DROIT PATRIMOINE: THE BARNES COLLECTION, THE PUBLIC INTEREST, AND PROTECTING OUR CULTURAL INHERITANCE

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INTRODUCTION

Say what you will about Dr. Albert C. Barnes as a person—and few people had anything good to say—but he was a genius at collecting art.[1] Beginning in 1912, he put together what remains the world's greatest private collection of paintings, drawings, and objects.[2] It is beyond value.[3]

Dr. Barnes also devised a theory of art appreciation that was unappreciated—indeed, overtly rejected—by the entrenched art establishment.[4] Stung by that rejection, Dr. Barnes withdrew his collection from circulation, housing it in a building he commissioned in Lower Merion Township just outside Philadelphia. He also established the Barnes Foundation for the avowed purpose of

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1. *See, e.g.*, Stanley Meisler, *Say What They May, the Feisty Doctor Had an Artful Eye*, SMITHSONIAN, May 1993, at 96, 98. "The tale of Dr. Barnes and his paintings make up one of the grand sagas of private collecting. When he died, the obituaries described him as a collector with a 'talent for invective,' and an imposing figure who kept the American art world in 'paralyzing terror.'" *Id.* Dr. Barnes "developed [a] reputation in the American art world for vitriol and bluster." *Id.* at 101. The author of a biography of Dr. Barnes described him as "stubborn, strong-willed, doggedly opinionated, and totally unwilling to compromise." HOWARD GREENFELD, THE DEVIL AND DR. BARNES: PORTRAIT OF AN AMERICAN ART COLLECTOR 23 (1987). For a review of this book, see Arthur C. Danto, *Every Straw Was the Last*, N.Y. TIMES, Nov. 22, 1987, § 7 (Book Review), at 13.

2. *See Where There's a Will*, THE ECONOMIST, Aug. 1, 1992, at 77, 77. Although he "was a cranky, boorishly opinionated" person, Dr. Barnes "had one saving grace" and that was his collection. *Id.* The collection can be "visited" on a CD-ROM. *See* A PASSION FOR ART: RENOIR, CÉZANNE, MATISSE AND DR. BARNES (Corbis Publishing, CD-ROM Windows, 1995).

3. *See* Anne Higonnet, *Whither the Barnes? Controversy Surrounding the Barnes Foundation's Touring Exhibition of French Paintings*, ART IN AMERICA, Mar. 1994, at 62, 64. "Virtually no museum in the world, and certainly no other privately formed collection, can boast as many really great modern masterpieces as the Barnes Collection . . . . [T]he depth of the Barnes Collection is so extraordinary that it defies imagination." *Id.*

4. *See* Meisler, *supra* note 1, at 101.

promoting his idiosyncratic views on art appreciation and education.[5] Dr. Barnes did not want to establish another museum, nor did he want to generally share his collection with the public.[6] He built his repository, hung his art, and closed the doors.

Thus, the Barnes Collection, called "[o]ne of America's national treasures"[7] and "a unique and amazing cultural artifact,"[8] disappeared from general view. Over time, the Barnes Foundation, like its founder, developed a combative and rancorous personality that led it into a financially ruinous spate of litigation.[9] When the costs of those fights were added to the costs of building maintenance and improvement, the Barnes Foundation had depleted its endowment and faced the prospect of dissolution and dispersal.[10]

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5. *See* Richard J. Wattenmaker, *Dr. Albert C. Barnes and the Barnes Foundation*, *in* GREAT FRENCH PAINTINGS FROM THE BARNES FOUNDATION 3, 3 (1993) [hereinafter GREAT FRENCH PAINTINGS].

> What set Barnes apart from the other great collectors was his conviction that these works of art could be employed as tools in an educational experiment crystallized in 1922 in the school of the Barnes Foundation. . . . [T]his great art collection and the systematic teaching program it served were developed by Dr. Barnes to form one of the unique cultural institutions in American life . . . .

Id.

6. *See* Meisler, *supra* note 1, at 102.

7. Frederick M. Winship, *Barnes Art Display Threatened By Poor Funding*, UNITED PRESS INT'L (news wire), Oct. 17, 2000. The collection "is considered the finest such private collection anywhere, even in France." *Id.*

8. Edward J. Sozanski, *A Lust For Bigness Has Brought Barnes to the Brink of Bankruptcy*, PHILA. INQUIRER, Apr. 6, 2001, at H1 [hereinafter Sozanski, *A Lust*]. The author said the collection is "an art experience like no other." *Id.*

9. *See* Jeffrey Toobin, *Battle for the Barnes: Can One of America's Greatest Private Collections Survive?*, NEW YORKER, Jan. 21, 2002, at 34, 34-35.

> [T]he Barnes Foundation might be expected to thrive in an era more receptive to diversity in art and culture than Barnes's own time was. Instead, it is financially imperilled [sic] and perhaps mortally threatened. The story of Barnes's collection has turned out to be a lot like the story of his life—full of rancor, misunderstanding, and unhealed wounds.

Id. at 34-35. The Foundation had adopted characteristics of Dr. Barnes's personality. The author of his biography said it was

> not an authorized biography. The Barnes Foundation did not, in any way, cooperate with me in my attempts to draw an honest portrait of its founder. Paranoia still reigns at Merion. Most people officially connected with the Foundation, past and present, refused to speak with me; many of them . . . angrily accused me of prying.

GREENFELD, *supra* note 1, at vii.

10. Although the trustees did not create all their own difficulties, they did play the major role in driving the Barnes Foundation to a dangerous financial position. *See* Debra E. Blum, *Sketching Out a Plan for Survival*, CHRONICLE OF PHILANTHROPY, Mar. 8, 2001, at 57.

> The foundation . . . has teetered on the brink of collapse since 1998 when it spent the last of its endowment. Years of costly legal disputes, infighting

And the public faced the prospect of losing access to a collection in which it had an important interest. The Barnes Collection as an entity is a cultural ensemble, which has become an integral part of our cultural inheritance.[11] As such, the collection is an aspect of our cultural evolution and experience.[12] 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."[13] It is our inheritance.

> among the foundation's trustees, and limitations put on the Barnes both by its founder and by local authorities had drained the institution of money and energy.

Id. The current trustees have recently sought permission to move the collection to a new site in Philadelphia, a move that would require a significant modification of Dr. Barnes's intentions. *See* Patricia Horn & Patrick Kerkstra, *Barnes Wants to Move Art Collection to Phila.*, PHILA. INQUIRER, Sept. 25, 2002, at A1; Patrick Kerkstra, *Barnes Faces a Tricky Legal Test*, PHILA. INQUIRER, Sept. 26, 2002, at A1. The reactions ranged from the enthusiastic, *see* Edward J. Sozanski, *Relocating Gallery's Treasures Could Turn City into Art Mecca*, PHILA. INQUIRER, Sept. 25, 2002, at A1; Editorial, *Art of the Deal: Move to the Parkway Would Boost Barnes and City's Cultural Attractions*, PHILA. INQUIRER, Sept. 26, 2002, at A24, to the resigned, *see* Marc Schogol, *Old Foes Would Mourn a Move*, PHILA. INQUIRER, Sept. 25, 2002, at A17, to the opposed, *see* Don Steinberg, *College Opposes Move by Barnes*, PHILA. INQUIRER, Oct. 3, 2002, at A1; Don Steinberg & Patricia Horn, *Lincoln Files Legal Challenge to Barnes Plan*, PHILA. INQUIRER, Oct. 9, 2002, at C1.

11. *See* John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881, 1888 (1985) [hereinafter Merryman, *Elgin Marbles*]. "The term [cultural property] refers to objects that have artistic, ethnographic, archaeological, or historical value. Most nations control cultural property in the interest of its retention, preservation, study, enjoyment, and exploitation." *Id.* For another article on cultural property, see John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 341 (1989) [hereinafter Merryman, *Public Interest*], which states that "[b]y 'cultural property' I mean objects that embody the culture—principally archaeological, ethnographical and historical objects, works of art, and architecture; but the category can be expanded to include almost anything made or changed by man." Professor Rebecca Tsosie has written a very interesting article on cultural property, cultural identity, and the harms of cultural misappropriation. *See* Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299 (2002).

12. Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 ARIZ. ST. L.J. 291, 340 (1999). The author further said that "[g]iven that cultural experience or a stable cultural context is intrinsically valuable, cultural heritage as a constituent of that experience is also intrinsically valuable." *Id.*

> An art historian explains that works of art and, by extension, other cultural objects, "tell[] us who we are and where we come from." The need for cultural identity, for a sense of significance, for reassurance about one's place in the scheme of things, for a "legible" past, for answers to the great existential questions about our nature and our fate - for all of these things, cultural objects provide partial answers.

Merryman, *Public Interest*, *supra* note 11, at 349.

13. Dalia N. Osman, Note, *Occupiers' Title to Cultural Property: Nineteenth-Century Removal of Egyptian Artifacts*, 37 COLUM. J. TRANSNAT'L L. 969, 970-71

The Barnes Collection as an ensemble has a public value that transcends the value of its constituent parts. The manner in which those parts are displayed embodies and preserves information and is a source of knowledge and wonder. Dr. Barnes intended to communicate directly with observers and intended to reveal lessons about the creative life and the ubiquity of culture.[14] The collection communicates ideas and information and conveys experience and emotion.[15] It is part of our cultural inheritance, comprising "the overlapping domains of art and culture" and involving "aesthetic and cultural experience."[16] However limited the public's access may be, the Barnes Collection is public art that is more than a formal collection; it is an intellectual, emotional and cultural experience.[17]

Our cultural inheritance has a foundational nature and intrinsic public value, which this article will argue provides a legal basis for

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(1999); *see also* Elizabeth C. Gutman, Note, *Landmarks as Cultural Property: An Appreciation of New York City*, 44 RUTGERS L. REV. 427, 467 (1992) ("Much of the value of cultural property arises from its connection with the past. This value, however, is difficult to quantify or articulate.... To mankind, cultural objects are valued as a confirmation of the continuum of human existence.").

14. *See* Sarah Eagen, Comment, *Preserving Cultural Property: Our Public Duty: A Look at How and Why We Must Create International Laws That Support International Action*, 13 PACE INT'L L. REV. 407, 411-12 (2001).

> It has been said that "cultural property is analogous to a multi-colored afghan, interwoven with pieces of philosophy, politics, and law." To that definition I would add the category of social history, for cultural property can show how individuals and cultures once lived, and thought. Cultural property is of such importance to people and their countries because it helps to explain and represent their past.... [A]s a people we can form an identity from the accomplishments that have occurred in the past, and exist today in the form of cultural objects. Accordingly, "the material objects through which the highest achievements of the human spirit are embodied must therefore be treasured," as well as those objects that simply help to define who we are and how we live as a people.

Id. (citations omitted).

15. Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 77 (1996).

16. Harding, *supra* note 12, at 330.

> Cultural heritage is, in varying degrees, intimately connected to both aesthetic experience and cultural experience.... [I]t is important to recognize that aesthetic experiences are ultimately shaped by the cultures in which we live and thrive; cultural experience and aesthetic experience are intimately connected.... We might in fact say that the aesthetic is a personal experience of the cultural.

Id.

17. Vera Zlatarski, Note, *"Moral" Rights and Other Moral Interests: Public Art Law in France, Russia, and the United States*, 23 COLUM.-VLA J.L. & ARTS 201, 201 (1999). Leading up to this statement, the author said public art "has the power to enrage, edify, or even heal.... The work of art may enable the present generation to come to terms with its past, and to preserve history for the future." *Id.*

preventing disruptive or destructive acts.[18] We have a collective *droit patrimoine*, a right to see and save our cultural inheritance. The article will describe how existing legal methods and theories can be used to meet the goals of *droit patrimoine:* preserving the authenticity of and protecting access to our cultural inheritance.[19] That is a matter of public interest calling for a public policy that preserves that inheritance.[20] It is a matter of promoting the general welfare.[21]

People do care about preserving their cultural inheritance.[22] It

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18. Harding, *supra* note 12, at 346. The author continued: "The intrinsic value of cultural heritage . . . does suggest the benefits of some public control to ensure the survival of aesthetically significant works not subject to other cultural constraints." *Id.*

19. Nicole B. Wilkes, *Public Responsibilities of Private Owners of Cultural Property: Toward a National Art Preservation Statute*, 24 COLUM.-VLA J.L. & ARTS 177, 181 (2001).

20. *See* Merryman, *Public Interest, supra* note 11, at 363.

> [T]here is a *public* interest in cultural property because people care deeply about it for a variety of natural and laudable reasons. Since there is such a degree of public interest, and cultural property touches on so many public concerns, the development of some kind of public policy toward cultural objects is both desirable and unavoidable. All would, of course, prefer a policy that is sensitive to the public interest and, where appropriate, actively protects and advances it.

Id.

21. *See* Gregory A. Ashe, *Reflecting the Best of Our Aspirations: Protecting Modern and Post-Modern Architecture*, 15 CARDOZO ARTS & ENT. L.J. 69, 101-02 (1997). "With over 1,000 local, state and federal preservation laws in force, it is no longer in doubt that the preservation of our Nation's cultural and architectural heritage is necessary in promoting the general welfare of the country." *Id. See also* Marilyn Phelan, *A Synopsis of the Laws Protecting Our Cultural Heritage*, 28 NEW ENG. L. REV. 63, 64 (1993). Phelan observes that legislation has "resulted from the recognition that our cultural treasures are in jeopardy, that many have been destroyed without consideration of their values, and that not only do they 'represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today.'" *Id.* (citation omitted).

22. When the Taliban destroyed the giant standing Buddhas in Bamiyan, Afghanistan, Lowry Burgess, an artist and professor whose work had related to those statues, "sat down and wrote a statement calling for international protection of sites and artifacts embodying cultural memory, not just in wartime . . . but at all times." Miriam Seidel, *An Artist's Answer to Ruin of the Buddhas*, PHILA. INQUIRER, May 5, 2002, at H1. At the Toronto World Day Roundtable Dialogue on March 20, 2001, Burgess began with this declaration:

> In the cause of human toleration and understanding, and as a comfort to the world, historic and cultural artifacts require care by all people and societies. In conservation and preservation is assurance of shared meaning, a cooperation and communion in deeper human values, a celebration of high aspirations, and a continuity of memory and lore.

Lowry Burgess, *The Toronto Manifesto: The Right to Historical Memory That the Past May Not Vanish* (March 20, 2001), *available at* www.planetaryvision.net/page48.html (last visited Jan. 27, 2003).

should not take a Taliban-like cultural attack to reveal the depth of that concern.[23] Our cultural inheritance opens doors that reveal and remind, instruct and inspire, express and exalt.[24] We have "an inherent affinity for creativity.... a shared fascination for the creative process."[25] This affinity and fascination is heightened by access to the original works.[26]

But these works are nonrenewable resources.[27] With the Barnes

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23. *See* Andrew Solomon, *An Awakening After the Taliban*, N.Y. TIMES, Mar. 10, 2002, at AR1.

> The Taliban's purpose [in destroying Afghanistan's national treasures] was to wipe out Afghan identity so that nationalist resistance to them would be weak. Unlike Soviets or Maoist Chinese, who interfered with the arts in an effort to eliminate whatever history could not be used to construct patriotic propaganda, the Taliban worked toward annihilation. The whole idea of being an Afghan was to be eradicated.

Id. For further discussion of the Taliban destruction of artifacts, see Celestine Bohlen, *Cultural Salvage in Wake of Afghan War*, N.Y. TIMES, Apr. 15, 2002, at E1, describing Afghan museum custodians likening the destruction to "watching members of their own families being murdered" and saying the Taliban's conduct is "regarded as crimes against Afghanistan's cultural patrimony that are all the more chilling for their deliberate and efficient execution."

24. *See* Harding, *supra* note 12, at 315-16. Harding explains:

> By providing an experience of wonder, cultural heritage allows us to transcend our present circumstances and imagine or connect with other individuals, communities and cultures. It also reinforces cultural identity.... Cultural heritage is a creation of individual genius and ingenuity, while at the same time, it is an expression of a cultural community.

Id.

25. Thierry Joffrain, Comment, *Deriving a (Moral) Right for Creators*, 36 TEXAS INT'L L.J. 735, 737-38 (2001).

26. *See* Merryman, *Public Interest*, *supra* note 11, at 346. "[There is] magic that only the authentic object can work.... There seems to be something paradoxical about a reproduction of a genuine, unique artifact.... The truth, the certainty, the authenticity, seem to inhere in the original. 'Copies are always second best....'" *Id.* (citation omitted). *See also* Michael J. Lewis, *It Depends On How You Define 'Real'*, N.Y. TIMES, June 23, 2002, at WK3. Lewis, discussing a trend in historic preservation of making replicas of buildings, states:

> [W]e then lose the tragic and mortal thing that is the building itself, the physical object that has journeyed across time, and whose roster of scars and alterations represents the most fragile aspect of a historic artifact[:] the sense of congealed time.... Such a recreated design might be like the genetic clone of a dear friend — identical in every respect but that of shared experience, and therefore a stranger.

27. *See* Stephanie O. Forbes, Comment, *Securing the Future of Our Past: Current Efforts to Protect Cultural Property*, 9 TRANSNAT'L LAW. 235, 241 (1996).

> The importance of leaving behind a legacy to be valued and conserved for present and future generations is generally recognized. These nonrenewable historical resources engender a nation's quality of life, economy, and cultural environment. Cultural property plays an integral role in characterizing and expressing the shared identity and essence of a community, a people and a

Collection, not only are the individual works unique but so is the manner in which they are displayed. There is nothing else like it. If the collection is altered, we will have deprived future generations of the opportunity for that experience. If it is altered, we will have mismanaged a portion of our cultural inheritance.[28] Professor John Henry Merryman says the "essential ingredient of any cultural property policy is that the object itself be physically preserved," a statement that "from a certain point of view . . . is tautological; if we don't care about its preservation, it isn't, for us, a cultural object."[29] However, it is clear that we do care.[30]

The difficulty is transforming that concern or public interest into a reasonable and workable public policy. That is a complex and controversial task.[31] How do we go from respecting intrinsic cultural values to preserving and protecting those values?[32] As this article will describe, the Barnes Foundation is the custodian of Albert Barnes's interesting but peculiar vision of art.[33] As custodian, the Foundation

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nation.

Id. See also Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1, 36-37 (1997), stating:

> If works of art have a unique power to transform the way we interact with our environment, by providing us with new ways of redescribing and reinterpreting our existence . . . then the recognition of some form of special protection for these works might seem compelling. Works bearing this unique power, after all, need to be preserved if they are to continue to serve this function for us and for our descendants; if we destroy or alter them, future generations will not be able to share this experience.

