \$14 million net income in the fiscal year 1996-1997 came from museum shop sales alone.

Unlike the success of museums, the Barnes Foundation reported only \$45,680 income from licensing, merchandising and other publication sources in 2001 (*The Barnes Foundation's Return of Organization Exempt From Income Tax, Form 990, Section 501 (c), 2001* (online) www.barneswatch.org). Nonetheless, considering the high quality and rarity of the Impressionist and Post-Impressionist works in the Barnes collection and the public's interest, the Barnes could be generating far greater revenues from merchandising. Possibly, the most profitable way of expanding sales of educational merchandise and reproductions while increasing public access lies in on-line sales (Kosaras, 2001, p.8).

In the fall of 1994, Bill Gates purchased a 300-sheet manuscript, handwritten and illustrated by Leonardo da Vinci, for \$30.8 million (Harding, 1999, p.2). Cultural property specialist Sarah Harding claims that Gates will most likely marry the modern technology of the Internet with the Da Vinci manuscripts and post them on the Internet for the public access. The benefit of this will be that anyone with reasonable Internet search skills could locate the manuscripts, read them, marvel at them and learn from them (Harding, 1999, p.2). Although the special character of the Barnes cultural ensemble may be difficult to reproduce in on-line images, the educational potential of an on-line resource center for the study of the Barnes' theories and collection is incomparable.

One of the inherent risks that the Barnes Foundation would be faced with when reproducing artworks is the preservation of Barnes' aesthetic principles and the integrity of the collection as a whole (Weil, 2002, p.249). Policies on the propriety of

manufacturing reproductions, replicas and derived products varies amongst public collections, and the Barnes Foundation would have to explore how to ensure the most ethical ways of producing and distributing images from its collection (Malaro, 1998). The sale of reproduced images and replicas in the collection's store must be carefully regulated because of the ease by which authenticity may be misperceived by the public. In order to respect the authenticity and integrity of the original, all reproductions and replicas would have to be clearly and indelibly identified as such. Providing brief written descriptions explaining the educational value of a particular item and its connection with the gallery's collection or activities may be possible (Machin, 1989, p.150). Similar explanations should be a part of all catalogue descriptions wherever feasible.

Although both these activities depart from Albert Barnes' by-law against loans and reproductions, the two alternative solutions deviate less from Barnes' charitable intentions than the trustees' three-campus model. Moreover, there are several additional advantages over the three-campus model that the alternative remedies of remunerated long-term loans and increased e-commerce of reproductions provide . First, they do not threaten the collector's aesthetic and educational philosophies. Secondly, they respect preservation and conservation principles and are ethical and legal revenue-generating activities that are undertaken by other public collections in America. Third, both revenue-generating activities combined could generate \$20 million in revenue, thereby providing the sum necessary to replenish its endowment as proclaimed by the *Amicus Curiae* and by the Barnes trustees in the Orphan's Court in 2004 (*Post Hearing Brief of the Amicus Curiae, in re The Barnes Found. A Corp. Fiduc. Rpt., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, October 20, 2004*). An additional benefit of lending for profit and

of e-commerce sales is that they cannot be taxed by American federal or state governments since loans do not involve the direct exchange of property for an agreed sum that is, a sale (Kosaras, 2001, p.12).

These alternate revenue-generating activities depart to a far lesser degree from cultural preservation principles than the deviations proposed by the Foundation trustees in the three-campus model. Furthermore, permitting the Foundation to undertake these activities does not require additional administrative deviations than what the court has already permitted. The Barnes Foundation could therefore be preserved as a cultural ensemble, protecting the context in which the artworks and their setting were shaped.

Conclusion: Losing a Legacy with the Three-Campus Model

The Barnes Foundation, as a cultural ensemble, is part of an inheritance that overlaps domains of art, culture, and involving aesthetic and cultural experience (Nivala, 2003, p.2). It communicates important social ideas and information that convey historic experience and emotion, opening doors that reveal and remind, instruct and inspire, express and exalt (Sozanski, 2003). It is more than a formal collection; it is an intellectual, emotional and cultural experience that warrants protection and preservation. To take Barnes' art collection and place it in a distorted environment such as the one planned by the current trustees is antithetical to Barnes' vision and to the preservation of his creative legacy. The court's decision to allow the relocation of the artworks to central Philadelphia emphasizes the economic potential of transforming the Barnes into a tourist destination rather than on the preservation and protection of the Barnes Foundation as a unique example of cultural heritage. This, however, goes against precedents and

legislation that favour the preservation of landmarks such as the Barnes against dismemberment or alterations.

As the past needs to meet the present, the present needs to protect the past for future generations. If we do not protect the past, we change history and preserve untruths and cultural assumptions rather than authentic examples of the beliefs of cultural innovators (Harding, 1999). In order to protect the Barnes ensemble from dismemberment, it should be protected as an historic landmark. This would not only preserve the rare collection, but would also provide another precedent to ensure that other worthy cultural ensembles are preserved and protected from alteration or destruction.

CHAPTER FIVE

CONCLUSION

Throughout this thesis, several of the complexities behind the 2004 Orphan's Court approval of the Barnes Foundation's relocation proposal have been presented. As has been shown, the interests of the founder, Dr. Albert Barnes, the Foundation's trustees, the public, and the Township of Lower Merion, have often collided and caused countless litigations and court interventions. Until December 14, 2004, the most recent court decision on the by-laws that affect the art collection, the Barnes Foundation was able to preserve its distinct character as an educational institution devoted to the aesthetics and the appreciation of fine art. With the major by-law modifications, the Barnes has a new face: it is to be transformed from an institution focused on the education of art and horticulture to a full-time museum and tourist attraction. By approving the trustees' proposed three-campus model and the relocation of the collection to central Philadelphia, the Orphan's Court over-extended itself through its use of administrative deviation and went contrary to the objectives of Barnes wishes. The resulting three-campus model with its homogenized gallery in central Philadelphia will present a bastardized version of the unique cultural ensemble whose attraction stemmed from the unique vision of its *avant-garde* founder.