28. *See* John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1041 (1976) [hereinafter Merryman, *Refrigerator*]. "Art is an aspect of our present culture and our history; it helps tell us who we are and where we came from. To revise, censor, or improve the work of art is to falsify a piece of the culture." *Id.*

29. Merryman, *Public Interest*, *supra* note 11, at 355. Earlier, in answer to the question of why do we care about cultural objects, Professor Merryman said that "at the center is the desire to remember, and to be remembered . . . to forestall 'the eternal silence created by the destruction of culture.'" *Id.* at 347.

30. *See* Joffrain, *supra* note 25, at 742. "Original intellectual works play a significant role in the development of societies, to the extent that we judge civilizations by their artistic output. . . . History seldom forgets leaders who were patrons of the arts, or easily forgives destroyers of art. The value assigned to creative works, then, is tremendous." *Id.*

31. *See* Cindy May, Note, *Reformulating the New York City Landmarks Preservation Law's Financial Hardship Provision: Preserving the Big Apple*, 14 CARDOZO ARTS & ENT. L.J. 447, 448 (1996) (noting that "while [preservation] efforts have enhanced our cultural resources, they also have yielded a complex set of laws that struggles to balance normative values and descriptive realism"). The Barnes situation is a struggle to find that balance. *See Of Art, Will, Time and Power*, PHILA. INQUIRER, Dec. 16, 2002, at A19.

32. James W. Nickel, *Intrinsic Value and Cultural Preservation*, 31 ARIZ. ST. L.J. 355, 361 (1999).

33. *See* Michael Kimmelman, *The Barnes Explores Other Byways*, N.Y. TIMES, Apr.

is subject to public scrutiny, public accountability, and public regulation. There is an existing complex of laws and accepted legal theories that, taken together, establish a *droit patrimoine*, a right to see and save our cultural inheritance.

Part I of this article will briefly introduce Dr. Barnes and his collection. Part II will describe the public interest that exists with regard to the Barnes Collection. Part III will describe how existing public law has worked to protect that public interest through judicial oversight of the tax-exempt foundation, which Dr. Barnes established to protect his collection and promote his theory of art education. Part IV will describe how, given that Dr. Barnes allowed the public access to his collection, existing historic preservation theory could also be used to protect the public interest. Part V will describe how the existing moral rights theory might be used to grant the public the ability to intercede on its own behalf to protect its interest in the collection. Part VI will discuss what might be done had Dr. Barnes not established his foundation and had not made his collection accessible to the public but had, instead, withdrawn it completely from public view or even made plans to destroy it. Part VII will conclude that the ultimate protection for all interests, public and private, lies in an open process that clearly articulates the public interest to be protected, the standards by which that interest is to be determined, and the procedures by which that determination will be made.

I. ALBERT BARNES AND HIS FOUNDATION

If nothing else, Dr. Albert C. Barnes would be remembered as perhaps "the most difficult patron in the history of American collecting . . . [,] coarse, vindictive, paranoid and given to scatological insult."[34] Even a favorably inclined observer said Dr. Barnes's "personality . . . was defined by a degree of irascibility . . . outside the common measure" which made him "a gifted but an extremely tiresome man."[35] The general dislike, which Dr. Barnes evoked, led people to disregard what he did for art collecting and education.[36] He

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21, 1991, at H35.

34. Robert Hughes, *Opening the Barnes Door*, TIME, May 10, 1993, at 61, 63. Time has not softened the general perception of Dr. Barnes. *See* Carrie Rickey, *The Contradictory, Combative Albert Barnes*, PHILA. INQUIRER, Oct. 8, 2002, at A1 ("Albert Barnes. A name that, 50 years after his death, still lives . . . in infamy.").

35. Danto, *supra* note 1, at 13.

36. *See* Edward J. Sozanski, *Glanton's Tenure: A Mission to Alter Albert Barnes' Dream*, PHILA. INQUIRER, Feb. 18, 1998, at E1 [hereinafter Sozanski, *Glanton's Tenure*]. "It always seemed to me that Barnes' achievement was underplayed. The media doted on his 'eccentricities' . . . but the boldness of his connoisseurship — and the passion for art that inspired it — wasn't sufficiently appreciated." *Id.*

had philanthropic goals meriting comparison with the best.[37] Although not a nice person, he was a gifted collector and an insightful art educator.[38] Dr. Barnes produced substantial achievements in art collecting, scholarship, and education on both aesthetic and social levels.[39]

Dr. Barnes was a student of John Dewey who, in turn, was "deeply influenced by Barnes' ideas about art,"[40] and who became the first head of the Barnes Foundation. The two men shared a view that creating, interpreting, and appreciating art evoked past experience and stimulated new experience.[41] Art had value not so much for revealing a truth as for making the observer an interpreter, an experience that creates new possibilities for the interpreter.[42] Dr. Barnes's theory of art appreciation was both respectable and credible.[43]

Dr. Barnes used his collection to express that theory. He displayed its works in a novel, intermingled manner, creating juxtapositions challenging observers "to see connections and draw relationships among often seemingly disparate traditions and among

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37. *See, e.g.*, Wendy A. Lee, Note, *Charitable Foundations and the Argument for Efficiency: Balancing Donor Intent with Practicable Solutions Through Expanded Use of Cy Pres*, 34 SUFFOLK U. L. REV. 173, 174 (2000) (describing the origins of "the new philanthropic institution known as the foundation, an organization that coexists with government to support public interest in spending for the general welfare of the nation"). "[F]oundations quickly amassed resources to pioneer the development of experimental programs, promote research, and enrich the cultural lives of individuals and families of all income levels." *Id.* "Barnes' enlightened exercise in industrial relations and self-improvement led to the establishment of the Barnes Foundation in 1922. Barnes saw the Foundation as a force for social action." Wattenmaker, *supra* note 5, at 6.

38. *See* JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 74 (1999). Sax comments:

> Dr. Barnes was not simply a rich accumulator. He was a serious student of art, with real taste . . . and extensive knowledge. But he was also deeply unsure of his judgments and unable to bear criticism of any kind, and he was developing his own extremely eccentric views of art criticism.

Id.

39. Wattenmaker, *supra* note 5, at 26-27.

40. Meisler, *supra* note 1, at 102. Meisler observes:

> Barnes was so cantankerous a character, and his displays of paintings so eccentric, that it is easy to assume that his theories of art must have been goofy. But in fact, the theories – sensible and carefully thought out – were influenced by Dewey's philosophy of education. Dewey, in turn, was deeply influenced by Barnes' ideas about art.

Id.

41. *See* Cotter, *supra* note 27, at 33-34.

42. *Id.* at 33.

43. Danto, *supra* note 1, at 14. The theory "really will, at a certain theoretical and . . . esthetic cost, close the gap between modern and traditional art." *Id.*

works by the same artist."[44] Barnes was so sure of his approach that when he established his foundation, he ordered that his arrangement be maintained without change.[45] Although Dr. Barnes's personality undeniably affected critical evaluation of his approach,[46] he, unlike many collectors, developed a philosophy of art to validate his personal taste; he was exceptional in using the collection as the basis of an educational system based on that philosophy.[47] The foundation he created remains "one of the most striking—and perplexing—anomalies of the international art world."[48]

Some have suggested that the Barnes Foundation reflects the public personality of its founder.[49] Certainly, that could not be gainsaid in the 1990s when control of the Foundation passed to Lincoln University whose general counsel assumed managerial responsibility.[50] The Foundation entered into a protracted period of expensive litigation, unmet operational costs, and unnecessary conflicts with neighbors, former students, and local government.[51] The consequences of this period—the threats to the public interest—

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44. Wattenmaker, *supra* note 5, at 15.

45. *See id.* at 13.

> In a practice that continues to this day at the Barnes Foundation, the galleries were used as a laboratory.... Barnes was emphatic in his opposition to formalist aesthetics, wherein the concept of form tended to be reduced to pattern and outline. He stressed the essential affinity of art to nature, whatever creative departures artists may effect by their purposive selection and reorganization of objects and situations in the real world.

Id.

46. *See* John Russell, *A House of Art That Is Quirky, Aloof and Grand*, N.Y. TIMES, Feb. 7, 1988, at H35. "So loathsome was the public persona of Dr. Barnes—his psychopathic rudeness, his insane conceit, his odious behavior to his employees—that it is difficult to believe that he was ever right in what he said." *Id.*

47. Danto, *supra* note 1, at 13. Dr. Barnes believed that philosophy "consisted of principles so transparent and scientifically compelling that no one could resist them who was not stupid, willful, pettifogging or debauched (his term) by incorrect theory." *Id.*

48. Daniel S. Levy, *Want to See Some Secret Pictures?*, TIME, Apr. 20, 1992, at 87, 87.

49. R.C. Baker, *The Collector as Artist*, N.Y. TIMES, Mar. 13, 2001, at A19; *see also* Doreen Carvajal, *Quirky Art Foundation Ponders Radical Move*, N.Y. TIMES, Mar. 6, 2001, at A14 (noting that the Barnes Foundation "has one of the quirkiest identities in the art world" whose "personality and philosophy were shaped by its acid-tongued founder").

50. Sozanski, *Glanton's Tenure*, *supra* note 36, at E10; Toobin, *supra* note 9, at 36, *see* Francis X. Clines, *A Priceless Art Collection Finds Itself Strapped for Cash*, N.Y. TIMES, Sept. 17, 2000, § 1, at 18.

51. Patrick Kerkstra, *Nearly Broke, the Barnes Foundation Calls for Help*, PHILA. INQUIRER, Sept. 10, 2000, at A1; *see also* William C. Smith, *The Barnes Case Through an 'Historical Lens'*, LEGAL INTELLIGENCER (Suburban Edition), Feb. 25, 1998, at 1 (characterizing the "legal skirmishing" as being "particularly nasty").

persist to the present.[52]

II. THE PUBLIC INTEREST AND THE BARNES COLLECTION

Although Dr. Barnes would have recoiled from this statement, the Barnes Collection is public art because the collection is a public charity displayed in a location accessible to the public.[53] As such, there is a legitimate public interest in its management and preservation which, in turn, justifies public intervention when that management goes bad or that preservation is threatened.[54]

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52. *See* Kerkstra, *supra* note 51, at A1. "[T]he Barnes was battered by ruinously expensive litigation, soaring operating costs, and conflicts with neighbors, former students, and Lower Merion Township. . . . [T]he 'ghosts' of past leaders still trouble the foundation . . . ." *Id.* In addition to the litigation discussed in this article, the foundation sued Lower Merion Township and its commissioners in federal court, resulting in a 51 page district court opinion. *See* Barnes Foundation v. Township of Lower Merion, 982 F. Supp. 970, 979 (E.D. Pa. 1997). The court found that:

> [T]he Barnes has not shown that it would be able to produce admissible evidence at trial sufficient to allow a jury to conclude that the Defendants undertook any of the actions they did with a racially discriminatory purpose. . . . Accordingly, . . . a trial is unnecessary and [the court] will grant the Township's and the Commissioners' motions for summary judgment.

Id. at 979. The Foundation subsequently was found liable for attorneys' fees. *See* Barnes Foundation v. Township of Lower Merion, 242 F.3d 151 (3rd Cir. 2001). The township and commissioners filed a state court defamation action against the trustees which ultimately was settled with the trustees apologizing and paying attorneys' fees. *See* Stephanie Cash & David Ebony, *Barnes Makes Nice With Neighbors*, ART IN AMERICA, Dec. 1998, at 112; Shannon P. Duffy, *Barnes Settles with Lower Merion*, LEGAL INTELLIGENCER (Reg'l News), Oct. 2, 1998, at 3. The Foundation even got into a nasty fight with the City of Rome which finally resulted in this statement of exasperation by a federal district court judge:

> The battle over whether Richard Glanton, on behalf of the Barnes Foundation, made a contract to exhibit art works is over. The battle over whether Rome's officials slandered Mr. Glanton by calling him a "conman" is over. Yet the dogs of war still fight over the bones, i.e., the bills of costs. Enough is enough. Each side shall bear its own costs.

City of Rome v. Glanton, 184 F.R.D. 547, 548 (E.D. Pa. 1999).

53. *See* Zlatarski, *supra* note 17, at 201 n.1 (stating that public art "is broadly understood to include visual works of any medium . . . which are displayed in a location accessible to the public"). *See also* Alfred Hickling, *Sacred Monsters, Sacred Masters*, THE GUARDIAN, Dec. 1, 2001, at 9 (book review). "Albert Barnes, a rapaciously paranoiac Philadelphia drug manufacturer, was the owner of the greatest private collection of modernist paintings in America . . . . Barnes's motive for assembling the most comprehensive hoard of modern masterpieces in the world was, principally, to deny the world the pleasure of seeing them." *Id.*

54. *See* Myrl L. Duncan, *Property as a Public Conversation, Not a Lockean Soliloquy: A Role For Intellectual and Legal History in Takings Analysis*, 26 ENVTL. L. 1095, 1142-43 (1996). By use of the term public rights, analysts "do not simply mean the power of government to act in the public interest. Rather, 'public rights' signify government's positive obligation to act, its duty to provide those things that the community 'has a right to expect of its government.'" *Id.* For another similar perspective, see Peter Dobrin, *Civilization is One Wise Investment*, PHILA. INQUIRER,

Dr. Barnes explicitly designated the Barnes Foundation as an educational institution. Shortly before the Foundation was established, he wrote a textbook articulating an approach by which individuals could come to understand the aesthetics of art and could attain their own vision of the traditional qualities and values embedded in the art.[55] He displayed his collection in a way that he believed enabled comparisons crucial to an individual's serious study of art.[56] The Foundation itself was considered "a model of capitalistic democracy, for it transformed tremendous personal wealth into a philanthropic institution presumably accessible to the general public."[57] Even today, the Barnes Collection, its constituent parts and their arrangement, evokes praise. The Barnes arrangement, as well as the individual works, is part of America's modern art history.[58] The collection reflects Dr. Barnes's taste; its arrangement reflects his vision.[59] The collection remains one of the world's special places.[60] That special place is infused with a public interest. Art generally has significant public value.[61] The value is enhanced by the public's access to the original work. The Barnes Collection itself is an original

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Mar. 12, 2002, at C1, stating:

> Let's support the arts because it's the only part of life that advances civilization. . . . [W]hen do we think bigger thoughts? When do we get any sense of the lives of those before us? It's only in the concert hall or art museum or out in the colorful gardens . . . that ideas of lasting value are achieved. The arts . . . is how the generations talk to each other.

55. Wattenmaker, *supra* note 5, at 13. Also see Harding, *supra* note 12, at 333, in which it is noted that all aesthetic theories "view aesthetic experience as foundational. Whether the experience is thought of as predominately emotional, cognitive, or imaginative, it is recognized as an essential aspect of human experience."

56. Steven C. Munson, *Art by the Yard*, COMMENTARY, Jan. 1, 2001, at 58, 59.

57. Higonnet, *supra* note 3, at 66.

58. Michael Kimmelman, *A Famous Collection Escapes Its Moorings*, N.Y. TIMES, May 2, 1993, at H35; *see also* Michael Kimmelman, *Barnes Foundation, A Recluse No More*, N.Y. TIMES, Nov. 24, 1995, at C1 [hereinafter Kimmelman, *A Recluse*] ("The Barnes doesn't look like any other place, which remains much of its appeal.").

59. *See* Baker, *supra* note 49, at A19. "Dr. Barnes's rigid arrangements may seem outdated; but sometimes pure visions can teach us as nothing else can. They make us struggle against them, think for ourselves, gain confidence in the affinities and connections we sense." *Id.*

60. *See* Anne Distel, *Dr. Barnes in Paris*, *in* GREAT FRENCH PAINTINGS, *supra* note 5, at 43. "The Barnes Foundation remains one of the special places in the world where one always senses the presence of the old master of the premises, whose single vision is behind each of the extraordinary works that greet the visitor." *Id.*

61. *See* Susan P. Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41, 56 (1998). "Art can tell us 'who we are and where we come from,' both as individuals and a society. People and societies who have a strong sense of themselves are not likely to fall apart." *Id.* (quoting Merryman, *Refrigerator*, *supra* note 28, at 1041) (footnotes omitted).

work, an arrangement of individual original works.[62] There is a significant public interest in preserving the collection in its true version permitting us and those who follow us to see it as Dr. Barnes envisioned it.[63] Authenticity is a fundamental reason why people care about their cultural inheritance; accessibility is a fundamental necessity to promoting the benefits derived from preservation.[64]

As Dr. Barnes intended, his collection holds out the promise of nourishing creativity, enriching lives, and discrediting racial and ethnic cultural stereotypes.[65] His collection offers the public an opportunity to experience and appreciate the expressions of diverse, creative people.[66] However, if the Barnes Foundation fails, that

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62. *See* Edward J. Sozanski, *Walls of Treasure*, PHILA. INQUIRER, Sept. 29, 2002, at H1. "The Barnes collection is spectacular because it's unique in the way it's displayed. The hanging is so idiosyncratic that it defies even studied analysis. As such, the total installation constitutes a work of art in its own right." *Id.* As another scholar notes:

> There is truth in objects. We yearn for the authentic, for the work as it left the hand of the artist or artisan. . . . Robertson Davies speaks of the work of art as a source of certainty. It is also possible to talk of "getting it right," of the concern for truth in the sense of accuracy. Truth, certainty, and accuracy are closely related and may express the same fundamental need.

Merryman, *Public Interest*, *supra* note 11, at 346.

63. *See* Justin Hughes, *The Line Between Work and Framework, Text and Context*, 19 CARDOZO ARTS & ENT. L.J. 19, 36 (2001). *See also* Merryman, *Refrigerator*, *supra* note 28, at 1041.

> There is . . . the interest of others in seeing, or preserving the opportunity to see, the work as the artist intended it, undistorted and "unimproved" by the unilateral actions of others. . . . We yearn for the authentic, for contact with the work in its true version, and we resent and distrust anything that misrepresents it.

Id. (footnotes omitted).

64. *See* Merryman, *Public Interest*, *supra* note 11, at 359. "The basic concern is for authenticity and is fundamental to most of the reasons why we care about cultural property . . . . Everything significant about cultural objects flows from authenticity." *Id.* "Inaccessibility is an even more pervasive problem than destruction or mutilation. Some of the greatest objects in the world, even though they were in a sense public, have been secreted away." SAX, *supra* note 38, at 8.

65. Merryman, *Elgin Marbles*, *supra* note 11, at 1923.

66. *See* Liemer, *supra* note 61, at 57.

> If more people in a given society felt free to take the risk to express themselves freely via artistic media and more people in the society could experience those expressions, there would be more genuine communication and understanding among individuals with different views. Increasing this common understanding could alleviate many social problems.