In the introduction to Dr. Albert Barnes in Chapter 1, we saw that from his early collecting days until his death he had a specific vision of the way in which his art collection should be used. Drawing on the educational and aesthetic theories established in his early professional life, Dr. Barnes used his collection to educate those from less

fortunate socio-economic backgrounds. In establishing his art gallery on Latches Lanes in the Township of Lower Merion, Dr. Barnes took the same deliberate care in infusing his aesthetic and educational principles in the layout and design of the gallery as he did when creating the Foundation's by-laws. Dr. Barnes' beliefs in social equality, particularly between Caucasian and African-Americans, and in democracy were entrenched in the Barnes Foundation's programs. They often provoked disapproval from Philadelphia's elite. Unwilling to sacrifice his beliefs or the integrity of his Foundation to meet the pressures of the art world, both Dr. Barnes and his Foundation were often misunderstood and earned unjustified disrepute. This in turn strengthened Dr. Barnes' disfavor with the press and conventional art establishments. He retaliated by ensuring that access to his Foundation, as well as the use of his art collection, would remain restricted to educational purposes. Although he had equipped his Foundation to survive along the lines of his vision beyond his own lifetime, he could not have predicted the disputes that were to arise over the future of the Foundation.

Chapter 2, which dealt with trust laws, discussed how charitable trusts are supposed to endure in perpetuity in order to fulfill the charitable missions intended by their founders and to serve the public. At the same time, it was shown that, although charitable Foundations including great art collections such as the Barnes Foundation, are usually both rare and unique, they cannot remain static to the needs of present and future generations (Lee, 2000). Collections cannot be kept in perpetuity without consideration for the artworks' changing social and cultural significance or the public's right to access cultural property (Lee, 2000). If public interest competes with the charitable intentions of

a Foundation, it is the responsibility of the courts to rule on the control of public collections with the doctrines of *cy pres* and administrative deviation.

During the 1990s, Barnes Foundation's trustees appealed to the courts in order to modify the by-laws, claiming that its financial situation had exhausted the trustees' ability to administer the Foundation. Rather than seeking alternatives to return the Foundation to financial stability, the trustees initiated a practice of appealing to the courts for the amendment of the Foundation's by-laws. By the end of the decade, after numerous court actions to amend the by-laws and litigations against the Township of Lower Merion, the trustees had drained the endowment and damaged the Foundation's relationship with the Township. Compounding the negative effects of these developments, the courts had set a dangerous precedent, permitting several by-law modifications initiated by the trustees without requiring an investigation by the State Attorney General into the trustees' administrative practices.

Irresponsible administration of the Barnes Foundation, which was run as though it were a full-time public collection, persisted under Kimberly Camp's directorship. As we saw in Chapter 3, while Camp and the trustees ran the Foundation's finances into the ground, the whole time making pleas to the courts for assistance, the Pew Charitable Trust, the Lenfest Foundation and the Annenburg Foundation came to the rescue with a \$150 million offer. As reflected in the proposed three-campus model and its by-law modifications, the three Pew, Lenfest and Annenburg trusts, along with civic and state leaders, had a greater interest in the Barnes' collection's economic potential as a tourist attraction than in preserving the Foundation's mission and restoring the preeminence of its donor's philosophy.

After examining the case presented by the trustees and the counter-claims of the *Amicus Curiae*, the trustees' claims that the three-campus model is 'necessary' to replenish the Foundation's endowment and offers the 'least drastic' administrative deviations from Barnes' by-laws was rejected. It was concluded that several alternatives exist that are both more ethical and more economically feasible. The trustees did not try any of the alternatives presented by the *Amicus Curiae*, which included increasing the admission costs at the Lower Merion gallery, or exploring the Lower Merion Civic Association's resolution to permit increased admissions in order to keep the Barnes in Lower Merion.

From the proposed downtown Philadelphia location's planned lay-out to the increased visiting hours and the diminished attention to educating in Barnes' aesthetic principles, the charitable intentions of the Foundation will be completely altered by the three-campus model. By aligning itself with the supporters of the gallery's relocation, the Orphan's Court disregarded administrative trust law and overstepped its judicial powers. Pursuant to this conclusion, the level of influence and pressure exerted by civic, political and economic leaders over the Court should be called into question. It is needless to say that politics influenced the Court either consciously or otherwise. Regardless of the Court's stated intentions, its decision clearly favors the use of the Barnes collection as a major tourist attraction on Philadelphia's Museum Mile over the preservation of the Foundation's unique character and purpose.

Although the Court claimed that its approval of the trustees' proposed by-law modifications promoted the Foundation's preservation, its financial stability, and public

access, as a result of the proposed three-campus model, the Barnes Foundation is in its most precarious position since its founding over 80-years ago.

As described in Chapter 4, Barnes' charitable intentions, including his aesthetic, educational and social visions have been overridden to accommodate changes that permit the economic exploitation of the art collection. The three-campus model deviates from sound preservation principles by separating the art collection from the arboretum and the historically significant art gallery, thereby destroying the Foundation's authenticity and integrity. Moreover, Dr. Barnes provided a cultural legacy beyond a formal art collection: his aesthetic and educational philosophies provide invaluable insight into the culture and social context behind his interest in art collecting, democratic teachings, equality and social justice, all of which warrant preservation. By moving the art collection, the trustees will destroy the aesthetic ensemble and the artistically created collection that Dr. Barnes took such personal care and time to arrange and preserve. It will also destroy a unique, alternative to museums, an art gallery that adds to the richness and diversity of America's cultural inventory. As Peter Schjeldahl exclaimed in *The New Yorker*:

The Barnes is a work of art in itself, more than the sum of its fabulous parts. You don't view the installations so much as live it, undergoing an experience that will persist in your memory like a love affair that taught you some thrilling and some dismaying things about your character. If there were other places like the Barnes, dispensing with it would be less tragic. But, one minus one is zero. (2004, p.202)

Beyond the negative consequences that the Court's decision will have on the preservation of the Barnes Foundation, a dangerous precedent has been created for administrative trust law and the preservation of cultural heritage in general.

Disregarding the preservation principles enshrined in American legislation at the federal, state and municipal levels, the Orphan's Court's decision does not protect the Foundation's authenticity or integrity, and actually threatens its survival and cultural value. John Nivala wrote, "If art, mirrors life, so does the law pertaining to it." (Nivala, 2003, p.21) In the same spirit, it can be said that as art leaves a lasting impact and impression, so do the courts in ruling on art collections. The Court's decision to allow relocation of the Barnes collection sets a perilous precedent in the areas of administrative trust law and cultural resource preservation law. More specifically, where these two areas meet, the administration of charitable art Foundations, the Barnes Foundation precedent may prove to have grave consequences for the rich American tradition of donating artworks to the public. As the number of charitable Foundations and public art collections in particular continue to increase in America, the courts need to broaden their understanding of cultural ensembles and the irreplaceable value that these Foundations have when they are preserved in their collective form.

By providing invaluable opportunities to experience cultural heritage, unique public art collections deserve to be protected from alteration or the influences of economic and political stakeholders. According to recent precedent, courts have valued the preservation of historic exteriors, interiors and installation in their intended settings and in their complete form. The preservation of the Barnes Foundation properties as a historical and cultural landmark would follow both preservation principles and precedents. Therefore, the solution to the Barnes' Foundation dilemma is to designate it as a cultural landmark, thereby making it immune from the economic interests of its trustees and their desire to alter and dismember it.

For the benefit of present and future generations, the Barnes Foundation Lower Merion estate, as a designated cultural landmark, would be preserved to authentically reflect the spirit of its founder and the embedded historic and cultural significance. Even though charitable art Foundations represent the thoughts and aesthetics of a particular individual at a particular time and in a particular location, as John Nivala explains, to respect the *genius loci* of a cultural ensemble *in situ* does not mean to “freeze the place and negate history” (1996, p.17). On the contrary, it means that the life rooted in a cultural ensemble such as the Barnes Foundation, and the ‘spirit’ of these places need to be preserved with a care for the past and the future, providing the public a present identity, individually and culturally (p.17). Therefore, as a means of financially ensuring the maintenance of the Barnes Foundation estate in Lower Merion as a cultural ensemble, several alternative revenue-generating activities can be further explored. As mentioned in the conclusion to Chapter 4, in addition to the alternatives presented by the *Amicus Curiae*, two possible income-generating activities include remunerated long-term loans of non-displayed artworks and increased e-commerce sales of the Foundation’s educational materials.

In sum, while the December 2004 decision on the Barnes Foundation is clearly flawed and tragic for the Barnes art collection and art in America, it has set an extremely dangerous precedent and will be bell-weather for other culturally significant collections and settings. Accordingly, one must conclude that the true battle between the intentions of art donors, their Foundations and our society’s ever-increasing preoccupation with simple economics will continue to heighten in its intensity. Unless proper guidelines are

Preserving the Barnes Foundation

p. 197

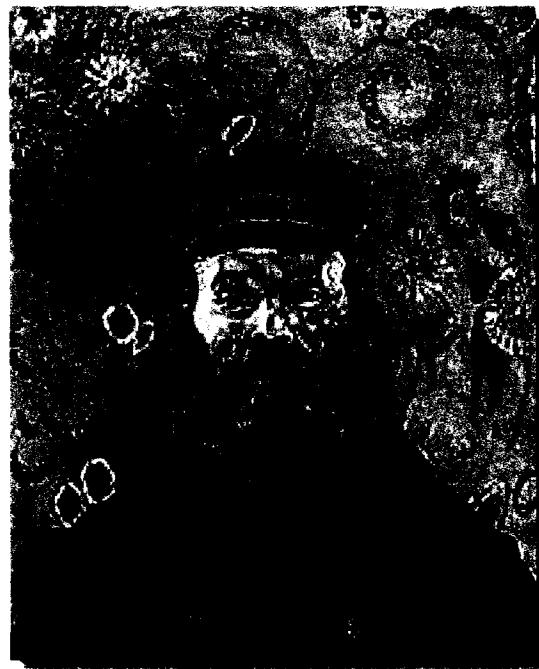
established for Foundations and the judiciary alike, the fate of the Barnes Foundation is only the first of a litany of injustices to the art world and its serious collectors.

APPENDIX A:

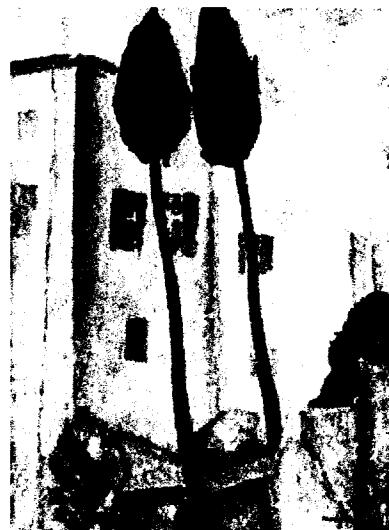
Selected Artworks from the Barnes Collection



*Figure 1: Vincent Van Gogh (1853 – 1890)
Lupanar, Tavern Scene Room XIV Barnes Gallery
n.d., oil on canvas, 12-3/4" x 15-1/2"
Source: www.barnesfoundation.org*



*Figure 2: Vincent Van Gogh (1853 – 1890)
Postman, Room II
1889, oil on canvas
21" x 15", Acquired by Dr. Barnes in 1912
Source: www.barnesfoundation.org*



*Figure 3: Amedeo Modigliani (1884-1920)
Cypress Trees and Houses
n.d., oil on canvas, 23-3/4" x 17 3/4"
Source: www.barnesfoundation.org*