Id. See also Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 483 (1981). The author discusses

> two elements of continuing and critical importance in historic preservation law. The first is the idea that preservation can in fact have the political purpose of fostering a sense of community. The second . . . is the understanding that a *place* can convey this sense of community, or more generally, that visual surroundings work a political effect on our

promise will go unfulfilled, that opportunity will go unrealized. The certainty of the past will be replaced by uncertainty. The public value will be destroyed; the public's interest will not be served.

Even if Dr. Barnes's collection is characterized as private property, it would be private property infused with a public interest by virtue of the Foundation's undeniable public value, its tax-exempt status as a public charity, and its avowed dedication to public education. When the Foundation was created, the idea of government legitimately interceding in an owner's management of private property was barely arguable. Today, it is beyond argument.[67] The translation of this "awareness of a public interest in cultural property into a substantively responsive public policy draws attention . . . to the general goals of preservation, truth, and access."[68]

Although the preservation of authentic works and protection of public access are of national concern, the game is truly fought at the local level, applying state legislation or municipal ordinances that, in turn, should clearly articulate the public purposes served by the preservation and protection.[69] This is more than preventing harm;

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consciousness.

Id.

67. For a discussion on the American concept of property, see Duncan, *supra* note 54, at 1144, noting that the "essential fact of the American concept of property is that it has always reflected the values and needs of society—the community—however they may have coalesced and been expressed at any point in time." For a discussion of the Hershey and Barnes trusts, see Margaret Graham Tebo, *A Matter of Trust*, A.B.A. J., Jan. 2003, at 24.

> But two Pennsylvania cases link canvases and cocoa as lawyers representing great public institutions battle over the nature of a trust, and who exactly ought to benefit. Both involve trusts established by business tycoons whose named beneficiaries compromise only a share of what courts are increasingly coming to see as a wider group of affected individuals. Courts appear to be broadening their view of a trust's intent into something akin to a multipurpose "do good" clause. And lawyers are finding novel ways of making sure that happens.

Id.

68. Merryman, *Public Interest*, *supra* note 11, at 363. The Barnes situation has certainly confronted local government with the task of making this translation. *See* Jane Eisner, *Barnes Move Would Test City's Character*, PHILA. INQUIRER, Sept. 29, 2002, at C1. It appears that private and public entities have accepted the task. *See* Peter Dobrin, et al., *Big Money Lining up to Support the Barnes*, PHILA. INQUIRER, Sept. 29, 2002, at A1; Patricia Horn, *Barnes Tapping Area's Wealthiest*, PHILA. INQUIRER, Nov. 6, 2002, at C1; James M. O'Neill, *Street: City Would Aid Barnes Move*, PHILA. INQUIRER, Jan. 4, 2003, at B1.

69. For example, see Michael J. Lewis, *How Much Change Is Too Much?*, N.Y. TIMES, Apr. 7. 2002, §4, at 16. "The destruction of the Maslon house again shows how toothless American preservation remains. Federal designations of 'national landmarks' remain nominal categories, with little force beyond moral suasion. Otherwise, only local municipalities can restrict the freedom of a landowner to alter or destroy his property." *Id.*

this is an affirmative governmental duty necessary to improving the public's quality of life.[70]

This does not undercut our traditional respect for private property. The Barnes Collection is not pure private property. It is private property infused with a public interest, tax-exempt and accessible to the public. Dr. Barnes clearly intended for people to view his collection, displayed in a manner that he believed would heighten the immediate experience and enrich the long-term effect.[71] His theories would make little sense, would have little value, without the collection's physical, public manifestation of them. His offering was to the public, his goal was public education, his collection provides a significant public value. As a consequence, the foundation he created assumed a fiduciary duty to the public.[72] That duty can be

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For further discussion of historic preservation, see Albert H. Manwaring, IV, Note, *American Heritage at Stake: The Government's Vital Interest in Interior Landmark Designations*, 25 NEW ENG. L. REV. 291, 296 (1990). Manwaring states that:

> [T]he "real cutting edge of historic preservation law is at the local level," as municipalities are in the best position to monitor .... Since the heart of historic preservation lies at the local level, the ability of municipalities to enact and enforce preservation ordinances is essential to protecting our nation's significant interiors.

Id. (quoting Fowler, *Historic Preservation and the Law Today*, 12 URB. LAW. 3, 7 (1980)) (citations omitted).

70. *See* Rebecca J. Morton, Note, Carter v. Helmsley-Spear, Inc.*: A Fair Test of the Visual Artists Rights Act?*, 28 CONN. L. REV. 877, 908-09 (1996). "*Penn Central* validated the idea that the visual environment in which we live has far reaching affects [sic] on our well being. Controlling how that environment appears has become an affirmative duty of local governments." *Id.* at 909. *See also* Tyler E. Chapman, Note, *To Save and Save Not: The Historic Preservation Implications of the Property Rights Movement*, 77 B.U. L. REV. 111, 143 (1997) ("Courts have long recognized that historic preservation is an essential tool for local governments to improve the quality of life for their citizens."); Rose, *supra* note 66, at 479 ("Precisely because preservation calls for political choices, it is imperative to identify the public purposes of preservation so that preservation law can be made intelligible by reference to those purposes.").

71. *See* Leo J. O'Donovan, *Idiosyncracy and Genius: The Barnes Foundation on Tour*, AMERICA, July 17, 1993, at 16 (noting Dr. Barnes's "clear intention to show them as he saw them").

72. *See* Richard H. Glanton, *Preface* to GREAT FRENCH PAINTINGS, *supra* note 5, at viii.

> The Board of Trustees [of the Barnes Foundation] is also committed to increasing public access and that of scholars and experts to Dr. Barnes' magnificent collection. The renovation of the gallery, combined with the determination of the Board to treat the Foundation as a public trust, will allow us to maintain the level of public access befitting the collection.

Id. See also Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT'L L. 197, 244 (2001).

> Unlike private collectors, museums are public charitable organizations with the purpose of furthering educational and scientific values. As such, the museum and its Board of Trustees owe a fiduciary duty to the public. When

discharged only by preserving the public's access to the authentic collection, authentic to Dr. Barnes's vision.

Ensuring the proper discharge of that duty implies the exercise of political power by state and local government. That is not a novel concept, at least with regards to private property infused with a public interest.[73] It dates at least to 1876 when the Supreme Court decided *Munn v. Illinois*.[74] There, the state legislature had limited the fees charged for warehouse grain storage. The warehouse owners argued that this violated the Fourteenth Amendment's protection against government's depriving a citizen of property without due process.[75]

The Court rejected this argument. It said private property becomes "clothed with a public interest when used in manner to make it of public consequence, and affect the community at large."[76] The warehouse owners had devoted their "property to a use in which the public has an interest[,]" which "grant[ed] . . . the public an interest in that use" and which required the owners to "submit to be controlled by the public for the common good, to the extent of the interest [they had] thus created."[77] The state did not "compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular [public] manner."[78] The following section will describe how Pennsylvania courts have acted to control the Barnes Foundation for the common good, at least to the extent of the public interest created by Dr. Barnes.

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the museum ignores the educational and scientific value of cultural objects, then it is arguably committing a breach of these public obligations.

Id. (citations omitted).

73. *See* Justice Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 WASH. L. REV. 857, 904 (2000). "The police power touches upon the core functions of government . . . . The exercise of police power is necessary to adjust interpersonal relationships in such a way as to facilitate the general ability to live together in society." *Id.*

74. 94 U.S. 113 (1876).

75. *Id.* at 123.

76. *Id.* at 126.

77. *Id.* The Court also rejected the argument that the businesses predated the regulations, because "[w]hat [the plaintiffs] did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established . . . for the common good." *Id.* at 133.

78. *Id.* at 133. "The [*Munn*] Court concluded that this social compact provided the source and basis for the police powers. Pursuant to these police powers the government may regulate how individuals act toward one another and how they use their property." Susan M. Stedfast, *Regulatory Takings: A Historical Overview and Legal Analysis for Natural Resource Management*, 29. ENVTL. L. 881, 887 (1999).

III. THE PUBLIC INTEREST, THE COLLECTION, AND TRUST ADMINISTRATION

Dr. Barnes granted the public an interest in his collection by establishing the Barnes Foundation in 1922 "to promote the advancement of education and the appreciation of the fine arts, and . . . to erect, found, and maintain an art gallery for the exhibition of ancient and modern art."[79] Although grudgingly, Dr. Barnes opened his collection to the public for no more than two weekdays and only to people who obtained admission cards distributed by the foundation's Board of Trustees; the collection was completely closed during July, August, and September.[80]

The Foundation's public nature (and its tax-exempt status) quickly became an issue.[81] The Foundation bought property in Philadelphia for administrative, literary, and other uses related to the Foundation's operations.[82] When the city levied taxes on the property, the Foundation sued and obtained an injunction against collection.[83] The city appealed to Superior Court, which determined that the first question was whether the Foundation was "a purely public charity."[84] The city argued that it was not, because Dr. Barnes had testified that

> the gift was with qualifications, and that he 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 wishes." . . . Dr. Barnes, in answer to a question as to the financial extent of the investment, said: "Yes, but don't forget that there is a string on that. If the people do not behave

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79. Barnes Found. v. Keely, 171 A. 267, 268 (Pa. 1934).

80. Wiegand v. Barnes Found., 97 A.2d 81, 86 (Pa. 1953). This lawsuit arose because those who sought these cards of admission received instead the following card: "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 every day, and conducted by a staff of experienced teachers. Admission to the gallery is restricted to students enrolled in the classes." *Id.*

81. *See* James Cuno, *Museums and the Acquisition of Antiquities*, 19 CARDOZO ARTS & ENT. L.J. 83, 85-86 n.8 (2001).

> The United States is unusual in that it has made few laws protecting its cultural property. . . . Despite the seemingly lax cultural property laws of the United States, it can be argued that in effect the United States discourages the expropriation of its cultural property . . . by allowing significant tax benefits to individuals who give such property to our country's public institutions.

Id.

82. Barnes Found. v. Keely, 164 A. 117, 118 (Pa. Super. Ct. 1933).

83. *Id.*

84. *Id.*

> around here I pull that string back and it all drops into my lap. I don't expect to pull it unless they hit me too hard."[85]

The court described this as "an inconsiderate statement," and said it "was but an expression of [Dr. Barnes's] opinion, not warranted by the deed of trust, as, under its provisions, he does not have control of the disposition of the assets."[86] The indenture documents controlled, and they could not be altered by what Dr. Barnes said or thought.[87]

The court also said that the restrictions on public access did not destroy the charitable nature of Dr. Barnes's gift.[88] It was necessary to enforce reasonable regulations for public admission; otherwise, unrestricted access "might defeat the very purpose of the gift by interfering with, if not entirely preventing, intelligent study of the works of art and the proper educational development of the students."[89]

The city then appealed to the Pennsylvania Supreme Court, which affirmed the Foundation's tax-exempt status. 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. . . .[90]

The Foundation was accessible to the public under limitations consistent with the practices of other leading tax-free institutions.[91]

The court did take pains to lecture Dr. Barnes about his belief that he still controlled disposition of the collection. The Foundation's charter and trust indenture controlled and Dr. Barnes could not alter the indenture; the control that Dr. Barnes thought he had and the control he actually retained were completely different things.[92] The court said the Foundation's property included the paintings, and there was nothing in the instrument suggesting or permitting the Foundation's trustees to give Dr. Barnes repossession of the

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85. *Id.* at 119.

86. *Id.*

87. *Id.*

88. *Id.* at 120.

89. *Id.*

90. Barnes Found. v. Keely, 171 A. 267, 268 (Pa. 1934). The students remain an integral part of the Barnes situation. *See* Patricia Horn, *Barnes Fights Student Petition*, PHILA. INQUIRER, Oct. 31, 2002, at C3; Don Steinberg, *Students Criticize Barnes' Moving Plan*, PHILA. INQUIRER, Dec. 11, 2002, at C3.

91. *Keely*, 171 A. at 268.

92. *Id.*

paintings.[93] If the Foundation should ever fail, the "transfer or sale" of the art "would be subject to the control of the courts, as well as the disposition of the purchase price to objects similar to those contemplated by the foundation."[94]

For nearly two decades following these decisions, the Barnes Foundation existed undisturbed and, for the most part, unvisited.[95] Dr. Barnes's notoriety increased by the imperious and seemingly haphazard manner in which he controlled access to the collection. Eventually, a Philadelphia Inquirer editor, with the consent of Pennsylvania's Attorney General, sued the Foundation claiming that its administration of the collection and its limitation on public access amounted to a rejection of the charitable purposes for which the Foundation was established.[96]

The Pennsylvania Supreme Court said the editor's claim should have been dismissed because he lacked standing to complain:

> In the absence of statutory authority, no person whose interest is only that held in common with other members of the public, can compel the performance of a duty owed by the corporation to the public. 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 of such nature.[97]

Although the Attorney General had consented to the editor's action, he lacked statutory authority to do so and, as a consequence, could "not delegate the conduct or control of the suit."[98]

The dissenting justices stated that the editor, as a member of the public, was an intended beneficiary of the Foundation and therefore was an interested person capable of bringing the action.[99] They said the Foundation was apparently "seeking to perpetuate [Dr. Barnes's] idiosyncratic trend in the administration of the trust fund, but [the Foundation had] no right to go beyond the clearly worded intention of the Charter and Indenture."[100] The dissent acknowledged that, at one point, Dr. Barnes could have disposed of his collection and gallery as he chose; however, once Dr. Barnes infused them with a public interest by gaining a tax exemption, he divested himself of sole

93. *Id.*

94. *Id.*

95. *See* Meisler, *supra* note 1, at 98.

96. Wiegand v. Barnes Found., 97 A.2d 81, 81-82 (Pa. 1953).

97. *Id.* at 82.

98. *Id.* at 83.

99. *Id.* at 85 (Musmanno, J., dissenting).

100. *Id.* at 86 (Musmanno, J., dissenting). It seemed that "Dr. Barnes in his lifetime, not unlike other geniuses, leavened the force of a powerful personality with the yeast of whim and idiosyncracy." *Id.* (Musmanno, J., dissenting).

control over the assets.[101] And if Dr. Barnes was divested, so was his foundation.

The dissent said 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."[102] The Foundation could surely manage this access by imposing reasonable restrictions. However, the editor's complaint was that the restrictions imposed were unreasonable; if true, the dissent said, that complaint would merit judicial attention.[103]

That judicial attention was paid seven years later, this time in an opinion written by the justice who wrote that dissent. In *Commonwealth v. Barnes Foundation*,[104] the state's Attorney General sued the trustees "to show cause why they should not unsheathe the canvases to the public in accordance with the terms of the indenture and agreement entered into between" Dr. Barnes and the Foundation.[105]

This time, the Pennsylvania Supreme Court went directly to the public interest in a public institution, which justified judicial intervention:

> Although the Foundation . . . assumed indisputable status as a tax-exempt public charity, its officers and trustees have consistently refused to the public admission to its art gallery. 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. Thus, if the paintings here involved may not be seen, they may as well not exist . . . . If the Barnes art gallery is to be open only to a selected restricted few, it is not a public institution, and if it is not a public institution, the Foundation is not entitled to tax exemption as a public charity. This proposition is incontestable.[106]

And this time, there was no question of standing. The Attorney General was "authorized to inquire into the [Barnes Foundation's]

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101. *Id.* at 86-87 (Musmanno, J., dissenting).

102. *Id.* at 88 (Musmanno, J., dissenting). The dissent said that "[b]uilding a well 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.'" *Id.* at 86 (Musmanno, J., dissenting).

103. *Id.* at 88 (Musmanno, J., dissenting).

104. 159 A.2d 500 (Pa. 1960).

105. *Id.* at 501. The court noted that "[a]lthough the Barnes Foundation has been judicially recognized as an institution of public charity and, therefore, enjoys exemption from taxation, the public as such has been denied access to the gallery housing the canvases and other works of art." *Id.*

106. *Id.* at 502-03.

status, activities and function[s]."[107] By claiming public status as a charity, the Foundation submitted to public "supervision and inspection."[108] Here, the Foundation had "sealed off the art gallery to the public."[109] Although the Foundation might "argue that there must be [some] limitations in the public's frequenting of the gallery, [it could not] successfully argue that the public can be shut out as if it were a contagion."[110]

As a result, the Barnes Foundation was required to loosen its restrictions on public access, although gaining that access remained one of the toughest tickets in town. However, the Foundation managed to stay out of court until the last of the original trustees died. At that point, litigation hell broke loose.[111] The new trustees began with a public relations fiasco by suggesting the sale of some works to fund admittedly needed renovations.[112] Faced with overwhelming national and international criticism of its suggestion, the trustees withdrew it.[113]

But the trustees remained faced with investment and other restrictions reflecting "the rigid and peculiar nature of Dr. Barnes's persona and his philanthropic ideology."[114] In 1992, they sought

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107. *Id.* at 505.

108. *Id.* The court said "[i]t would be an inadequate form of government which would allow organizations to declare themselves charitable trusts without requiring them to submit to supervision and inspection. Without such supervision and control, trustees of alleged public charities could engage in business for profit." *Id.*

109. *Id.*

110. *Id.* at 506. The court concluded that

> the trustees of the Barnes Foundation may not exclude the public from the art gallery without offering explanation as to why it ignores the expressed intention of Dr. Barnes that the gallery shall, within certain restrictions, be open to the public . . . . [S]uitable discovery shall be allowed the Attorney General to the end that the rights of the public in the indenture, and in accordance with public policy, may be protected and assured.

Id. For further analysis, see Higonnet, *supra* note 3, at 66, stating that "the same individualism that fueled Alfred [sic] Barnes's manic drive to amass great wealth also urged him to do with his collection as he wished. . . . If we see these stipulations in context, however, we recognize that they are no more draconian than those governing similar institutions."

111. *See* Higonnet, *supra* note 3, at 64 ("The still-unfolding saga of the Barnes Foundation's struggle to break indenture and to escape financial ruin is bizarre and tortuous. No one has done anything criminal, but few have behaved honorably.")

112. *See* Grace Glueck, *Foundation Reverses Plan to Sell Paintings*, N.Y. TIMES, July 4, 1991, at C11.