*Figure 4: Paul Cezanne (1839-1906)
Orange and a Bottle
1890-94, oil on canvas, 19 x 28-1/8 in.
Source: www.barnesfoundation.org*



*Figure 5: Claude Monet (1840-1926)
Girl in a Garden with a Dog
1873, oil on canvas, 21-11/16" x 18"
Source: www.barnesfoundation.org*



*Figure 6: Paul Gauguin (1848-1903)
Loulou
1890, oil on canvas, 21-3/4" x 18-1/2"
Source: www.barnesfoundation.org*

APPENDIX B:

The Barnes Foundation Gallery and Arboretum



Figure 1: Detail of the front, left-side view of Paul Cret's chateau-style gallery with images of Jacques Lipchitz' friezes above the Juliet balconies on the second



Figure 2: Main entrance to the Paul Cret designed gallery on the Barnes Foundation Estate



Figure 3: Front, right side view of the front of the Barnes Gallery in the Township of Lower Merion



Figure 4: Back, right side view of the chateau-style gallery designed by Albert Barnes and Paul Cret gallery from the arboretum



Figure 5: Back view of chateau-style gallery's main hall from the arboretum



Figure 6: The arboretum greenhouse and parking lot on the west side of the Barnes Estate



Figure 7: Back, left-side view of the gallery designed by Paul Cret from the parking lot next to the arboretum



Figure 8: Detail of the mosaic tile entrance way and the Baule door leading into the Barnes Foundation Gallery in the Lower Merion Estate

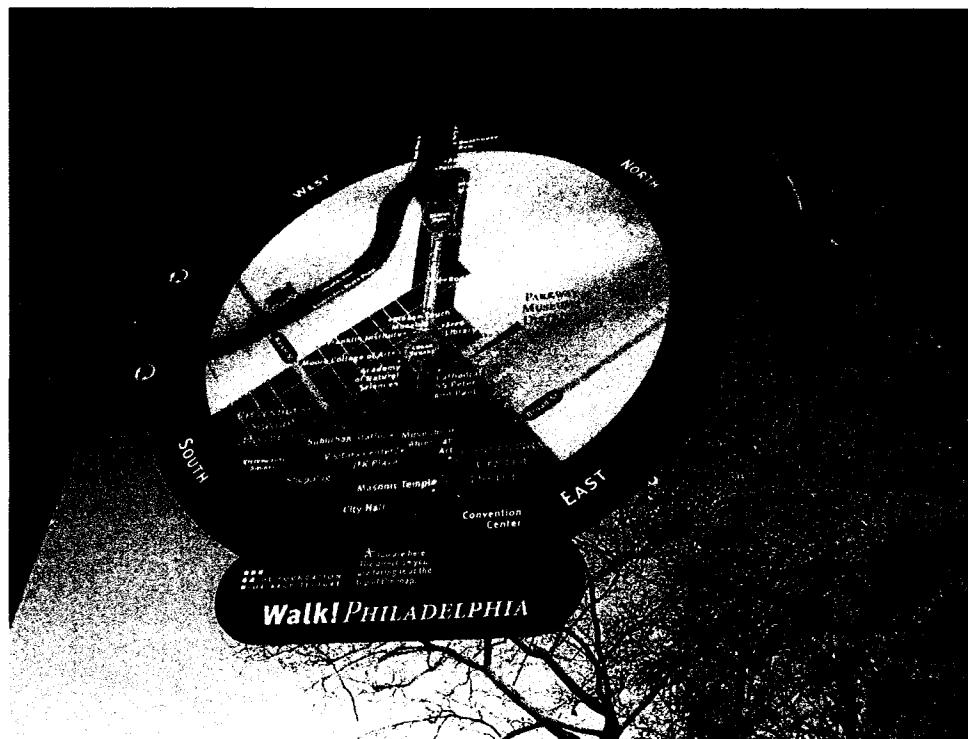


Figure 9: A Map of the Parkway Museum District, or 'Museum Mile', in central Philadelphia – the proposed site for the relocation of the Barnes gallery and art collection

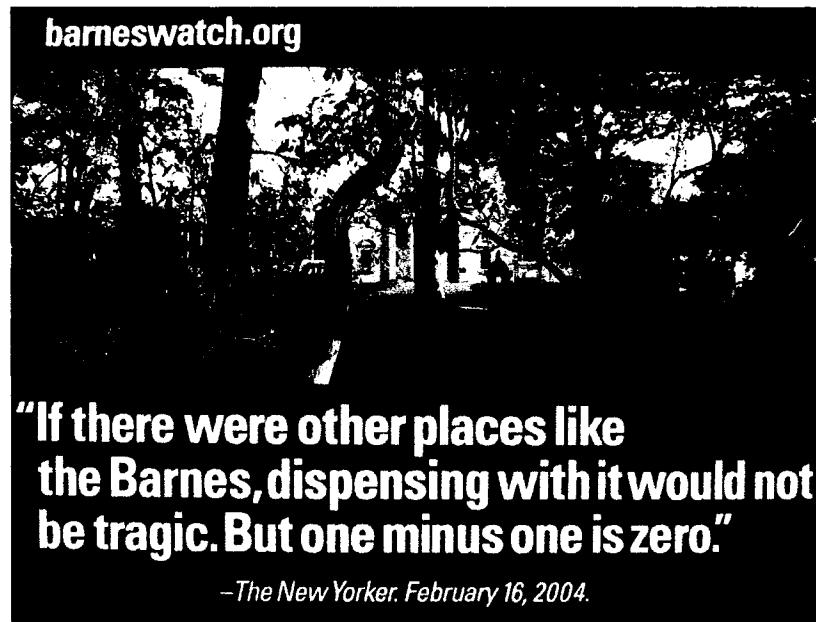


Figure 10: A sign posted on a neighbour's lawn across the street from the Barnes Estate on Lower Latches Lane supporting the preservation of the Barnes Foundation in Lower Merion