113. *See id.*

114. Chris Abbinante, Comment, *Protecting "Donor Intent" in Charitable Foundations: Wayward Trusteeship and the Barnes Foundation*, 145 U. PA. L. REV. 665, 672 (1997). "The question of whether the trustees have the duty to adhere to these extreme guidelines is the cause of the controversies that have long cast a shadow over the Foundation's existence." *Id.*

judicial relief by filing a petition to amend and clarify the trust indenture.[115] In Pennsylvania, such cases are heard in the Orphans' Court division of the Common Pleas court. That court found that the buildings' unacceptable conditions jeopardized the trust's central purposes of the advancement of art education and appreciation and of the preservation of the collection, and threatened the safety of the staff, students, and visitors.[116] The court also found that the renovations necessary to correct these conditions required removal of the collection to facilities where the works could be displayed and maintained in an environmentally suitable, professionally supervised, and diligently safeguarded setting.[117] The problem was that Dr. Barnes had specifically prohibited this.[118]

However, the court said that "literal compliance with these provisions, which do not address the safekeeping of the collection during periods of renovations, would be both impracticable and inconsistent" with other of Dr. Barnes's provisions.[119] The court, although expressing some concern about the trustees' conduct, found that permitting selected works of the collection to be sent on an "exhibition tour . . . will finance the critical renovations, safeguard the art during the renovations, and promote the education and appreciation of fine arts."[120] If this tour did not proceed, the

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115. *See* Lee, *supra* note 37, at 190-91. "The *Barnes* case represents a situation whereby the trustees attempted to expand the pursuits of a foundation against the clearly articulated desires of its donor." *Id.* at 189. This resulted in court-ordered changes that "were merely conveniences that suited the needs of the trustees." *Id.* at 191.

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

117. *Id.* at 350-52.

118. *See id.* at 352. The court noted that paragraph 10 of the indenture provided that "[a]fter [Dr. Barnes'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." *Id.* (alterations in original). Paragraph 13 provided that "[a]ll the paintings shall remain in exactly the places they are at the time of the death of [Dr. Barnes] and his said wife." *Id.* (second alteration in original) However, the court found:

> [it is] difficult to believe that a man of Dr. Barnes' erudition would not have anticipated that the day would come when the structure he had created to house his collection would require such fundamental structural repairs and renovations as would make impossible the uninterrupted display of the collection as mandated by the Indenture.

Id. at 355.

119. *Id.* at 352. The other provisions were paragraph 16 of the Indenture, providing that "[a]ll of the buildings and improvements of [the Foundation] shall at all times be kept in first-class order and repair" and paragraph 30, providing that "[i]t shall be incumbent upon the Board of Trustees . . . to make such rules and regulations that will protect the works of art in the gallery . . . ." *Id.* at 350 (alterations in original).

120. *Id.* at 352. The court, wary because the trustees' "suggested amendments . . .

Foundation, which was then operating at a deficit, could not pay for the necessary renovation.[121]

In 1994, the trustees went back to court seeking to add additional venues to the authorized tour.[122] The ongoing renovations had exceeded the original estimates, and the Foundation needed more money. The court was not happy with the trustees. It was especially concerned about the trustees' attitude that the proceeds from the additional venues could be used at their discretion for purposes other than the necessary renovations.[123] The court made it clear that this would not happen:

> Although the Court is reluctant to inject itself into the operations of The Barnes Foundation, the present litigation clearly points out the need to avoid a repetition of the emergency atmosphere surrounding the matter at hand. Therefore, 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.[124]

The court also demanded an accounting of all Foundation activities, past, present, and future.[125]

A different judge expressed an equal measure of exasperation with the trustees' conduct. On January 18, 1995, the Philadelphia Museum of Art, one of the original tour venues, petitioned the court

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do give rise to the suspicion that [their] intentions . . . might be somewhat more ambitious than what their present request has indicated," concluded that

> an order permitting a *single* tour limited to the period of any renovation can and should be accomplished by Court order . . . upon the express conditions that, following completion of the renovations, the paintings be returned to their places on the walls as directed by Dr. Barnes, and the provisions of the Indenture reinstated in full.

Id. at 356.

121. *Id.* at 355.

122. The Barnes Found., A Corp., 14 Fiduc. Rptr. 2d 92, 93 (1994), *appeal dismissed*, 661 A.2d 889 (Pa. Super. Ct.), *lv. to appeal denied*, 668 A.2d 1119 (Pa. 1995).

123. The Barnes Found., A Corp., 14 Fiduc. Rptr. 2d at 95. The court delivered this lecture to the trustees:

> It should not be necessary to iterate to the Trustees that this tour runs contrary to the expressed desires of Dr. Barnes. . . . The establishment of the fund for basic rehabilitation and repair of the Foundation's buildings and systems should help them remain true to their charge, so that the present tour is indeed the "once in a lifetime" opportunity and event which they have asserted.

Id. at 96.

124. *Id.* at 95-96.

125. *Id.* at 96.

for clarification regarding the museum's intended exhibition of a particular work, Georges Seurat's *The Models*.[126] On January 19, the court stated that it

> laments and to some extent resents being constrained to deal with this issue on an emergency basis. Although the Museum . . . may well have been unaware of any potential controversy involving display of *The Models*, the same cannot be said of the Trustees. We are not impressed with the Trustees' remonstrations that the language of the Decrees is so clarion that the instant controversy could not have been anticipated. Nothing in this case has been easy. No position has gone unrefuted; every thrust has been parried. The Trustees knew or should have known that the plan to include *The Models* . . . would be challenged. . . . Nevertheless, the issue is bigger than the Trustees' lack of foresight and/or candor and the circumstances are now clearly exigent.[127]

The court decided to permit exhibition of the work because there was no reason to believe that the environment at the Museum would be less hospitable than that at the Foundation's facilities.[128]

Less than five months later, the court was again importuned by the trustees to permit the addition of another venue to the tour. The renovations still had not been completed and were now $4 million over the estimate. This time, it seems that the court had run out of patience:

> The Trustees . . . point out that the Foundation's unrestricted endowment, which had been approximately $10,000,000 in 1992, has diminished to approximately $8,500,000 today because the Foundation's income has been insufficient to cover its operating expenses and the costs attendant to its on-going litigation. However, [the original decree] did not authorize the single tour to increase the Foundation's unrestricted endowment or defray its operating expenses. . . . We think it especially noteworthy that the 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.[129]

The court again reminded the trustees of their duty regarding Dr. Barnes's wishes:

> Finally, the Trustees have attempted to emphasize the benefits that would accrue to the public generally by extending the tour.

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

127. *Id.* at 55-56.

128. *Id.* at 57.

129. The Barnes Found., A Corp. (No. 5), 15 Fiduc. Rptr. 2d 212, 215-16 (1995).

> We need not attempt to assess this benefit because it is irrelevant. The paintings belonged to Dr. Barnes and his Trust Indenture dictates the terms of public access.[130]

The court denied the application because the trustees had not established that further touring was necessary.[131]

This decision, dated May 11, 1995, was immediately appealed to the Superior Court, which, on May 17, permitted further touring of the exhibition.[132] The Superior Court, in an opinion issued ten months later, said the lower court had withdrawn

> to a technical application of the trust agreement which would have unnecessarily denied the Foundation the ability to enlarge its endowment and protect what could be an inevitable defeasance of the trust . . . which fails to earn sufficient income to fulfill the dominant intent of the trust to preserve the art works intact and to teach students.[133]

The court said "the major operative fact is that the [extended] tour would take place during the [renovation] period . . . and the mandate . . . to have the paintings permanently returned to their places at the Barnes Foundation by completion of restoration of the buildings would still be met."[134] Although the costs of renovation had been met, the Superior Court considered it unconscionable to order storage of the works when the extended tour might bring in an

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130. *Id.* at 216.

131. *Id.*

132. *See id.* at 217 (Editor's Note) (noting that "after oral argument by telephone conference call without transcript of the record on emergency relief basis [the Orphans' Court's] adjudication was vacated and the tour permitted by" the Superior Court).

133. In re Barnes Found., 672 A.2d 1364, 1366-67 (Pa. Super. Ct. 1996). The court, emphasizing the need to protect the public interest, made the following response to that technical application:

> Blind adherence to the terms of the trust agreement could result in the trust losing its public non-tax status and financially defaulting to the point the art works sought to be preserved . . . would be sold off or assigned to some other institution which would not respect the wishes of Dr. Barnes and might in fact be the very institutions he had strongly opposed during his lifetime. . . . [The tour opponents] espouse a principle of blind adherence . . . despite clearly inevitable destruction of the Foundation and total denial of an inherent public interest. . . . The Barnes Foundation is no stranger to litigation and early on it was threatened with oblivion for failure of the settlor to accommodate the public interest . . . . Through intervention by the Commonwealth . . . this crisis was resolved. The administrative scheme adopted by the settlor . . . did not acquire a mantel of impenetrable insulation incapable of being adjusted to a change of cultural, social and economic factors.

Id. at 1367 (citations omitted). The court went on to say that the lower court's technical application was "to the detriment of the settlor's intent to perpetuate the art . . . for the distant future generations of students and the public." *Id.*

134. *Id.* at 1370.

additional $2.5 million.[135]

The Orphans' Court and the Superior Court again clashed when the Barnes Foundation sought to settle a long-running dispute with the de Mazia Trust, established by Violetta de Mazia, a close friend of Dr. Barnes who directed the Barnes art education program for approximately fifty years.[136] Her trust, designed to support that specific art education program, had challenged the Barnes trustees' management of it. The Orphans' Court rejected the trustees' argument that

> the Barnes Foundation is required only to promote some art program, and not necessarily the Barnesian program. Dr. Barnes developed this philosophy himself (in conjunction with John Dewey) and any claim that he did not necessarily intend for his Foundation to be the standard bearer for this method of instruction borders on the absurd.[137]

The court believed that Dr. Barnes and Ms. de Mazia would have been "chagrined, if not horrified" by this dispute and counseled the parties to compromise and cooperate as the founders had desired.[138]

On appeal, the Superior Court did not see it that way. It applied a pragmatic approach to ensure that those desires were achieved, an approach that was even more evident in this situation in which the litigating parties had reached their own settlement agreement. [139] The Superior Court was convinced that approving the settlement would advance Ms. de Mazia's interest by releasing her trust from a bad relationship that threatened the parties' respective abilities to benefit the public.[140]

While this decision was pending, the Barnes trustees were once

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135. *Id.*

136. Barnes Found.–de Mazia Trust, 15 Fiduc. Rptr. 2d 322, 324-25 (1995).

137. *See id.* at 337.

138. *Id.* Earlier, the court noted that "[t]hroughout these pleading skirmishes, the discovery battle raged on in the form of endless petitions to compel, to quash, for contempt, for production of documents, for protective orders, etc." *Id.* at 329. These activities may have accounted, in part, for the Foundation's financial problems:

> A primary motive for [settlement] is, of course, to save litigation costs. Instantly, enormous fees have been incurred by both sets of Trustees to date. The Attorney General, who is charged with protecting the interests of the people . . . specifically asks that the settlement be approved to prevent "the expenditure of vast sums of charitable dollars in future litigation."

Id. at 334. Although "mindful of the fact that this decision runs *contra* the half-hearted recommendation of the Attorney General's Office," the court found "the need to preserve the sanctity of the donors' written intents more compelling than the immediate, but short-sighted, benefits of approving the [settlement] agreement." *Id.* at 338.

139. In re Barnes Found., 684 A.2d 123, 133 (Pa. Super. Ct. 1996).

140. *Id.* at 136.

again before the Orphans' Court requesting changes to indenture provisions that they claimed had "been misconstrued or [had] become impracticable," and which threatened to frustrate the Foundation's intent and purpose.[141] The first requested change—relief from investment restrictions—was approved, the court finding it impractical to adhere to Dr. Barnes's restrictions.[142]

The second requested change was different. The trustees sought sole authority to set the admission fee.[143] Dr. Barnes, however, wanted "the plain people, that is, men and women who gain their livelihood by daily toil," to be admitted free.[144] Even that directive had been earlier modified to permit a $1 entry fee. The trustees now wanted to increase the fee to at least $10. Once again, the court found that the trustees' request contradicted Dr. Barnes's wishes, stating that "Dr. Barnes' goal of free access has had to yield to the charging of an admission fee, due to economic realities. However, the instant proposal would likely discourage 'the plain people,' i.e., the working class whom Dr. Barnes most wanted to view his collection, from visiting the gallery."[145] The Court found an appropriate balance between the Foundation's need to generate revenue and the interest in keeping the fee reasonable for all people by approving a general public admission fee of five dollars.[146]

In their third requested change, the trustees sought sole authority to set hours of operation.[147] Dr. Barnes originally opened the gallery to invited people on only two days a week and not at all in July, August, and September.[148] After his death, the trustees basically closed the gallery off to all public view. It took a suit by Pennsylvania's Attorney General to enforce the two day provision which was subsequently extended to a third day.[149] The trustees now wanted the gallery to be open 6 days a week. The court said the opponents feared

> this broad expansion because of its anticipated 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 an educational process within the scope of Dr. Barnes' indenture. These divergent views frame the philosophical chasm between

141. The Barnes Found., A Corp. (No. 6), 15 Fiduc. Rptr. 2d 381, 381 (1995).
142. *Id.* at 382.
143. *Id.*
144. *Id.*
145. *Id.* at 383.
146. *Id.*
147. *Id.*
148. *See supra* note 80 and accompanying text.
149. Commonwealth v. Barnes Found., 159 A.2d 500, 506 (Pa. 1960).

> the Foundation and its opponents . . . . For present purposes, it will suffice to say that the Trustees' proposal would transform the Foundation into a full-time museum, which goes far beyond [Dr. Barnes's] intent.[150]

The court found the appropriate balance to be struck by allowing the gallery to be open an additional day.

Finally, the trustees sought permission to organize, supervise, and host functions on the Foundation's property to benefit the Foundation and support its operational costs.[151] This clashed with one of Dr. Barnes's more detailed proscriptions banning social functions.[152] Although the trustees, supported by Pennsylvania's Attorney General, argued that their fund raising activities were not social functions, the court was

> not persuaded. The Foundation established . . . that its development strategy would be to stage events geared toward attracting future benefactors, i.e., potential corporate and individual donors. To state the obvious, there would be nothing "democratic" (Dr. Barnes' word) about the guest lists. Those not in a position to make a pledge to the Foundation would not be invited. It is clearly not possible to reconcile the Trustees' proposed clarification with the intent of Dr. Barnes . . . .[153]

The trustees had not established that it was impossible to raise adequate funds without entertaining on the Foundation's grounds.[154]

Six weeks later, the trustees were back before the Orphans' Court. The Foundation had planned a 400 to 500 person dinner and a special viewing of the collection to celebrate the gallery's post-renovation reopening. The guests had purchased tickets costing between $500 and $1,000 a person. The court said that the trustees

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150. The Barnes Found., A Corp. (No. 6), 15 Fiduc. Rptr. 2d at 384. For another perspective on the trustees' intent, see Sozanski, *A Lust*, *supra* note 8, at H1, saying that the trustees "tried to transform the Barnes into something it was neither intended nor equipped to be—a mass-appeal tourist museum. The trustees never seemed to appreciate what the Barnes represented as an expression of personal connoisseurship and pedagogical theory."

151. The Barnes Found., A Corp. (No. 6), 15 Fiduc. Rptr. 2d at 384-85.

152. *See id.* at 384 (reprinting paragraph 33 of the indenture).

> The purpose of this gift is democratic and educational in the true meaning of those words, and special privileges are forbidden. It is therefore expressly stipulated . . . that at no time . . . shall there be held in any building or buildings any society functions commonly designated receptions, tea parties, dinners, banquets, dances, musicales or similar affairs . . . whether such functions be private or public.

Id. Dr. Barnes even ordered the Foundation to pay "the total legal expense" of anyone seeking an injunction against a violation of this paragraph if it was "based upon what reputable legal counsel consider is sufficient evidence." *Id.*

153. *Id.* at 385.

154. *Id.*

had ignored Dr. Barnes's restrictions. [155] However, since the dinner was to be held in a tent and not in the gallery, it did not violate Dr. Barnes's ban on holding such functions in Foundation buildings.[156] But these guests could not visit the gallery; the court would "not countenance the use of the Barnes Foundation's art gallery as a hall for rent."[157]

The trustees again appealed to Superior Court, which again reversed the lower court. The Superior Court found "a decided difference between fund raising functions which have as their purpose the preservation and enrichment of the assets which the Foundation is charged with protecting, and a social affair which has as its purpose the inclusion of some and the exclusion of many."[158] However, the Superior Court agreed with the lower court that the trustees had fallen short of demonstrating the need for either increased access or an increased admission fee.[159]

The trustees continued their attempts to circumvent the terms of Dr. Barnes's trust "concerning gallery operating hours, admission fees, and fund raising events," prompting a complaint by Robert Marmon, who lived across the street from the gallery.[160] Although Mr. Marmon did not appear to have standing to bring the complaint, the Orphans' Court, acknowledging the seriousness of the issues raised by Marmon, directed the Attorney General to investigate those

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155. The Barnes Found., A Corp. (No. 7), 16 Fiduc. Rptr. 2d 1, 3 (1995).

156. *Id.*

157. *Id.* at 4.

158. In re Barnes Foundation, 683 A.2d 894, 898 (Pa. 1996). The court prefaced this statement with the following:

> It is obvious that the late Dr. Barnes did not wish to have his school and gallery trivialized by the use of it as a mere rental hall for socialites. However, nothing in [the trustees'] application or in the testimony in support of that application suggest that the Foundation seeks to violate that intention.

Id. However, the court immediately emphasized that "it is our interpretation that nothing in the paragraph [33] prohibits fund raising functions which have as their sole purpose the raising of funds for the institution . . . and the paragraph will continue to include the safeguard from abuse which Dr. Barnes intended . . . [i.e., the private citizen suit]." *Id.*

159. *Id.* at 899. The court described how short this was:

> At the hearing . . . [the trustees] failed to produce any reliable evidence concerning the true financial picture of the foundation . . . did not produce any recognizable financial statements, bank statements, tax returns, budgets or audited reports. Instead, it offered one unsubscribed exhibit containing alleged expenses . . . . [The trustees] also introduced oral representations by its President which were very general in nature, and were not indicative of a true financial picture of the Foundation.

Id. at 899-900.

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

issues.[161]

The Attorney General, who believed that the public's access to the collection should be maximized, reported that in addition to admitting the public during the dictated gallery hours, the trustees were permitting tour groups into the gallery on days it was closed to the public.[162] The Attorney General considered the trustees' system of scheduling tour groups on non-public days to be appropriate.[163] The court, with unveiled sarcasm, said that in this, as in "all Barnes Foundation matters, the issue of judicial scrutiny takes on special importance inasmuch as the Attorney General and the Barnes Foundation in tandem seem to treat the intent of the donor as a hurdle to be overcome rather than a guiding light."[164]

The court found light in paragraph 30 of the indenture:

> Dr. Barnes specified that, on the days the gallery is not open to the public, it "shall be open . . . solely and exclusively for educational purposes— to students and instructors of institutions which conduct courses in art and art appreciation, which are approved by the Trustees of Donee." . . . The group admissions policy now in place brings to mind the "hall for rent" concept which has already been rejected. . . . At present, any group willing to pay the $500 lecture fee can sign up for a private tour. This development flies in the face of Dr. Barnes' expressions that the purpose of his gift was "democratic" and "without special privilege," and that his Trustees should ensure that "the plain people" have "free access" to the art collection and arboretum.[165]

The court directed the trustees to adhere to these instructions as to who could enter the gallery on non-public days.[166]

Even more blatantly than this, the trustees had rewarded an individual who had helped plan the gallery's reopening by allowing her to hold an event at the gallery for Pennsylvania Ballet Company sponsors.[167] The trustees defended such action by stating it would showcase the Foundation's operation and the renovations to the

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161. *Id.* Mr. Marmon later sought contempt orders against the trustees and the attorney general and again was rebuffed for lack of standing. *See generally* The Barnes Found., A Corp. (No. 10), 21 Fiduc. Rptr. 2d 351 (2001); Ralph Vigoda, *Judges: Barnes May Hold Benefits*, PHILA. INQUIRER, Apr. 25, 2002, at B2.

162. The Barnes Found., A Corp. (No. 8), 18 Fiduc. Rptr. 2d at 34-35.

163. *Id.* at 35.

164. *Id.*

165. *Id.*

166. *Id. See* Sozanski, *Glanton's Tenure*, *supra* note 36, at E10. "What was overlooked, though, by both Glanton and his board . . . is that there wasn't anything intrinsically wrong with continuing to operate the foundation primarily as an educational program. That is, after all, what the founder intended." *Id.*

167. The Barnes Found., A Corp. (No. 8), 18 Fiduc. Rptr. 2d at 35-36.

gallery to influential people in attendance.[168] Although the Attorney General said that this appeared to violate a previous holding that permitted only on-site functions raising funds for the Foundation, the court was not so equivocal: it was certain the judicial order had been contravened.[169]

Within ten months, the Foundation presented another petition involving the admissions policy.[170] It asked the court to strike Dr. Barnes's language closing the gallery in July and August.[171] The Foundation felt that it should be permitted to deviate from this language because Dr. Barnes had "not foresee[n] the technological advances" permitting the collection to be kept in a temperature-controlled environment.[172] Since Dr. Barnes closed the gallery to prevent damage to the collection, the court agreed that he would have welcomed advances that could eliminate the dangers of adverse weather conditions.[173] The court granted the Foundation's petition because they felt that it better effectuated Dr. Barnes's intent.[174]

IV. THE PUBLIC INTEREST, THE COLLECTION, AND HISTORIC PRESERVATION

The above discussion of the public's interest being addressed by public trust administration law was predicated on Dr. Barnes's use of a charitable tax exemption. However, permitting public access to the collection also opened up an analytically available avenue to preserving the collection. There is a real possibility that the Barnes Collection could be dismantled and dispersed. During the 1990s, the trustees depleted the Foundation's endowment, leaving it with a very uncertain future.[175] However, as a historically significant, publicly valuable cultural ensemble, the Barnes Collection merits preservation.[176]

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168. *Id.* at 36.

169. *Id.*

170. The Barnes Found., A Corp. (No. 9), 18 Fiduc. Rptr. 2d 393, 393 (1998).

171. *Id.* at 395.

172. *Id.*

173. *Id.* at 396.

174. *Id.*

175. *See* Kathy Boccella, *An Artist to the Rescue*, PHILA. INQUIRER, Nov. 19, 2000, at J1. "With its $10 million endowment gone, the foundation is living hand-to-mouth and could be broke within a year .... Under that scenario, the Barnes' $6 billion collection ... could be broken up or moved to another museum." *Id.* "No one connected to the Barnes wants to talk about what would happen if the foundation fails. But Albert C. Barnes himself anticipated the possibility. He wrote in his indenture that if the foundation failed, its property should be given to a similar local institution." Kerkstra, *supra* note 51, at A1.

176. See Merryman, *Elgin Marbles*, *supra* note 11, at 1917, for a discussion of the fate of the Elgin Marbles. "Preservation takes priority for obvious reasons. If the

As with all American preservation issues, there is a strong counter-current: we have a fundamental belief that people who own property, particularly personal property, can do with it as they please. Had Dr. Barnes not created the Foundation and imbued it with a public interest, he arguably could have sealed his collection away or given it away or sold it away, or, perhaps, destroyed it.[177] However, the Foundation no longer has those options. Dr. Barnes granted the public access to his collection and, by so doing, gave local government a public interest basis for interceding to preserve the collection as created by Dr. Barnes.[178]

There should be little argument at this date that preservation is a legitimate governmental end.[179] Cultural ensembles such as the Barnes Collection fulfill a necessary public function.[180] This is true even though the collection is comprised of works from other times and other places.[181] Furthermore, the public interest in the Barnes

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Marbles are destroyed, people of all cultures will be deprived of an important part of their cultural heritage .... Damage short of destruction ... threatens the same value." *Id.*

177. For a discussion of the private collection of Baron Thyssen-Bornemisza, see Jonathan Kandell, *Baron Thyssen-Bornemisza, Industrialist Who Built Fabled Art Collection, Dies at 81*, N.Y. TIMES, Apr. 28, 2002, at 50, explaining how the Baron built his private collection into one "rivaled only by the collection of the queen of England" and then "sold the bulk of his treasures to Spain" for $350 million, "a fraction of its $2-billion estimated value." For a discussion of another famous art collection, see Grace Glueck, *The Treasures of a Private Collector From Copenhagen*, N.Y. TIMES, June 21, 2002, at E35, discussing a tour of the Wilhelm Hansen collection occasioned by renovations to his gallery, "the most important collection of 19th-century French paintings in northern Europe," which "became the state-owned Ordrupgaard Museum" after his wife's death.

178. *See* Patty Gerstenblith, *Architect as Artist: Artists' Rights and Historic Preservation*, 12 CARDOZO ARTS & ENT. L.J. 431, 464 (1994) (advocating reliance "on an aggressive landmarking process to represent the public's interest in the preservation of public art and architecture"); Zlatarski, *supra* note 17, at 225-26 ("Clearly a check on property rights, and a deviation from the traditional principle of unencumbered land, preservation regulations function nonetheless to protect the community's interest in maintaining important historical, cultural, and aesthetic landmarks.").

179. *See* Gutman, *supra* note 13, at 465 (arguing that "preservation of such structures is justified not only as a valid exercise of governmental power but also as part of a nation's cultural heritage").

180. Merryman, *Public Interest*, *supra* note 11, at 349. As the author explained, "[e]ven a single object ... illustrates humanity's social nature. ... The social functions of objects testify to our common humanity. They illustrate one's connection with others, express a shared human sensibility and purpose, communicate across time and distance, dispel the feeling that one is lost and alone ...." *Id.*

181. *See id.* at 343.

> [A]n object valued by people in one culture may be valued by those in others who respond to the object's "human component," even though they are not drawn to its specific cultural value. Thus, despite cultural variations, people in most (all?) places care in special ways about objects that evoke or embody

Collection transcends an interest in any 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.[182] It has a specific context that gives it a specific intended meaning. Even a well-intentioned displacement of the collection would change that meaning.[183]

That specific context is also a public venue. Dr. Barnes displayed his collection in a manner designed to educate the public. He created the context in which the collection was to be viewed for a specific if idiosyncratic purpose: to expose the viewer to his theory of art appreciation. In its eighty year existence, the Barnes Collection has "become a part of the cultural, aesthetic, historical and economic fabric of the community."[184] This is true even though access has been limited and even, at one point, cut off.[185]

Provided that it follows a constitutionally proper process, local government, if authorized by appropriate legislation, confidently could act to preserve a treasure such as the Barnes Collection. However, it does not appear that Lower Merion Township, where the collection is located, has enacted an appropriate ordinance.[186]

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or express their own and other people's culture.

Id. (footnotes omitted).

182. *See* Morton, *supra* note 70, at 884-85. "Movable works of art do not impinge on any other piece of property; their preservation is rarely dependent upon their environment. But when a work has become incorporated into a building, there are more complex issues of competing interests." *Id.*

183. *See* Merryman, *Public Interest*, *supra* note 11, at 356. "Physical preservation of discrete objects themselves may not be enough. Every cultural object is to some extent a part of a larger context from which it draws, and to which it adds, meaning. Separated from its context . . . the object and the context both lose significance." *Id.*

184. *See* Scott H. Rothstein, Comment, *Takings Jurisprudence Comes In From the Cold: Preserving Interiors Through Landmark Designation*, 26 CONN. L. REV. 1105, 1132 (1994).

185. *See* Manwaring, *supra* note 69, at 322.

> The preservation of interiors is reasonably related to the accomplishments of landmark objectives, even when public access may be limited, as many private uses afford the public an opportunity to view, appreciate, and thereby, benefit from these significant assets. This principle is still applicable even if public access is banned, because the opportunity to preserve our cultural, historical, and architectural resources for the benefit of future generations may be lost forever.

Id.

186. LOWER MERION, PA., CODE part II, ch. 155, art. II, §155-4(B) (2002) seems to limit preservation protection to exteriors by defining demolition as follows:

> The razing or destruction, whether entirely or in significant part, of the exterior of a building, structure, or site. Demolition includes . . . the removal, stripping, concealing or destruction of the facade or any significant exterior architectural features which are integral to the historic character of the resource, for whatever purpose, including new construction or

Philadelphia's recent brush with losing a significant cultural object should have prompted some action.[187] It may be that Lower Merion Township might prefer that the Barnes Collection go somewhere else; the relationship between the Township and the Foundation is that bad.

If the Township wishes to act, it has a suitable legislative model in New York City's Landmarks Preservation and Historic Districts Code.[188] Like Pennsylvania, New York's legislature had determined that "the historical, archaeological, architectural and cultural heritage of the state is among the most important environmental assets of the state and that it should be preserved."[189] The legislature declared it to be the state's "public policy and in the public interest of this state to engage in a comprehensive program of historic preservation" that would, in part, "encourage and assist municipalities to undertake preservation programs and activities."[190]

New York City accepted this invitation to act. The city council "declared as a matter of public policy" that historic preservation "is a public necessity and is required in the interest of the health, prosperity, safety and welfare of the people."[191] Among the legislative purposes was the desire to "promote the use of . . . interior landmarks . . . for the education, pleasure and welfare of the people of the city."[192] An interior landmark is defined as follows:

> 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.[193]

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reconstruction.

Id.

187. *See* John Nivala, *Preservation is Process: The Designation of Dream Garden as a Historic Object*, 8 WIDENER L. SYMP. J. 237, 238 (2002).

188. *See* N.Y. PARKS REC. & HIST. PRESERV. LAW, § 14.01 (McKinney 1984).

189. *Id.* The Pennsylvania legislature made a similar declaration: "The irreplaceable historical, architectural, archaeological and cultural heritage of this Commonwealth should be preserved and protected for the benefit of all the people, including future generations." 37 PA. CONS. STAT. § 102(3) (West Supp. 2002).

190. N.Y. PARKS REC. & HIST. PRESERV. LAW § 14.01(3). The Pennsylvania legislature made a similar statement: "It is in the public interest for the Commonwealth, its citizens and its political subdivisions to engage in comprehensive programs of historic preservation for the enjoyment, education and inspiration of all the people, including future generations." 37 PA. CONSOL. STAT. § 102(6).

191. N.Y. CITY, N.Y., CHARTER & ADMIN. CODE § 25-301(b) (1992).

192. *Id.* § 25-301(b)(g).

193. *Id.* § 25-302(m).

An "interior" is the "visible surfaces of the interior of an improvement."[194] An "improvement" is "[a]ny building, structure, place, work of art or other object constituting a physical betterment of real property, or any part of such betterment."[195] Once an interior is designated a landmark, it is a violation of the code to remove or alter "a significant portion of a protected feature of an interior landmark" unless the Landmarks Preservation Commission [hereinafter "Commission"] has approved the action.[196]

Such Commission approval sparked the litigation in *Committee to Save the Beacon Theater v. City of New York*.[197] The Commission had designated the theater's interior in 1979.[198] However, in 1986, following an extensive public review, it granted the owner's application to make certain alterations; this grant was subject to a number of conditions.[199] The Committee to Save the Beacon Theater challenged the approval, and the reviewing court found the Commission's decision to be arbitrary and capricious. The city then appealed to the Appellate Division.[200]

After disposing of the Committee's action on ripeness grounds,[201] the court, although it did not have to reach the merits, stated that the lower court's finding that the Commission's determination was "arbitrary and capricious" was erroneous.[202] A court's scope of review of such decisions was narrow in scope as to whether there was a rational basis for the Commission's determination.[203] In addition, the lower court failed to afford due deference to the Commission as a body of experts acting within their field of expertise.[204]

The original designation of the theater's interior did not depend so much on the interior's individual elements, as it did on total effect.[205] However, the court explained that the Commission reasonably concluded that, "although certain factors will be shielded from view by non-permanent fixtures, they also will be shielded from

194. *Id.* § 25-302(k).

195. *Id.* § 25-302(i).

196. *Id.* § 25-302(x)(1)(b) (Supp. 1992).

197. 541 N.Y.S.2d 364 (App. Div. 1989).

198. *Id.* at 365.

199. *Id.* at 366.

200. *Id.* at 367.

201. The court concluded that the Commission's action did not constitute "a reviewable 'final determination' . . . making the issues raised by the petition 'ripe' for judicial review." *Id.* at 365.

202. *Id.* at 369.

203. *Id.*

204. *Id.*

205. *Id.*

harm."[206] In addition, "[t]he Commission considered the question of the Beacon's value as a theater and not just for its individual elements and determined that since the Beacon would still occasionally be used as a theater and that since the alterations were non-permanent, the purposes of the designation were accommodated."[207]

A case of much broader impact arose in 1987 when the Commission issued forty-seven landmark designations for twenty-eight theaters; three were landmarked for both their exterior and/or their interior.[208] These designations resulted from over five years of studies, reports, public hearings, and public executive sessions.[209] The Appellate Division explained that the Commission clearly had a reasonable basis, under the statutory criteria, for each designation based on the amount of analysis, reports, and anecdotal testimony considered by the Commission before making the designations.[210]

The theater owners also raised constitutional challenges to the underlying landmarks legislation. However, the Appellate Division decided that the owners failed to demonstrate that the legislation denied them essential use of the theaters.[211] The court further stated that the legislation served the legitimate public purpose of preserving historic landmarks.[212] In any event, the owners could obtain economic benefit by continuing to use the buildings as theaters.[213]

Perhaps the most significant interior landmarking decision arose when the Landmarks Preservation Commission designated the Seagram Building, its outdoor plaza, the building lobby, and the interior of the Four Seasons restaurant, which is located in the building.[214] The building owner was displeased by the Four Seasons designation, which resulted from the restaurant operators' independent proposal to the Commission.[215]

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206. *Id.*

207. *Id.*

208. Shubert Org., Inc. v. Landmarks Pres. Comm'n, 570 N.Y.S.2d 504, 506 (App. Div. 1991), *cert. denied*, 504 U.S. 946 (1992).

209. *Id.*

210. *Id.* at 507.

211. *Id.* at 508 (requiring that petitioners carry the burden to demonstrate that the law as applied to their property denies their essential use thereof).

212. *Id.* (citation omitted).

213. *Id.*

214. *See* Teachers Ins. & Annuity Ass'n of Am. v. City of New York, 623 N.E.2d 526, 528 (N.Y. 1993) [hereinafter *Teachers II*].

215. *See id.* at 527-28. The court explained:

> In December 1987, [the building owner] proposed the designation of the Seagram Building, including the building lobby and outdoor plaza. Prior to the public hearings before the Commission, and without consulting [the

The Four Seasons interior was created by Philip Johnson, a renowned American architect, who worked with the building's architect, Mies van der Rohe, one of the twentieth century's master architects.[216] The restaurant's interior was carefully designed to reflect and complement the Seagram Building's overall design and innovation.[217] The Commission's "designation accord[ed] landmark status to the [restaurant's] entrance lobby, Grill Room, Pool Room and balcony dining rooms, and include[d] the marble pool, walnut bar, wall surfaces, floor surfaces, ceiling surfaces, doors, railings, metal draperies and two hanging metal sculptures commissioned by Johnson from the artist."[218] The building owner appealed this designation.[219]

The Appellate Division, citing *Shubert*, stated that it had "rejected challenges to designation of interior elements *per se* as well as designation of interiors when such designation was argued to restrict use of the property."[220] In response to an argument that the restaurant interior lacked the essential public character, the court said the Four Seasons was normally accessible to the public.[221] The court also noted that designated interior features, including the sculptures, were sufficiently integral to the restaurant's interior, and, even if those features were not considered to be common law fixtures, the landmarks ordinance that "authoriz[ed] the designat[ion] of interior architectural features [did] not distinguish between personalty and realty."[222]

The building owner then appealed to the Court of Appeals but with no more success.[223] The owner limited this appeal to three arguments challenging the Landmark Preservation Commission's

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owner], the restaurant operators themselves proposed to the Commission that the restaurant interior also be considered for landmark status.

Id. at 527.

216. *See id.*

217. *See id.*

218. *Id.* at 528. The Court explained:

> Noting the particular architectural features of the restaurant, including its distinctive design, integral relation to the building architecture and innovative use of new technologies, the Commission found that the restaurant interior "has a special character, special historical and aesthetic interest and value as part of the development, heritage and cultural characteristics of New York City."

Id.

219. *Id.*

220. Teachers Ins. & Annuity Ass'n of Am. v. City of New York, 586 N.Y.S.2d 262, 263 (App. Div. 1992) [hereinafter *Teachers I*].

221. *Id.* at 264.