REFERENCES

- Abbinante, Chris. (1997, January) "Protecting "Donor Intent" in Charitable Foundations: Wayward Trusteeship and the Barnes Foundation", University of Pennsylvania Law Review, 145, 665, 1997.
- Alsop, Joseph. (1982) *The Rare Art Traditions*. New York: Harper & Row Publishers.
- American Association of Museums. "Home" [online] website: www.aam-us.org, April 3rd, 2005.
- Anderson, John. (2003) *Art Held Hostage: The Battle Over the Barnes Collection*. New York: W. W. Norton & Co.
- Andreae, Christopher. (2003, July 24) "An Artless Way to Enforce One's Will" Christian Science Monitor.
- Andrews, F. Emerson. (1953) *Attitudes Towards Giving*. New York: Russell Sage Foundation.
- Association of Art Museum Directors. "History" [online] website: www.aamd.org, April 3rd, 2005.
- Atkinson, Rob. (1993, July) "Reforming *Cy pres* Reform", Hastings Law Journal, 44, 1112, 1993.
- Barnes, Albert. (1965) *The Art in Painting*, 3rd Ed. New York: Harcourt, Brace & World.
- Barnes, Albert. (1942) Radio Address. Plaque at the Barnes Foundation, March 18th, 2005.
- BarnesWatch*. (Spring, 2003) [online] website: www.barneswatch.org
- BarnesWatch*. (June, 2003) [online] website: www.barneswatch.org
- BarnesWatch*. (Spring, 2005) [online] website: www.barneswatch.org
- Blumenthal, Ralph. (2002, September 25) "Barnes Foundation Seeks OK to Move Art Gallery" The Legal Intelligencer.
- Blumenthal, Ralph. (2003, July 2) "Audit Sharply Criticizes Art Institution's Dealings" The New York Times.

Bolling, Deborah. (December 4, 2003) "Thy Will Be Done?" Citypaper.net, Philadelphia [online] website: www.citypaper.net, February 23rd, 2005.

Brody, Evelyn. (1997) "Charitable Endowments and the Democratization of Dynasty" Arizona Law Review, 39, 873, 1997.

Ciba Foundation. (1975) *The Future of Philanthropic Foundations*. Amsterdam: Associated Scientific Publishers.

Clifford, J. (1994) "Collecting Ourselves" *Interpreting Objects and Collections*, Susan Pearce (Ed.), London: Routledge.

Coggins, Clemency. (2001, Spring) "Ownership and Protection of Heritage: Cultural Property Right for the 21st Century" Connecticut Journal of International, 16, 183, 2001

Collins, Bruce. (2002, December) "Founder's Wishes Shackie Foundation's Future" Corporate Legal Times.

Costonis, John. (1989) *Icons and Aliens: Law, Aesthetics, and Environmental Change*. Chicago: University of Chicago Press.

Dewey, John. (1934) *Art as Experience*. New York: Minton, Balch & Company.

Dobrzynski, Judith. (1997) "Art(?) to Go: Museum Shops Broaden Wares, at a Profit", New York Times, December 10, 1997.

Duncan, Carol. (1994) "Art Museums and the Ritual of Citizenship". *Interpreting Objects and Collections*. Susan Pearce (Ed.) London: Routledge.

Edie, John. (1987) "Congress and Foundations: Historical Summary" *America's Wealthy and the Future of Foundations*, Boris, Elizabeth and Teresa Odendahl (Eds.) New York: The Foundation Centre.

Eisenstein, Ilana. (2003, May) "Keeping Charity in Charitable Trust Law: The Barnes Foundation and the Case for Consideration of Public Interest in Administration of Charitable Trusts", University of Pennsylvania Law Review, 151, 1747, 2003.

Elsen, Albert. (1980, June) "Blockbusters: Assessing the Pros and Cons", Art in America, 27. P.24.

Feder, Barnaby. (1988) "Metropolitan Museum Shows Retailing Bent." New York Times, May 27, 1988.

Feld, Alan, Michael O'Hare, Mark Schuster. (1983) *Patrons Despite Themselves: Tax Payers and Arts Policies*. New York: New York University Press.

- Feldman, F., S. Weil, & S. Duke Biederman. (1986) *Art Law: Right and Liabilities of Creators and Collectors*. Boston: Little, Brown & Co.
- Fox, Daniel. (1995) *Engines of Culture: Philanthropy and Art Museums*. New Brunswick, N.J.: Transaction Publishers.
- Fraser, Philip. (1991) *Making and Effacing Art: Modern American Art in a Culture of Museums*. New York: Oxford University Press.
- Frick Collection. "Education" [online] website: www.frick.org, April 4th, 2005.
- Greenfeld, Howard. (1987) *The Devil and Dr. Barnes*. New York: Marion Boyars.
- Goldfarb Marquis, Alice. (1991) *The Art Biz* Chicago: Contemporary Books.
- Goldstein, Jason. (1997) "Deaccession: Not Such a Dirty Word" Cardozo Arts and Entertainment Law Journal, 15, 213, 1997.
- Greenfeld, Howard. (1987) *The Devil and Dr. Barnes*. New York: Marion Boyars.
- Grampp, William D. (1989) *Pricing the Priceless*. New York: Basic Books.
- Guggenheim Museum. "History of the Collection" [online] website: www.guggenheim.org, April 4th, 2005.
- Harding, Sarah. (1999) "Value, Obligation and Cultural Heritage", Arizona State Law Journal, 31, 291, Summer, 1999.
- Hart, Henry. (1963) *Dr. Barnes of Merion*. New York: Farrar, Straus and Company.
- Historical Architectural Review Board, Township of Lower Merion, www.lowermerion.org/HPOrd/brief2.htm
- Horn, Patricia. (2004, January 29) "With the Fate of One of the World's Greatest Private Art Collections in his Hands, Montgomery County Orphans' Court Judge Stanley Ott will issue a decision this morning on the Barnes Foundation's proposal to move its gallery from its garden setting in Lower Merion to the Benjamin Franklin Parkway in Center City" The Philadelphia Inquirer.
- Horn, Patricia & Matthew Blanchard. (December 27, 2004) "On Barnes Plans, Lessons in Success and Failure" The Philadelphia Inquirer.
- Institute of Museum and Library Services. "About IMLS" [online] website: www.imls.org, April 4, 2005.

Isabella Stewart Gardner Museum. "The Museum: Isabella Stewart Gardner" [online] website: www.gardnermuseum.org, April 4th, 2005.

Kelly, Joseph Dennis. (2004, December 21) "After Judge's Ruling, Barnes Foundation will Move to Downtown Philadelphia", *Architectural Record*. [online] website: <http://archrecord.construction.com/news/daily/archives/041221barnes.asp>, February 12, 2005.

Kerkstra, Patrick. (2000, November 16) "For the Barnes, \$500,000 from the Getty" The Philadelphia Inquirer.

Klein, Julia. (2005, January 15) "Relocating The Barnes Raises Hard Challenges" The New York Times. P. 7

Kosaras, Andras. (2000) "Federal Income and State Property Tax Exemption of Commercialized Nonprofits: Should Profit-Seeking Art Museums Be Tax Exempt" New England Law Review, 35, 115, Fall.

Kramer, Hilton. (2003, October 13) "Looting Dr. Barnes: Philly Plutocrats Plunder a Legacy" The New York Observer.

Lee, Wendy. (2000) "Charitable Foundations and the Argument for Efficiency: Balancing Donor Intent with Practicable Solutions Through Expanded Use of Cy Pres", Suffolk University Law Review, 34, 173, 2000.

Lerner, Ralph & Judith Bresler. (1989) *Art Law: The Guide for Collectors, Investors, Dealers & Artists*, Vol. II. New York: Practicing Law Institute.

Machin, Alan. (1989) "The Social Helix: Visitor Interpretation as a Tool for Social Development", *Heritage Interpretation*, Vol. 2, David Uzell (Ed.), London: Belhaven Press.

Malaro, Marie. (1994) *Museum Governance*. Washington, D.C.: Smithsonian Institute Press.

Malaro, Marie. (1985) *A Legal Primer on Managing Museum Collections*. Washington, D.C.; Smithsonian Institute Press.

Manwaring, Albert. (1990) "American Heritage at Stake: The Government's Vital Interest in Interior Landmark Designations" New England Law Review, 25, 2291, 1990.

Merryman, John Henry. (1985) "Thinking About the Elgin Marbles", Michigan Law Review, 88, 1881, 1888.

Merryman, John Henry. (1989) "Public Interest in Cultural Property" California Law Review, 77: 339, March.

Merryman, John. (2000) *Thinking about the Elgin Marbles: Critical Essays on Cultural Property, Art and Law*. London: Kluwer Law International.

Merryman, John & Albert Elsen. (1987). *Law, Ethics and the Visual Arts, 2nd ed.* Philadelphia: University of Pennsylvania Press.

Merryman, John & Albert Elsen. (1987). *Law, Ethics and the Visual Arts, 4th ed.* London: Kluwer Law International.

Middlemas, Keith. (1975) *The Double market: Art Theft and Art Thieves*. Hampshire, England: Saxon House, D.C. Heath Ltd.

Nivala, John. (1996) "Saving the Spirit of Our Places: A View on Our Built Environment" UCLA Journal of Environmental Law & Policy, 15, 1, 1996.

Nivala, John. (2002) "Preservation is Process: The Designation of Dream Garden as a Historic Object", Widener Law Symposium, 8, 237, 2002.

Nivala, John. (2003, Winter) "Droit Patrimoine: The Barnes Collection, The Public Interest, and Protecting Our Cultural Inheritance" Rutgers Law Review, 55, 477, 2003.

Nochlin, Linda. (1987) "Museums and Radicals: A History of Emergencies" in *Law, Ethics and the Visual Arts, 2nd ed.* Merryman, John & Albert Elsen (Eds.). Philadelphia: University of Pennsylvania Press. P.646-649

Odendahl, Sean. (2001) "Who Owns the Past in U.S. Museums? An Economic Analysis of Cultural Patrimony Ownership", University of Illinois Law Review, 475, 2001.

Odendhal, Teresa and Elizabeth Boris (Eds.) (1987) *America's Wealthy and the Future of Foundations*. New York: The Foundation Center.

Osman, Dalia. (1999) "Occupiers' Title to Cultural Property: Nineteenth-Century Removal of Egyptian Artifacts", Columbia Journal of Transnational Law, 37,969, p.970-71

Pennsylvania Law Weekly. (2002, September 30) "Barnes Foundation Trustees Seek Court Approval to Move Art Gallery to City" Pennsylvania Law Weekly, 25, 38

Perry, Marilyn. (1994) "The Art Museum and the Public" *The Arts in the World Economy*. Robinson, O. Freeman, R. & Riley, C. (Eds.) Hanover: Salzburg Seminar.

Philadelphia Daily News. (2003, December 11) "Why the Barnes Art Matters; and Why We Should All See It" Philadelphia Daily News, Editorial Opinion, p.27.

Philadelphia Inquirer. (2000, September 16) "Buried Treasure: Dig up ways to make the Barnes accessible and financially sound – before it's too late". The Philadelphia Inquirer.

Phillips Collection. "Museum History" [online] website: www.phillipscollection.org, April 2nd 2005.

Pratt, Lyndel. V. & P.J. O'Keefe. (1989) *Law and the Cultural Heritage*, Vol. 3, London: Butterworths.

Rand, Kathryn. (1993, Fall) "Nothing Lasts Forever: Toward a Coherent Theory in American Preservation Law", University of Michigan Law Review, 27, 277, 1993.

Rose, Joel [Reporter] (2003, October 21) "Disagreements over the location and status of the Barnes collection, the most famous private art collection in the world" [Radio Program] National Public Radio, All Things Considered, 9:00 PM ET – NPR. Melissa Block and Robert Siegel, Anchors.