222. *Id.*

223. *Teachers II*, 623 N.E.2d at 528.

statutory authority to designate the Four Seasons.[224] First, the owner sought to distinguish between the restaurant and other interiors that are dedicated to public use by using them for public assembly.[225] The Court of Appeals rejected the distinction as not part of the statute that the court was required to enforce as the city legislature had written it.[226] That statute made "the relevant inquiry . . . an objective one of whether the interior is habitually open or accessible to the public at large."[227] Since the public had enjoyed the Four Seasons restaurant since it opened, the Commission had a basis "to preserve it for others."[228]

The owner's second argument was that the Commission violated the statute by designating items that made the space unusable for other purposes should the restaurant cease operation.[229] The Court of Appeals, agreeing with the Appellate Division, stated that, even if designated, the owner failed to demonstrate that the space would be unusable.[230]

The owner's third statutory argument was that "items appurtenant to the interior of the restaurant cannot properly be included in the designation."[231] The owner argued that the Commission could only designate items that could be classified as fixtures at common law, and thus the Commission could not

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224. *Id.* at 527. For a similar case, see Weinberg v. Barry, 634 F. Supp. 86 (D.D.C. 1986). In *Weinberg*, the owner argued that "the portion of the D.C. Act which permits designation of the interior of buildings as historic landmarks is unconstitutional on its face" primarily because "no designation of a building interior can serve a public purpose unless the government requires public access to the building." *Id.* at 92-93. In rejecting this argument, the court explained that even if the proposition was accepted,

> there are in fact numerous conceivable private uses of the interiors of buildings which are compatible with public viewing of the area. Any private use which depends upon public patronage . . . would allow the public to view and enjoy the interior. . . . A theater is but one example where, without mandating public invasion of the building or depriving its owners of its only economically viable use, the government can reasonably be expected to satisfy a number of the purposes of a historic preservation statute . . . .

Id. at 93.

225. *Teachers II*, 623 N.E.2d at 529.

226. *Id.*

227. *Id.* at 530. The owner argued:

> [A]lthough currently open to restaurant customers, the restaurant interior should be beyond the Commission's jurisdiction because it can be adapted to private use in the future. The simple answer is that *any* structure, even a railroad station, can be converted to private use in the future; that potential cannot preclude the landmarking of appropriate interiors.

Id.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

designate the items it did.[232] Again, the Court of Appeals stated that the Commission's jurisdiction was not limited to fixtures, agreeing with the Appellate Division that the Commission could "designate items appurtenant to an interior,"[233] whether personalty or realty.[234] After acknowledging the Commission's special expertise in applying the preservation code, the court explained:

> The Commission found that each of the designated items was created and installed at Philip Johnson's direction as an integral element of the design of the interior.... As demonstrated by the items chosen for designation, the Commission has drawn a rational distinction between items integral to the design of the interior space, and items that merely enhance the restaurant's ambiance.[235]

The court concluded that the Commission's interpretation was reasonable, was supported by the record, and was within the Commission's discretion.[236]

This leaves us with an interesting question: What if the Barnes Collection were subject to New York City's Landmark Preservation Law? Could the city designate the gallery and the collection as a landmark interior and thus preserve it for future generations?

Dr. Barnes built his gallery with an interior designed to avoid "rich embellishment that would have detracted from the impact of the works of art" and to provide "an intimate setting for the paintings in [his] collection."[237] Dr. Barnes also deliberately displayed his collection in a unique manner, reflecting his "recognition of the unifying form of all art and an understanding of multiculturalism."[238]

Dr. Barnes's work in displaying his collection has drawn much attention. One observer said that "[Dr.] Barnes composed his walls like a painter working over a canvas, searching for something ineffable, something greater than the sum of its parts."[239] Another, who spoke of Dr. Barnes's "eclectically arranged 'ensembles,'" said that "Dr. Barnes believed in shocking people into fresh perceptions by avoiding traditional categorical and chronological

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232. *Id.*

233. *Id.* at 531.

234. *Id.* at 530-31.

235. *Id.* at 531.

236. *Id.*

237. Wattenmaker, *supra* note 5, at 10.

238. Glanton, *supra* note 72, at viii.

239. Baker, *supra* note 49, at A19. The author further commented that "the Barnes [Collection] invited a contemplation different from that in other museums, more akin to what I felt years later in Italian churches.... Barnes conveyed this by the way he grouped paintings on a wall.... The affinities between them were difficult to articulate but easily felt." *Id.*

juxtapositions."[240]

Dr. Barnes's approach was deliberate and permanent. He would often reject important works because he believed "they would 'break up . . . ensembles that are necessary for teaching purposes. 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.'"[241] He was adamant in insisting that the collection be displayed as "'wall pictures,'" in arrangements that he designed.[242] Dr. Barnes's arrangement, which "isn't just the paintings on the walls but the sense of the whole," is considered "a precious part of American history as well as a major aesthetic achievement in itself."[243] His unorthodox arrangement compels the viewer to consider each element in new ways.[244]

The Barnes Collection, which, like the Four Seasons restaurant, is normally open to the public, would be an interior landmark because it possesses significant historical, aesthetic, and cultural value. As in Philip Johnson's work in the Four Seasons restaurant, Dr. Barnes installed each element as integral to the gallery's interior. The collection is an integral element to the design of the space.

V. THE PUBLIC INTEREST, THE COLLECTION, AND MORAL RIGHTS

American law has long had available a theory, based on the French concept of *droit moral*, that when an artist creates, "he projects into the world part of his personality and subjects it to the ravages of public use."[245] This theory, in turn, raises the possibility of non-economic injury to the artist, an injury which copyright does not protect. In addition, copyright does not protect the public interest in preserving its cultural inheritance. The moral rights theory protects not only the artist's interest, but, unlike the Copyright Act, also the public interest.[246] The theory would extend moral rights protection to the work after the artist's death based on society's need to protect its cultural heritage.[247]

The transformation of the French *droit moral* into an American

240. Clines, *supra* note 50, at 18.

241. Wattenmaker, *supra* note 5, at 15 (citation omitted in original).

242. Higonnet, *supra* note 3, at 65.

243. Sozanski, *Glanton's Tenure*, *supra* note 36, at E10.

244. Kimmelman, *A Recluse*, *supra* note 58, at C22.

245. Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 557 (1940).

246. *See id.* (distinguishing copyright law protection from moral right protection, noting "[n]or is the interest of society in the integrity of its cultural heritage protected by the copyright statute").

247. *See id.*

moral right has been a mess.[248] The theory is, perhaps not surprisingly, more embraced by academics than by judges.[249] The name itself is a problem, invoking images of morality, which in turn raises the specter of imprecise norms and controversial applications.[250] A starting point for some proponents is to change the name.[251] One author suggests that "'personal rights'" is a more accurate, less provocative translation;[252] another suggests "author's right of personality."[253] The theory primarily protects the artist's individual rights, while secondarily protecting the public interest.[254]

That secondary benefit is what is of interest here. There is

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248. *See* Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 820-21 (2001).

> [T]he moral rights of authors in the United States appear settled in a legal thicket —federal legislation that is applicable to a limited number of artists and situations, a patchwork of state statutes . . . and a melange of common law theories emanating from a "collage of judicial attempts" to define American moral rights. Courts have followed "a tortuous path," to find some accommodation "between traditional property and copyright concepts and creative sensibilities."

Id. (internal citations omitted).

249. *See* Benjamin S. Hayes, Note, *Integrating Moral Rights into U.S. Law and the Problem of the Works for Hire Doctrine*, 61 OHIO ST. L.J. 1013, 1014-15 (2000) ("Not only have moral rights not played a part of American law, but they have been viewed . . . with little affection."); Christopher J. Robinson, Note, *The "Recognized Stature" Standard in the Visual Artists Rights Act*, 68 FORDHAM L. REV. 1935, 1939 n.22 (2000) ("Moral rights, not surprisingly, are a favorite of academics, and articles on the subject far outnumber the cases in which moral rights are invoked.").

250. *See* Merryman, *Elgin Marbles*, *supra* note 11, at 1903. "The moral question is much harder to resolve than the legal question because moral norms are imprecise and their applicability is controversial. That is one reason for legal rules: to provide definitive and practically workable solutions to otherwise troubling and unruly questions." *Id.*

251. Lee, *supra* note 248, at 818. The author states that our "reluctance to protect authors' moral rights appears to stem in part from the use of the term 'moral' and the suggestion to give legal status to an author's notion of proper mores." *Id.* For further discussion of moral rights, see Sheldon W. Halpern, *Of Moral Right and Moral Righteousness*, 1 MARQ. INTELL. PROP. L. REV. 65, 65 (1997), stating that "[c]arrying the dual function of preservation of culture and protection of individual 'personality,' in American society the moral right must conflict not only with rooted property principles but also with egalitarian norms. . . . [T]he translation of this civil law concept into its American incarnation cannot be nearly so literal."

252. Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 6 (1988).

253. Cotter, *supra* note 27, at 10 n.40.

254. Gerstenblith, *supra* note 178, at 439. *See also* Roberta Rosenthal Kwall, *"Author-Stories:" Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine*, 75 S. CAL. L. REV. 1, 24 (2001). "At base, moral rights laws are concerned primarily with safeguarding an artist's dignity as an individual and as an author. The interest served by moral rights laws is fundamentally a spiritual one which transcends the author's concern for property or even reputation." *Id.*

substantial evidence that Americans care about cultural works.[255] Our legislative attempts at translating *droit moral* have, in part, a purpose to protect the public interest in those cultural works.[256] However, as noted before, this runs into a very strong countercurrent: our belief that an owner, particularly one of personalty, can do with it as he or she sees fit.[257] In addition, some have suggested that "[t]here may be no truly satisfying way adequately to recognize both the individual personality and the cultural preservation concerns in a single moral right construct."[258] The one interest is temporal, the other perpetual.

There does not appear to be an American common-law version of a moral right. For example, the plaintiff in *Meliodon v. School District of Philadelphia*[259] was a sculptor hired to prepare models for work incorporated in a school district building.[260] He subsequently claimed that the school board altered the models to such an extent that he suffered permanent reputational damage as a distinguished artist.[261] The sculptor sought an order requiring the school district to take down the sculptural work and prevent it from being attributed to the artist.[262] The court determined that he had not set forth any right justifying an injunction or any other equitable relief.[263] The

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255. Merryman, *Public Interest*, *supra* note 11, at 343.

256. *Id.* at 344. *See also* Roeder, *supra* note 245, at 577.

> The doctrine of moral right favors the creator and the public against the entrepreneur and the performer. The public has a definite interest in the doctrine for it protects the integrity of its culture and, protecting the creator, it stimulates creation. The creator, of course, has an obvious interest which is more than economic.

Id.

257. *See* Colleen P. Battle, *Righting the "Tilted Scale": Expansion of Artists' Rights in the United States*, 34 CLEV. ST. L. REV. 441, 462-63 (1986). "The greatest stumbling block to the adoption of moral rights . . . is the traditional concept of what constitutes ownership. It has indisputably been accepted in our nation that bona fide owners of real property possess [the right to do with it as they like]." *Id.*

> Perhaps most jarring to the American psyche is the idea of an author's moral right taking precedence over another's property right. The notion that an artist may . . . prevent the purchaser and holder of title in the work from doing with it what she wishes may run contrary to the American socio-legal culture and border on the heretical.

Lee, *supra* note 248, at 814.

258. Halpern, *supra* note 251, at 82. The author explains that "[t]here seems to be little reason to protect the personality interest of the individual creator beyond the lifetime of the creator, or the copyright term of the work . . . but there is every reason to preserve perpetually culturally important 'art.'" *Id.*

259. 195 A. 905 (Pa. 1938).

260. *Id.* at 905.

261. *Id.*

262. *Id.* at 906.

263. *Id.* (declaring that because no question of title was apparent no court would

artist was left with only a possible tort claim for injury to his reputation.[264]

The artist in *Crimi v. Rutgers Presbyterian Church of New York*[265] won a design competition for a mural to be placed on a church wall.[266] However, eight years after the mural was completed, the church painted over the mural without notifying the artist, who then sued to have the paint removed or the mural moved or damages awarded.[267] The issue before the court was whether an artist loses interest in a work of art after selling it.[268] The court acknowledged that European artists "have peculiar and distinctive rights in their work."[269] However, after reviewing American decisions, the court concluded that there was no case support for the argument that American artists retain rights in protecting their artistic reputation after unconditionally selling works of art.[270] If the artist wanted to retain any rights in the work, he and his attorney should have specifically reserved such rights in the contract with the church.[271] He failed to do so and, as a consequence, the court held that he had sold and transferred to the church all his rights and interest in the work.[272]

A similar result was obtained in *Serra v. United States General Services Administration*.[273] The United States General Services Administration [hereinafter GSA] commissioned Serra to create a sculpture for a plaza adjacent to a federal office building.[274] Once installed, the work became the subject of intense public controversy leading eventually to its relocation despite Serra's argument that the work was site-specific.[275] Serra sued, claiming a violation of his First Amendment rights.[276] However, the Second Circuit said "Serra relinquished his own speech rights . . . when he voluntarily sold [the work] to GSA."[277] He failed to bargain for more protection, and GSA's

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"exercise the powers of a court of chancery in granting or continuing injunctions").

264. *Id.* at 906.

265. 89 N.Y.S.2d 813 (Sup. Ct. 1949).

266. *Id.* at 813-14.

267. *Id.* at 815.

268. *Id.*

269. *Id.* at 816.

270. *Id.* at 819.

271. *Id.*

272. *Id.*

273. 847 F.2d 1045 (2d Cir. 1988).

274. *Id.* at 1046-47.

275. *Id.* at 1047-48.

276. *Id.* at 1048.

277. *Id.* at 1049.

relocation decision was one of how to display its own property.[278] The GSA was like any other art patron and would not be restricted in deciding what to do with art it had purchased.[279]

Public art is of significant cultural importance to Americans. However, we must develop our own method of using other countries' experiences.[280] We are a different culture. Moreover, we have had experience with our own preservation legislation, which should help us determine the best way to sever "the moral right blending of the private and public interests."[281] Those other experiences may help us find a way to promote the social interest in preserving works that contribute to our shared cultural experience.[282] The following discusses two of those ways: one is federal—the Visual Artists Rights Act; the other is state—California's Artists Protection Act.

A. The Visual Artists Rights Act

Congress attempted to legislate moral rights in the Visual Artists Rights Act, which, in part, was specifically designed to protect the public interest by preserving its cultural inheritance.[283] One

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278. *Id.* The court noted that "artists must recognize that overly intrusive judicial restraints upon the prerogatives of government to decide when, where, and whether to display works of art that it has purchased would pose a serious threat to the vigor of such commendable ventures as GSA's art-in-architecture program." *Id.* at 1051.

279. *Id.* The court stated that:

> [Serra's] lawsuit is really an invitation to the courts to announce a new rule, without any basis in First Amendment law, that an artist retains a constitutional right to have permanently displayed at the intended site a work of art that he has sold to a government agency. Neither the values of the First Amendment nor the cause of public art would be served by accepting that invitation.

Id.

280. Merryman, *Refrigerator*, *supra* note 28, at 1043. The author believes that "[g]iven the cultural importance of American art, . . . our law [should] be modified in such a way as to protect the integrity of works of art . . . ." *Id.* at 1042.

281. Halpern, *supra* note 251, at 82.

282. Cotter, *supra* note 27, at 84-85. The author comments that "moral rights recognition [might] be viewed as a communal expression as to the appropriate way in which to value the unique contribution and personality of the artist, as well as the unique role of art in civic life." *Id.* at 85.

283. *See* Roberta Rosenthal Kwall, *How Fine Art Fares Post VARA*, 1 MARQ. INTELL. PROP. L. REV. 1, 18 (1997).

> To escape the conclusion that VARA effectuates a taking, the statute must be shown to further a public interest or yield an advantage to the public. . . . Moral rights provisions generally can be justified on two grounds: (1) the personal rights of creators are deserving of protection; and (2) society has an interest in preserving its cultural heritage.

Id. (footnote omitted). *See also* Morton, *supra* note 70, at 877. "With the stated intention of protecting the rights of working artists and preserving worthy pieces of contemporary art, VARA attempts to incorporate moral rights into American law." *Id.*

commentator said that, "[b]y enacting legislation to protect the historical legacy represented by artworks, Congress has established that the arts are an integral element of our civilization, are fundamental to our national character, and are among the greatest of our national treasures."[284] The House Report explicitly stated that VARA "follows a preservation model by protecting against both mutilation and destruction and that this model 'recognizes that destruction of works of art has a detrimental effect on the artist's reputation, and that it also represents a loss to society.'"[285] This public interest justified Congress's incursion into what precedent regarded as a matter of private contract.[286]

VARA has received some judicial attention, although the decisions mainly focus on the individual artist's interests, not the public's. The artist in *Pavia v. 1120 Avenue of the Americas Associates*[287] was commissioned to create a four-piece artwork, which was placed in a hotel lobby. Subsequently, the work was disassembled, moved to a commercial warehouse, and then displayed in an incomplete manner.[288] The artist's work was completed in 1963; VARA became effective in 1991.[289] The court said that Congress recognized that VARA accorded "new rights to artists" and "sought to balance them against the prior expectations of other parties."[290] By not making VARA retroactive, "Congress allowed those who had commissioned works before its effective date to maintain their privilege to alter those works, in line with the understanding of all parties to the pre-VARA transaction."[291]

Similar thinking was evident in *Carter v. Helmsley-Spear, Inc.*,[292] where three artists sought to enjoin a building owner from disturbing

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284. Phelan, *supra* note 21, at 93 (footnote omitted).

285. Kwall, *supra* note 283, at 39 n.221 (quoting H.R. Rep. No. 101-514, at 16 (1990)). *See also* Robinson, *supra* note 249, at 1936.

> VARA recognizes a public interest in the encouragement of artists to work and in the preservation of their work once created. Appealing to the public interest on a narrow front helped ensure the passage of the legislation by invoking a higher social good than that of the individual gain of the artist or property holder.

Id. (footnotes omitted).

286. Robinson, *supra* note 249, at 1936. The author further states that "[b]y underpinning a copyright act with the public duty to preserve the nation's art and cultural patrimony, [VARA] also responded to a world-wide concern over issues of cultural protection and integrity." *Id.* (footnote omitted).

287. 901 F. Supp. 620, 623 (S.D.N.Y. 1995).

288. *Id.* at 624.

289. *Id.* at 627.

290. *Id.* at 629.

291. *Id.*

292. 71 F.3d 77 (2d Cir. 1995).

a work of visual art that the artists installed in the owner's building pursuant to a commission by a former tenant.[293] In denying relief, the court said that although Congress sought to protect artists' preservation rights in their works, Congress "did not mandate the preservation of art at all costs and without due regard for the rights of others."[294] The court of appeals concluded that the work was not protected by VARA because it was a work made for hire by artists who legally were employees, not independent contractors.[295] Lacking VARA protection, the work was subject to the owner's discretion in deciding whether to remove, alter, or destroy it.