Rubinkam, Michael. (2003, September 22) "University OKs Moving Art Collection to Philly" The Korea Herald.

Russell Sage Foundation (1965) *Foundations: 20 Viewpoints*. Philadelphia: Wm. F. Fell Co.

Salisbury, Stephan. (2001, October 28) "Painted into a Corner?" The Philadelphia Inquirer.

Sax, Joseph. (1990) "Heritage Preservation as a Public Duty: The Abbe Gregoire and the Origins of an Idea". Michigan Law Review, 88, 1142, 1990.

Sax, Joseph. (1990b) "Is Anyone Minding Stonehenge? The Origins of Cultural Property Protection in England" California Law Review, 78, 1543, 1990.

Sax, Joseph. (1999) *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures*. Ann Arbor: The University of Michigan Press.

Schack, Willaim. (1963) *Art and Argyrol*. New York: A.S. Barnes and Company.

Schjeldahl, Peter. (2004, February 16) "Untouchable: The Barnes Foundation and its Fate" The New Yorker.

Schulz, Eva. (1994) "Notes on the History of Collecting and the Museum" *Interpreting Objects and Collections*. Susan Pearce (Ed.) London: Routledge.

Sims, Lewis M. "The Dead Hand Achieves Immortality: Gifts to Charity", in the Thomas M. Cooley Lectures 110, 121(University of Michigan Law School, Series Series No. 6, 1955).

Smith, Roberta. (2004, December 15) "Does it Matter Where This Painting Hangs?" The New York Times.

Sozanski, Edward. (2003, April 20) "The Barnes at the Crossroads" The Philadelphia Inquirer.

Sozanski, Edward. (2003, April 24) "World Class Art and Flower to Grow Critical Thinkers" The Philadelphia Inquirer.

Stanley, Stephanie. (1999, October) "New Mission for Barnes Fund Raising" The ArtNEWS.

Swiecimski, Jerzy. (1989) "Truths and Untruths in Museum Exhibitions", *Heritage Interpretation*, Vol. 2, David Uzell (Ed.). London: Belhaven Press.

The Barnes Foundation's By-Laws. (December 4th, 1922) Chartered in the State of Pennsylvania. [On-line] website: www.barneswatch.org.

The Barnes Foundation, Camp, Kimberly. "A Message from the President and CEO" The Barnes Foundation. (online) www.barnesFoundation.org/h_message.html, February 12, 2005.

The Barnes Foundation. "Mission Statement", The Barnes Foundation. (online) www.barnesFoundation.org/h_mission.html, February 12, 2005.

The Barnes Foundation. "About the Barnes Foundation", The Barnes Foundation. (online) www.barnesFoundation.org/h_main.html, February 12, 2005.

The Barnes Foundation. "The Fundraising Challenge in 2004 Annual Fund", The Barnes Foundation. [online] website: www.barnesFoundation.org/s_af.html, February 12, 2005.

The Barnes Foundation. "Major Gifts from an Elite Level of Donors", The Barnes Foundation. [online] website: www.barnesFoundation.org/s_mg.html , February 12, 2005.

The Barnes Foundation. "The Life and Work of Albert Barnes", The Barnes Foundation. (online) www.barnesFoundation.org/h_bio.html, February 12, 2005.

The Barnes Foundation. (1993) *Great French Paintings from The Barnes Foundation*. New York: Alfred A. Knopf.

The Barnes Foundation. (2002, February 28) "Barnes Foundation Educational Program Approved by Pennsylvania Department of Education" [Press Release] (online) www.barnesFoundation.org/v_p>022802.html, February 12, 2005.

The Barnes Foundation. (2003) [CD ROM] *A Passion for Art*. New York: The Barnes Foundation and Corbis Publishing.

The Philadelphia Inquirer. (2000, September 16) "Buried Treasure: Dip up Ways to Make the Barnes Accessible and Financially Sound – Before it's too Late" [The Philadelphia Inquirer](#).

Toobin, Jeffrey. (2002, January 21) "Battle for the Barnes: Can One of America's Greatest Private Collections Survive?" [The New Yorker](#).

Van der Tas, Jacob. (1993) "Dilettantism and Academies of Art: The Netherlands example" *Paying the Piper*. Judith Higgins Balfe (Ed.) Chicago: University of Illinois Press.

Vogel, Carol. (2003, September 15) "The Barnes Takes Steps to Move to Philadelphia" [The New York Times](#).

Vogel, Carol. (2004, December 14) "Judge Rules the Barnes Can Move to Philadelphia" [The New York Times](#), p.1

Walker, John. (1974) *Self-Portrait with Donors: Confessions of an Art Collector*. Boston: Little, Brown & Co.

Warner, Susan. (2002, October 8th) "On Whole, Barnes Collection Would Rather Be in Philly", [Washington Post](#), C1.

Weaver, Warren. (1967) *U.S. Philanthropic Foundations*. New York: Harper & Row.

Weil, Stephen. (2002) *Making Museums Matter*. Washington, D.C.: Smithsonian Institute Press.

Weil, Stephen. (1995) *A Cabinet of Curiosities*. Washington, D.C.: Smithsonian Institute Press.

Weil, Stephen. (1990) *Rethinking the Museum*. Washington, D.C.: Smithsonian Institute Press.

Weil, Stephen. (1983) *Beauty and the Beasts*. Washington, D.C.: Smithsonian Institute Press.

White, Jennifer. (1996, February) "When it's OK to Sell the Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art to Meet Museum Operating Expenses" Michigan Law Review, 94, 1041, 1996.

Wilkes, Nicole. (2001, Winter) "Public Responsibilities of Private Owners of Cultural Property: Toward a National Art Preservation Statute" Columbia – VLA Journal of Law and the Arts, 24, 177, 2001.

Zucchini, David. (2002, September 3) "Great Art Framed by Turmoil" The Los Angeles Times.

Zuluta, Lito B. (2002, November 25) "Private Collection, Public Art" Philippine Daily Inquirer.

Laws and Statutes Cited:

Act of April 30, 1925, P. A. 388

California Art Preservation Act, 1982, Cal. Civ. Code 987, 988, 989

National Historic Preservation Act of 1966, Pub. L. No.89-665, 80 Stat. 915, codified as amended, 16 U.S.C., 470, 1988

National Historical Landmark Program, National Parks Services, 36 C.F.R. Part 65, [online] website: www.cr.nps.gov/nhl, June 9th, 2005

New York City Landmark Law, N.Y.C., N.Y., Charter & Admin. Code 25-30, 1992

New York City Landmark Preservation Commission, N.Y.C., N.Y., Charter & Admin. Code 25-302, 1992

Pennsylvania's *Cy Pres* Statute; 20 Pa. Cons. Stat. Ann. 6110

Pennsylvania Constitution, article I, section 27

Pennsylvania Historic Preservation Act, 1996, Code 36

Philadelphia Historic Object Preservation Act, 1996, Philadelphia, PA., Code 14-2007(1)(a), 2000

Treas. Reg. Internal Revenue Code, Section 501 [c] [3] – 1 [b] [2], amended in 1990

Tax Returns Cited:

The Barnes Foundation's Return of Organization Exempt From Income Tax, Form 990, Section 501 (c), 1998 (online) www.barneswatch.org

The Barnes Foundation's Return of Organization Exempt From Income Tax, Form 990, Section 501 (c), 1999 (online) www.barneswatch.org

The Barnes Foundation's Return of Organization Exempt From Income Tax, Form 990, Section 501 (c), 2000 (online) www.barneswatch.org

The Barnes Foundation's Return of Organization Exempt From Income Tax, Form 990, Section 501 (c), 2001 (online) www.barneswatch.org

Legal Cases Cited:

Philadelphia v. Heirs of Stephen Girard, 45 Pa. 9, 28 PA. 1863

MacKenzie et. al. v. Trustees of Presbytery of Jersey City, 61 A. 1027, N.J. 1905

Barnes Found. V. Keely, 314 Pa. 112, 171A. 267, 268, Pa. 1934

Barnes Found. V. Keely et al, 108 Pa. Super. 203; 164 A. 117; 1933 Pa Super.

Wiedgand v. Barnes Found., 97 A.2d 81, 81082, Pa. 1953

Wiedgand v. Barnes Found., 374 Pa. 149; 97 A.2d 81; Pa. Supre. Crt., 1953

Jacobs v. bean, 108 A.2d 559, 561, N.H. 1954

City of Danville v. Caldwell, 311 S.W.2d 561, 563, Ky. Ct. App. 1958

Commonwealth v. Barnes Found., 159 A.2d 500, Pa. 1960

Bank of Delaware v. Buckson, 255 A.2d 710, 712, 717, Del. Ch. 1969

Darmouth College v. Quincy, 258 N.E.2d 745, Mass. 1970

Penn Central Transportation Co. v. New York City N.Y.C. Admin. Code, ch. 8-A, 205-1.0 (b), 1976

re Estate of Buck, No. 23259, Cal. Super. Ct., Aug 15, 1986

Colin McK. Grant Home v. Medlock, 292, S.C. 466, 472, 349 S.E.2d 655, 6659, 1986

Brief for Defendant at 76, Society of Jesus v. Boston Landmarks Comm'n, Nos. 87-3138, 87-4751, 87-6586, Mass. Sup. Ct., Oct. 11, 1989

Sameric Corp. v. City of Philadelphia, 125 Pa. Commw. 520, 525, 558 A.2d 155, 158, 1989

State ex rel. Heddens v. Rusk, 139 S.W. 199, Supre. Court of Mi, 1991

Commonwealth v. Barnes Found., No. 58, 788, C.P. Ct. Montgomery County, Pa., Orphan's Ct. Div., July 21, 1992

Teachers Ins. & Annuity Ass'n. of Am. V. City of New York, 586 N.Y.S.2d 262, 263 App. Div., 1992

In re Barnes Found., 12 Fiduciary Rptr. 2d, 349, 352 ,Pa. Ct. C.P., Montgomery County, Orphan's Ct. Div, July 21, 1992

Teachers Ins. & Annuity Ass'n. of Am. V. City of New York, 623 N.E.2d 526, 528, N.Y. 1993

The Barnes Found., A Corp., 12 Fiduc. Rpts. 2d 349, 350 (1992), aff'd, 630 A.2d 468, Pa. Super. Ct. 1993

The Barnes Found., A Corp. (No. 4), 15 Fiduc. Rptr. 2d 54, 54, 1995

Barnes Found. v. de Mazia Trust, 15 Fiduc. Rptr. 2d 332, 324-25, 1995

Barnes Found. A Corp. (No.6), 15 Fiduc. Rptr. 2d 381, 381, 1995

The Barnes Found. A Corp. (No.8), 18 Fiduc. Rptr. 2d 33, 33, 1997

The Barnes Found. V. The Township of Lower Merion, 242 F.3d 151; 2001 U.S. App., Pa., 2001

Estate of Merriam v. Phila. Historical Comm'n, 777 A.2d, Pa. Commw. Ct. 2001

Memorandum of Law in Support of the Barnes Foundation's Petition to Amend Its Charter and Bylaws, *In re Barnes Found.*, No.58,788, Pa. Ct. Com. Pl. Montgomery County Orphans' Div. Sept. 24, 2002

Post Hearing Brief of the Amicus Curiae, in re The Barnes Found. A Corp. Fiduc. Rpt., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, October 20, 2004

re The Barnes Found. A Corp. Fiduc. Rpt., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004

Memorandum Opinion and Order of Second Amended Petition to Amend Barnes Foundation Charter and Bylaws, Court of Common Pleas of Montgomery Count, Orphans' Court, in re The Barnes Found. A Corp. Fiduc. Rrpt., No.58, 788, Orphan's Ctr. Div. Ct. C.P., PA, December 13, 2004