Carter involved a private individual's alteration of a public art work. *Martin v. City of Indianapolis*[296] involved the government's destruction of a public art work.[297] The artist there had completed a large sculpture on privately-owned land.[298] The city acquired the property as part of an urban renewal scheme and, without notifying the artist, demolished the work.[299] The artist sued under VARA.[300] The trial court granted his motion for summary judgment and awarded him the maximum amount of statutory damages for the city's non-willful VARA violation.[301] In reviewing this award, the Seventh Circuit found that although the artist had not waived his VARA rights by contract or otherwise, he could not collect VARA damages:

> In spite of the City's conduct resulting in the intentional destruction of the sculpture, we do not believe under all the circumstances, particularly given the fact that the issue of VARA rights had not been raised until this suit, that the City's conduct was "willful," as used in VARA . . . so as to entitle the [artist] to enhanced damages. This appears to be a case of bureaucratic failure within the City government, not a willful violation of [the artist's] VARA rights. As far as we can tell from the record, those VARA rights were unknown to the City. . . . As unfortunate as the City's unannounced demolition of [the work] was, it does not qualify [the artist] for damages under VARA.[302]

However, the court did affirm an award of costs and attorney's fees to

293. *Id.* at 79.
294. *Id.* at 80.
295. *Id.* at 88.
296. 192 F.3d 608 (7th Cir. 1999).
297. *Id.* at 610.
298. *Id.*
299. *Id.* at 611.
300. *Id.* at 610.
301. *Id.*
302. *Id.* at 614.

the artist.[303]

Another issue of governmental destruction of public art was presented in *Pollara v. Seymour*.[304] The artist was hired by a public interest group to create a large mural protesting certain government funding cuts.[305] The mural, installed at a public plaza, was removed and severely damaged by government employees before the general public could view it.[306] The artist sued under VARA.[307]

This time, the court addressed the public's interest. VARA only protects a "work of recognized stature."[308] The defendants felt that the mural was not a protected work because it had never been displayed or viewed publicly.[309] The court's review of VARA's underlying purposes revealed that prior recognition was not a necessary precondition to a VARA cause of action.[310] The court, giving primacy to the public's interest in preserving works of artistic merit, found that VARA's purpose was served even if the work had not been previously displayed or evaluated by the public.[311] In a lengthy supporting footnote, the court made the following analysis:

> It is noted that one of the primary motivations for the adoption of VARA was public outcry over a scheme where a painting by Picasso was cut up into postage stamp sized pieces which were then offered for sale. There is no less of a societal interest in preventing the destruction of its cultural treasures solely because the art has not been previously displayed. . . . Clearly, the same societal interests are present whether or not the work to be protected has had the benefit of public display. . . . To accept defendants' view of the statute would fail to recognize the significant societal interest in the preservation of great art.[312]

Upholding the defendant's interpretation would have defeated VARA's underlying policies.[313]

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303. *Id.*

304. 150 F. Supp. 2d 393 (N.D.N.Y. 2001).

305. *Id.* at 394.

306. *Id.* at 395.

307. *Id.*

308. 17 U.S.C. § 106A(a)(3)(B) (2000). The statute further states that the creator "of a work of visual art, . . . subject [to certain limitations], shall have the right . . . to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right." 17 U.S.C. §§ 106A(a), 106A(a)(3), 106A(a)(3)(B).

309. *Pollara*, 150 F. Supp. 2d at 396.

310. *Id.* at 397.

311. *Id.*

312. *Id.* at 397 n.8 (citations omitted).

313. *Id.* at 398.

All these cases have one common feature: VARA's benefits[314] were being protected by the artists and there was no independent public representation. Undoubtedly, VARA furthers a legitimate public interest,[315] but that interest may go unprotected because VARA does not allow for third-party intervention.[316]

There is an argument to be made in support of amending VARA to grant intervention rights to the public.[317] This is particularly so since VARA only protects "works of recognized stature",[318] a status that has a parallel in historic preservation legislation,[319] which generally requires a finding that the item preserved have a "special historical or aesthetic interest or value."[320] VARA's recognized stature requirement "implies that the work has already received acclaim and has been highly regarded by the art world or by the public, regardless of quality."[321] This does not require a judgment that the work be beautiful.[322] It only requires a decision that the work has

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314. *See Carter v. Helmsley-Spear, Inc.*, 861 F. Supp. 303, 328 (S.D.N.Y. 1994), *aff'd in part, rev'd & vacated in part*, 71 F.3d 77 (2d Cir. 1995) (holding that VARA benefits artists, by ensuring that their work is preserved, the public, by preservation of cultural resources, and building owners, by public interest in the artwork housed in their buildings).

315. *See* Kwall, *supra* note 283, at 19.

> Perhaps even more indicative of a legitimate public interest is . . . society's interest in preserving its cultural heritage. Clearly the public has a right to enjoy the fruits of a creator's labors in original form and to learn cultural history from such creations. . . . The public benefit in preserving society's cultural heritage is no less compelling than that which is involved in preserving a locality's landmarks.

Id. (footnotes omitted). *See also* Chintan Amin, Note, *Keep Your Filthy Hands Off My Painting! The Visual Artists Rights Act of 1990 and the Fifth Amendment Takings Clause*, 10 FLA. J. INT'L L. 315, 335-36 (1995). "The House Report on VARA is replete with factual findings pertaining to the interest of the state in protecting and preserving art. . . . Because of these findings, and because the legitimate state interest standard is extremely low, a court would probably find that VARA advances a legitimate state interest." *Id.*

316. *See* Morton, *supra* note 70, at 914. "[A] work may become valued by a segment of society, yet remain unprotected because the artist or his heirs are either missing or indifferent to the fate of the work. VARA could serve the public interest in art preservation by allowing third-party intervention in such cases." *Id.*

317. *See* Michelle Bougdanos, Note, *The Visual Artists Rights Act and Its Application to Graffiti Murals: Whose Wall is it Anyway?*, 18 N.Y.L. SCH. J. HUM. RTS. 549, 574-75 (2002); Edward J. Damich, *The New York Artists' Authorship Rights Act: A Comparative Critique*, 84 COLUM. L. REV. 1733, 1755 (1984).

318. 17 U.S.C. §106A(a)(3)(B) (2000).

319. *See, e.g.*, N.Y. CITY ADMIN. CODE §§ 25-301 to -321 (1992).

320. N.Y. CITY ADMIN. CODE § 25-302(n) (1992).

321. Peter H. Karlen, *What's Wrong With VARA: A Critique of Federal Moral Rights*, 15 HASTINGS COMM. & ENT. L.J. 905, 916 (1993).

322. *See* Robinson, *supra* note 249, at 1968-69.

> There is nothing in [VARA or its legislative history] that requires a finding

stature, an "art-historical value . . . derived from the work's position and role in art history."[323] Assuming the presence of an appropriate process, a decision regarding a work's recognized stature should not tax the system's ability any more than a finding of historic value.

B. California Art Preservation Act

In addition to the federal government's attempt at moral rights legislation, several states have likewise done so.[324] In contrast to VARA, one state—California—has put teeth into public interest protection by permitting the public to protect that interest independently of what the artist does.

In 1980, California enacted an art preservation act after finding that artists "have an interest in protecting their works of fine art against such alteration or destruction; and that there is also a public interest in preserving the integrity of cultural and artistic creations."[325] The protection was that no one "except an artist who owns and possesses a work of fine art which the artist has created, shall intentionally commit, or authorize the intentional commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art."[326] Fine art was defined as an original work "of recognized quality."[327] In determining whether that quality existed, a "trier of fact shall rely on the opinions of artists, art dealers,

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> that a work be viewed as "meritorious" . . . to qualify for protection against destruction. The Act was designed to guard against precisely this kind of aesthetic judgement [sic] on the part of art owners. . . . To require . . . a finding that the work is considered meritorious is to deny protection to the disliked and misunderstood, but undeniably important, object that future generations may value highly.

Id. (footnotes omitted).

323. Karlen, *supra* note 321, at 916 (stating "[a] work of 'recognized stature' need not have aesthetic value, and sometimes not even artistic value"). *See also* Robinson, *supra* note 249, at 1965. Robinson observes:

> Perhaps the most controversial element of the recognized stature standard is that it requires courts for the first time in copyright law to make distinctions based on aesthetic considerations. . . . One might argue that the Act merely requires courts to weigh expert evidence. . . . It would be naive, however, to expect that every trier of fact, even with the aid of expert testimony, would remain immune to his or her aesthetic taste. Moreover, as a question of fact, findings of recognized stature are to be accorded high deference on review . . . making them virtually unappealable.

Id. (footnotes omitted).

324. *See* Laura Nakashima, Comment, *Visual Artists' Moral Rights in the United States: An Analysis of the Overlooked Need for States to Take Action*, 41 SANTA CLARA L. REV. 203, 204 (2000).

325. CAL. CIV. CODE § 987(a) (1982).

326. *Id.* § 987(c)(1).

327. *Id.* § 987(b)(2).

collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of fine art."[328] However, only the artist could "effectuate the rights created by this section,"[329] which would be enforceable "until the 50th anniversary of the death of the artist."[330]

Three years later, the California legislature extended that effectuation right to the public, finding that "there is a public interest in preserving the integrity of cultural and artistic creations."[331] Fine art was redefined as an original work "of recognized quality, and of substantial public interest."[332] To determine whether an art work meets this definition, the fact finder was to rely on the same sources as described in the 1980 act. The new legislation now authorized an organization "acting in the public interest" to bring "an action for injunctive relief to preserve or restore the integrity of a work of fine art from acts prohibited by" the 1980 act; there is no fifty year time limit on this ability.[333]

The 1983 act reflected California's conclusion that art works can be an integral part of the public's cultural property and therefore merited preservation.[334] This public interest was emphasized by bill sponsor Senator Sieroty, who explained that "'works of fine art are more than economic commodities and they oftentimes provide our communities with a sense of cohesion and history. The public's interest in preserving important artistic creations should be promoted and our communities should be able to preserve their heritage when it is in jeopardy.'"[335] Promoting this public interest is a substantial justification for developing an appropriate relationship between artists' rights, public rights, and property rights.[336]

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328. *Id.* § 987(f).

329. *Id.* § 987(e).

330. *Id.* § 987(g)(1).

331. *Id.* § 989(a).

332. *Id.* § 989(b)(1).

333. *Id.* § 989(c). The courts were authorized "[t]o effectuate the rights created by this section" and to "[a]ward reasonable attorney's and expert witness fees to the prevailing party." *Id.* § 989(f)(1).

334. Battle, *supra* note 257, at 471.

335. SAX, *supra* note 38, at 24 (quoting the senator's letter to the governor, asking him to sign the bill).

336. Battle, *supra* note 257, at 468. In addition, Battle states:

> The legislative findings which prefaced [CAPA] articulated a . . . purpose . . . to protect the public interest in preserving the integrity of cultural and artistic creations. . . . It is this societal purpose which proves the most substantial justification for whatever modifications have occurred or will occur in the future development of artists' right and property interests, for it has already proven a successful argument in aesthetic zoning and landmark preservation cases.

California's legislation was designed to preserve artistic works shown to have value to society.[337] However, unlike historic preservation, which tests value in part by the passage of time, this preservation legislation seeks "to protect art in its infancy when it is most vulnerable to the perils of development, neglect, and greed."[338] By permitting an organization independent of the particular artist to exercise these rights, California has established a mechanism that permits a social representative to serve society's interest in preserving its cultural property, especially when the works are accessible to the public.[339]

The California courts have had few opportunities to discuss this legislation. In *Botello v. Shell Oil Company*,[340] the artists had been hired to paint a large mural on a Shell service station. Eight years later, the company destroyed most of the mural to make room for a parking lot, without notifying the artists.[341] The artists sued under CAPA.[342] The court of appeals only considered whether the mural could be classified as a painting under the act.[343]

In a finding favorable to the artists, the court cited a most unusual form of precedent regarding CAPA:

> The Legislature itself had occasion to construe the Act several years after its original enactment. The precipitating cause was the threatened destruction of a David Hockney mural that had been painted on the wall of a swimming pool at the Hollywood Roosevelt Hotel. Its location at that venue presented a violation of a safety regulation that required every public swimming pool to have a plain white finish. The Legislature responded with an uncodified general law . . . that specifically exempted the mural from the regulatory provisions that would have required its destruction.[344]

In doing so, the legislature explained that allowing "needless destruction of this unique work of art would be a great tragedy and inconsistent with the intent of the California Art Preservation Act,

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Id.

337. *See* Robinson, *supra* note 249, at 1941.

338. *Id.*

339. Gerstenblith, *supra* note 178, at 463 n.172.

> While authors should have continuing moral rights to their works, . . . there may well come a point when the public should be able to decide what is to be protected and how, especially for those works to be displayed in public and to be maintained by the public or by the owner.

Id. at 463.

340. 280 Cal. Rptr. 535 (Ct. App. 1991).

341. *Id.* at 536.

342. *Id.* at 536.

343. *Id.* at 537.

344. *Id.* at 538 (internal citations omitted).

which establishes a public interest in preserving the integrity of cultural and artistic creations."[345]

The artists in *Lubner v. City of Los Angeles*[346] sued the city after a trash truck rolled down a hill and crashed into their home, damaging not only the house but much of their artistic work.[347] After their insurance company compensated them for losses including the art work, the artists sued the city, in part, for emotional distress and loss of reputation, claims based on CAPA.[348]

The court concluded that CAPA did not explicitly permit a cause of action for damages for the negligent destruction of fine art.[349] Furthermore, the court could find no support for "the position that the theory of moral rights justifies finding in [CAPA] an implied remedy for destruction due to simple negligence."[350] The court did recognize that "the artwork may have been extremely important to [the artists] from financial, personal, and professional standpoints."[351] Nonetheless, "the artwork is property" making the artists "subject to the rule that recovery for emotional distress caused by injury to property is permitted only where there is a preexisting relationship between the parties or an intentional tort."[352]

VI. THE PUBLIC INTEREST, THE PRIVATE OWNER, AND NON-PUBLIC ART

But what about the intentional destruction of fine art when there is no protecting statute? What if a private owner of non-public fine art outside the protection of either federal or state preservation or moral rights legislation decided to play darts with his Rembrandt?[353] Is there any way to protect the public's interest in such works?

This is not a fanciful concern. Despite all the economic arguments against doing so, some owners do play darts with their Rembrandts—or worse.[354] In a cold sense, these owners might "simply exercis[e] a traditional property right— the right to injure or destroy"

345. *Id.* at 538-39 (internal citations omitted).

346. 53 Cal. Rptr. 2d 24 (Ct. App. 1996).

347. *Id.* at 26.

348. *Id.*

349. *Id.* at 28.

350. *Id.*

351. *Id.* at 29.

352. *Id.*

353. The phrase belongs to Professor Sax. *See* SAX, *supra* note 38, at 1 (paraphrasing from a quote from FRANKLIN FELDMAN & STEPHEN E. WEIL, ART LAW, §5.11 (1986)).

354. *See* Note, *Protecting the Public Interest in Art*, 91 YALE L.J. 121, 121 n.1 (1981).

their own property.[355] But there is a counter-mentality "with many roots: a respect for genius and a sense that its creations transcend ownership; a caring about our history and a wish that everyone share in its meaning; and a general presumption that time is our best editor and curator."[356] This mentality assumes that "[t]he sphere of individual sovereignty over resources will steadily recede, while the realm of collective sovereignty will expand."[357] Accompanying this expansion will be "an idea, a norm, that whoever we are, whether private owners or public officials, we are also stewards and trustees with higher obligations than simply the fulfillment of our own preferences."[358]

This is not simply a matter of preserving items of individual aesthetic appreciation. Rather, the idea of cultural preservation arises from a general concern for preserving our national heritage and a general conception that cultural property belongs to the public even if privately owned.[359] There is a widespread public desire "for a collective as well as an individual identity, and for the universal sense that some things just can't be 'owned,' not by anyone, not even by all of us."[360] Culturally significant property is not like other

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355. *See* Damich, *supra* note 317, at 1733 (discussing the Bank of Tokyo's decision to destroy a Noguchi sculpture which had been sited in its lobby); *see also* Eric E. Bensen, Note, *The Visual Artists Rights Act of 1990: Why Moral Rights Cannot Be Protected Under the United States Constitution*, 24 HOFSTRA L. REV. 1127, 1133-34 (1996) ("[A] work of art is a piece of physical property, not a piece of intellectual property.... The right to alter or destroy a piece of property is a long recognized property right.").

356. Lee Bollinger, *Foreword* to SAX, *supra* note 38, at xiii.

357. Thomas W. Merrill, *Compensation and the Interconnectedness of Property*, 25 ECOLOGY L.Q. 327, 342 (1998).

> Today's trustees can go to court for relief, as the Barnes's trustees have done. But these proceedings are time-consuming and their result is uncertain. A better way to balance a donor's wishes and the public's interest is to adopt state laws that would limit the period during which donor restrictions are enforceable, releasing trustees from them after, say, 50 years. This change would give trustees latitude to adjust to changing needs.

Gabriella De Ferrari, Editorial, *Private Art in Public*, N.Y. TIMES, Oct. 21, 2002, at A19.

358. Bollinger, *supra* note 356, at xiii. *Id.* Later, Professor Sax said:

> The thesis of this book is quite straightforward. It is simply this: There are many owned objects in which a larger community has a legitimate stake because they embody ideas, or scientific and historic information, of importance. For the most part it is neither practical nor appropriate that these things be publicly owned.

SAX, *supra* note 38, at 9.

359. Rothstein, *supra* note 184, at 1132.

360. Bollinger, *supra* note 356, at xii. Professor Sax wrote that "[t]he conjunction of legitimate private and public interests ... suggest that ordinary, unqualified notions of ownership are not satisfactory for such objects." SAX, *supra* note 38, at 9-10. The

property, and our laws of property should be adapted to address public concerns for preserving culturally significant property.[361]

This does not implicate a wholesale reconfiguring of our laws. While the common concept of property focuses on the object owned, the legal concept focuses more on property as defining relationships with respect to a thing.[362] As this article has discussed, we have a tradition that restricts individual property rights when those rights conflict with a significant societal interest, for we accept there are situations where society's interests are paramount to private property rights.[363] Even the Barnes Foundation trustees have characterized their obligation as being the management of a public trust.[364]

However, there remains a strong belief that the private owner of non-public art may, even in the face of moral rights legislation, destroy that which is owned.[365] This belief is perhaps strongest "in cases concerning items of highly personal property such as diaries, personal writings, notes, and other items" that "are inseparably linked with their owner/creator's personhood and as such have no recognizable value to another person."[366]

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tension is illustrated by these anecdotes. When Philadelphia faced the loss of a significant mural in 1998, the mayor said the buyer "had not realized the local importance of the mural and did not wish to hurt the city. Beyond that the mayor said . . . the mural was such a significant part of the city's cultural fabric that it should remain here. There are things, the mayor said, that 'you cannot sell.'" Stephan Salisbury, *Protected Status for Curtis Mural*, PHILA. INQUIRER, Dec. 1, 1998, at A01, A15. In contrast, when Ted Turner was told that John Huston was indignant over Turner's colorized version of *The Maltese Falcon*, Turner replied, "The last time I checked, I owned those films." Halpern, *supra* note 251, at 69.

361. Merryman, *Refrigerator*, *supra* note 28, at 1037.

362. Gerstenblith, *supra* note 72, at 235 n.161.

363. Battle, *supra* note 257, at 464.

364. *See* Note, *Protecting the Public Interest in Art*, *supra* note 354, at 122 (developing "a new theory . . . . premised on the existence of a public interest and a public trust in the artwork itself"); Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351, 351 (1998) (stating public trust is an "arresting phrase" that "catches the attention . . . with its intimations of guardianship, responsibility, and community").

365. *See* Roeder, *supra* note 245, at 569.

> The right to prevent deformation does not include the right to prevent destruction of a created work. . . . To deform [the artist's] work is to present him to the public as a creator of a work not his own, and thus make him subject to criticism for work he has not done; the destruction of his work does not have this result.

Id. "In the United States, hostility to the concept of moral rights was founded on the dual factors of a more limited interpretation of copyright protection . . . and a profound respect for traditional economic rights in property." Robinson, *supra* note 249, at 1940.

366. Abigail J. Sykas, Note, *Waste Not, Want Not: Can the Public Policy Doctrine Prohibit the Destruction of Property by Testamentary Direction?*, 25 VT. L. REV. 911,

There does appear to be a continuum of property concepts which charts movement from this intensely personal notion toward a public interest notion:

> Traditional conceptions of property rights dictate that "ownership of physical things" is "private and unqualified." However, there is an identifiable public of community-centered interest in certain objects. . . . [T]he line between public and private becomes somewhat blurred with respect to cultural property. The notion of a collective public heritage has previously been identified through statutory models protecting historic buildings, antiquities, and artist's moral rights.[367]

If this continuum exists, then our law must recognize "a species of qualified ownership founded on the recognition that some objects . . . are constituent of a community, and that ordinary private dominion over them insufficiently accounts for the community's rightful stake in them."[368] This recognition would not be a revolution. In other situations, our law has recognized what is sometimes labeled as property's social function or social obligation, describing a belief that individual property ownership involves social responsibilities as well as rights.[369] It is no longer a novel idea that property ownership does not confer on the owner the uncontrolled right to dispose of or destroy property.[370]

The conflict in concepts of property ownership rights can be seen in cases involving testamentary directions to destroy property. Many decisions begin with the traditional concept that courts will safeguard "the personal rights of an individual . . . to dispose of his property by last will as his judgment dictates, subject to a few statutes limiting [the testator's] absolute control" over disposition of the estate.[371] For example, when the testatrix in *In re Estate of Beck*[372]

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938 (2001).

367. Wilkes, *supra* note 19, at 178-79. *See* Harding, *supra* note 12, at 325, stating:

> If cultural heritage is so valuable that we think it should be preserved for all peoples at any point in time then, in essence, we have declared it to be a constant and primary source of obligation for which the establishment of a right would serve a merely fictional role.

368. SAX, *supra* note 38, at 197.

369. Mark W. Cordes, *Takings, Fairness, and Farmland Preservation*, 60 OHIO ST. L.J. 1033, 1077 (1999).

370. Peter H. Karlen, *Moral Rights and Real Life Artists*, 15 HASTINGS COMM. & ENT. L.J. 929, 948 (1993). *See also* SAX, *supra* note 38, at 197.

> Many things that we classify as ordinary property are important to our common agenda. . . . Conventional notions of ownership and dominion are unable to provide adequately for public access, openness, and preservation. The shape of the problem in the large, however, is clearer than the details of any particular remedy. Plainly no single or simple prescription can suffice.

Id.

371. *In re* Alburger's Estate, 117 A. 450, 451 (Pa. 1922).

died, her will directed her executor to demolish her house and offer the property to the city of Buffalo.[373] The executor petitioned the court for assistance after a city agency insisted that public policy mandated that the house be preserved.[374] However, the agency conceded that no city ordinance prohibited the demolition, that neither the house nor its locale had special significance, and that the city's preservation board had disclaimed jurisdiction over the house.[375] There was, in sum, no immediate public interest in the house.

Although the court recognized the public policy value in preventing destruction of property when "testator's wishes are capricious and demonstrably harmful,"[376] this case did not call for application of that policy:

> Ironically, the agency which now claims to champion its preservation on the basis of an undefined public interest, was the very same agency that once went to court seeking its demolition under the banner of urban renewal. That twist of fate is not lost on the court. Neither is the court willing to overlook that fact that to vitiate the decedent's intent . . . could result in financial harm to the residuary beneficiary who might well be burdened by the need to maintain an aging structure on limited resources. . . . *The clearly expressed provisions of a duly executed Will cannot be abrogated based on anemic assertions of vacillating public interest. This court refuses to substitute a quasi-public interest for the enforcement of a properly executed and valid Will.*[377]

The house was clearly titled to the testatrix, and "it was hers to dispose of as she intended."[378]

In contrast, another New York court refused, on public policy grounds, to enforce a testamentary direction to demolish two houses:

> To violate public policy the act in question need not be something which the testator could not have done with his own land while he was alive. There is a greater need for the protection of the community interests after the death of the testator. Although a person may wish to deal capriciously with his property while he is alive, his self-interest will usually prevent him from doing so. After his death there is no such restraint and it is against public policy to permit the decedent to confer this power upon someone else where his purpose is

372. 676 N.Y.S.2d 838 (1998).
373. *Id.* at 839.
374. *Id.*
375. *Id.* at 840.
376. *Id.* at 841.
377. *Id.*
378. *Id.*

merely capricious.[379]

The court found that the testator's wishes were capricious because the testator would not have demolished the houses while alive.[380] The court also stated that the testator's wishes would harm the community, the neighborhood, and the individual beneficiaries.[381]

A similar conclusion protecting the public interest was reached in *Eyerman v. Mercantile Trust Company*,[382] where the testatrix directed her executor to demolish her home. This time, the neighbors and the subdivision trustees petitioned to prevent the demolition, seeking to protect public interests against the testatrix's capricious clause in the will directing the demolition.[383]

The court characterized the petition as presenting a public policy issue involving a conflict between the rights of the individual and the rights of the community, concluding that the demolition would result in unwarranted public loss.[384] The neighborhood was "an area of high architectural significance, representing excellence in urban space utilization."[385] Removing the house from the street "was described as having the effect of a missing front tooth."[386] Acknowledging that

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379. *In re* Estate of Pace, 400 N.Y.S.2d 488, 492 (1977). Earlier, the court had noted New York's

> age old rule . . . that the intention of the Testator should be followed except where it is in violation of public policy. . . . Also in the opinion of this court, the intention . . . should not be carried out when the results would be absurd, abhorrent or a waste of the assets of an estate. . . . When the purpose of the testator is merely capricious and will benefit no one by its performance, the courts will not compel its execution.

Id. at 491 (citations omitted).

380. *Id.* at 493.

381. *Id.*

382. 524 S.W.2d 210 (Mo. Ct. App. 1975).

383. *Id.* at 212. As to whether the petitioners had standing, the court said the demolition question was "an issue of public policy involving individual property rights and the community at large. The plaintiffs have pleaded and proved facts sufficient to show a personal, legally protectible interest." *Id.* at 213.

384. *Id.*

385. *Id.*

386. *Id.* at 214. A witness who directed an organization striving to preserve the city's architecture testified about the importance of preserving the integrity of the neighborhood:

> [The neighborhood] is a definite piece of urban design and architecture. . . . The existence of this piece of architecture depends on the continuity of the [sic] both sides. Breaks in this continuity would be as holes in this wall, and would detract from the urban design qualities of the streets. And the richness of the street is this belt of green lot on either side, with rich tapestry of the individual houses along the sides. Many of these houses are landmarks in themselves, but they add up to much more . . . I would say [the neighborhood], as a whole, with its design, with its important houses . . . is a most significant piece of urban design by any standard.

public policy is difficult to precisely define, the court found it evident that

> no individual, group of individuals nor the community generally benefits from the senseless destruction of the house; instead, all are harmed and only the caprice of the dead testatrix is served. . . . This is not a living person who seeks to exercise a right to reshape or dispose of her property; instead, it is an attempt by will to confer the power to destroy upon an executor who is given no other interest in the property. To allow an executor to exercise such power stemming from apparent whim and caprice of the testatrix contravenes public policy.[387]

The dissenting judge, hewing to the traditional view, felt that the majority's aesthetic sympathies should not interfere with precedent, which clearly favored the unrestricted use of real property.[388]

The court in *National City Bank v. Case Western Reserve University*[389] reached a Solomonic resolution of this problem. Again, a testatrix directed her executor to demolish her house.[390] She felt it had no future as a residence, and she did not want it used for commercial purposes after her death.[391] After her death, the house was entered in the National Registry of Historical Places; however the court noted that if the testatrix were living, she could have altered her home as she desired or even completely destroyed it, even if listed in the National Registry.[392]

Unlike the *Eyerman* court, this court had been given an explanation for the testatrix's testamentary direction. The testatrix sought to prevent the house from being used other than as a private residence.[393] Her direction was not "a capricious or irrational" order "but rather . . . an effective means of preventing a beloved home from debasement" by being used for commerce.[394] However, the court found that the testatrix would likely want the house to remain if her fears

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Id. at 213-14 (quoting the Heritage St. Louis executive director's testimony).

387. *Id.* at 214. The court later said that a living person

> may manage, use or dispose of his money or property with fewer restraints than a decedent by will. One is generally restrained from wasteful expenditure or destructive inclinations by the natural desire to enjoy his property or to accumulate it during his lifetime. Such considerations however have not tempered the extravagance or eccentricity of the testamentary disposition here on which there is no check except the courts.

Id. at 215.

388. *Id.* at 220.

389. 369 N.E.2d 814 (1976).

390. *Id.* at 815.

391. *Id.* at 816.

392. *Id.* at 815.

393. *Id.* at 818.

394. *Id.*

were not realized.[395] The court thus permitted the executors to sell the house on condition that it "be retained and maintained for the use, enjoyment, and the edification of the public, and never be converted to or used as" a commercial establishment.[396]

Under Pennsylvania precedent, it appears that Dr. Barnes would have been constrained from ordering the Foundation trustees to destroy his collection following his death or dissolution of the trust. For example, the testatrix in *Capers Estate*[397] directed her executor to humanely destroy any of her dogs which survived her.[398] She feared that the dogs would either "grieve for her or that no one would afford them the same affection and kindness that they received during her life[;]" but the court stated that testimony indicated that "she was mistaken on both . . . points."[399] The court stated that there was "no question of the strength of the public sentiment in favor of preserving the lives of these animals."[400] The court concluded that it would violate public policy to enforce the directive to destroy the animals.[401]

Another testamentary destruction order was at issue in *Prosock Estate*.[402] The testatrix directed her executrices to demolish all buildings on her farm and sell the land for residential development.[403] The court, noting that the testatrix's intention normally "shall be given full expression," said it could "be denied only where it is unconstitutional, unlawful, or against public policy."[404]

The house to be demolished was historically significant and Pennsylvania had an express public policy supporting the preservation of such buildings.[405] Since there were no Pennsylvania cases on point, the court reviewed decisions in other states and found them to be strongly opposed to the destruction of historical buildings, considering them to be valuable resources.[406] The court also found no

395. *Id.* at 819.

396. *Id.*

397. 34 Pa. D. & C.2d 121 (1964).

398. *Id.* at 121.

399. *Id.* at 126. The court explained that the record

> clearly shows that the basis for the provision of the will has been eliminated. There is no lack of care. There is no reason for carrying out the literal provision of the will. That decedent would rather see her pets happy and healthy and alive than destroyed, there can be no doubt.

Id. at 129.

400. *Id.* at 130.

401. *Id.*

402. 13 Fiduc. Rptr. 2d 16 (Pa. Ct. Com. Pl. Orphan's Div. 1992), *aff'd*, 640 A.2d 478 (Pa. Super. Ct. 1993).

403. *Id.* at 16-17.

404. *Id.* at 19.

405. *Id.*

406. *Id.* at 20.

cases permitting the destruction of other valuable assets.[407] In noting that there was no evidence indicating the testatrix's intention, the court stated:

> I have no way of knowing why she wanted her house to be demolished. The demolition of the house benefits no one. . . . The testatrix's house has significant historic value and appears to be in good physical condition. The house is a valuable asset not only for the estate but for this and future generations, and the public has an interest in preserving such a building. The testatrix's direction appears capricious at best.[408]

The court therefore found that the direction violated public policy and directed that it not be enforced.[409]

Although our legal tradition "starts from a premise that an owner exercises full control over his property, and we tend to think of works of visual art as just another kind of property," we have accepted that "ownership of property is rarely absolute [and w]e are accustomed to restrictions on the use of property."[410] When property, in whatever form, comes to embody or represent our cultural inheritance, it assumes "a less tangible, symbolic quality," a quality which "raises questions as to whether any single individual is capable of being the 'true owner' of cultural property, since it can be viewed on one level as the property of an entire culture."[411] While voluntary owner preservation may well be a preferred mechanism,[412] the record to date does not establish that it is an effective mechanism.

But all this may assume an answer to the antecedent question: what is "the relation[ship] that *ought* to exist between certain things

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407. *Id.* at 21.

408. *Id.*

409. *Id.* at 22.

410. Simon J. Frankel, *VARA's First Five Years*, 19 HASTINGS COMM. & ENT. L.J. 1, 2 (1996) (footnote omitted).

411. Jordana Hughes, Note, *The Trend Toward Liberal Enforcement of Repatriation Claims in Cultural Property Disputes*, 33 GEO. WASH. INT'L L. REV. 131, 134 (2000) (footnote omitted).

412. *See* Daphna Lewinsohn-Zamir, *The "Conservation Game": The Possibility of Voluntary Cooperation in Preserving Buildings of Cultural Importance*, 20 HARV. J.L. & PUB. POL'Y 733, 736 (1997).

> [W]here voluntary self-preservation is feasible, state coercion should be avoided. In such cases, self-preservation is preferable because it entails fewer restrictions on individual autonomy and avoids the shortcomings of regulation. . . . [E]ven where voluntary cooperation is likely to fail, understanding the reasons . . . provides guidelines for the proper scope and content of government intervention. . . . On the whole . . . the state should have a more limited role in cultural preservation.

Id.

that are physically capable of exclusive ownership and control and the larger community's claim upon them?"[413] Is ownership "not merely a bundle of rights, but also a social institution that creates bonds of commitment and responsibility among owners and others affected by the owners' properties[?]"[414] Unlike aesthetic experience, which can be an individual experience, cultural experience is an interdependent experience.[415] This cultural experience is often based on being in the presence of property such as the Barnes Collection, property quite often privately held although infused with a public interest. Such property is part of our social framework and we can "legitimately define" the extent to which social concerns can limit private property interests.[416] Society can act to do more than prevent "nuisance-like behavior"; it can affirmatively act to protect property as it does environmental and other social resources.[417]

Dr. Barnes did not commit an intentionally destructive crime against art as others have, but he exemplifies a "related problem . . . with respect to 'crimes of omission' committed by owners of historically significant objects who choose to withhold their treasures from the general public."[418] Maintaining the Barnes Collection as an ensemble through whatever mechanism would not greatly benefit the public if the public did not gain access to the collection.[419]

Dr. Barnes did not have to create or endow his foundation or even maintain his collection. It is true that the Foundation's trustees and the courts may well have transformed the Barnes Collection into something that would have repelled Dr. Barnes.[420] But Dr. Barnes did

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413. SAX, *supra* note 38, at 9.

414. Hanoch Dagan, *Just Compensation, Incentives, and Social Meanings*, 99 MICH. L. REV. 134, 135 (2000). *See also* Merryman, *Refrigerator*, *supra* note 28, at 1047.

> There is another sense in which the right of integrity . . . appears to come into conflict with property rights — if by property rights one means the right of the owner to deal with the thing as he wishes. . . . [Some] may well see the right of integrity as an infringement or limitation on the property right of the owner of the work of art. Conversely, [others] will insist that property rights are defined (for legal purposes) by the positive legal order, so that the right of integrity . . . is merely one element of the legal definition of the right of property and consequently cannot be in conflict with it.

Id.

415. Harding, *supra* note 12, at 333. The author states that culture is "a forward-looking, non-static phenomenon [that] must always remain in some sense elusive and yet utterly indispensable." *Id.* at 334.

416. Cordes, *supra* note 369, at 1078.

417. *See id.*

418. Wilkes, *supra* note 19, at 178 n.2.

419. *See* Carl H. Settlemyer III, Note, *Between Thought and Possession: Artists' "Moral Rights" and Public Access to Creative Works*, 81 GEO. L.J. 2291, 2312 (1993).

420. *See* Abbinante, *supra* note 114, at 700. "If Albert Barnes knew that his Foundation would become an art museum and that many of his demands for the

not, during his lifetime, destroy or disperse his collection, and it appears that he could not do so from the grave.[421]

Could Dr. Barnes have destroyed or dispersed his collection before he died? Maybe in 1951. But now, the Barnes Collection can be characterized as an endangered resource; its "art is a non-renewable resource of significant value to the Nation," and as such, any preservation initiative "could be viewed as a means of protecting objects that are vulnerable to extinction."[422] This is particularly true if the Barnes Collection is viewed as its founder intended, as an entity, an ensemble. There is an argument to be made that government, acting to protect the public interest, could prohibit the trustees from breaking up the collection.[423]

The Barnes trustees might be likened to the property owners in *Andrus v. Allard*[424] who challenged regulations prohibiting their commercial transactions in bird parts obtained before the birds were protected by a federal conservation statute.[425] The Court concluded that Congress had empowered the Secretary of the Interior to prohibit commercial transactions in protected bird parts even if the parts were lawfully taken before the federal legislation.[426]

The District Court had found that the regulations violated the

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administration and disposition of the collection would be ignored or modified, would he have even created the Foundation or donated his art to charity in the first place?" *Id.* Abbinante asserts that "[r]especting [Barnes's] demands and eccentricities was part of the bargain agreed to when his public charity was accepted." *Id.* at 678. Another author noted that the trustees' "most serious betrayal . . . is the failure to honor Barnes' intentions. He was passionately devoted to certain aesthetic ideas. . . . Barnes' ideas about looking at art are limited in scope . . . but they're far from invalid." Sozanski, *Glanton's Tenure*, *supra* note 36, at E10.

421. *See* Sykas, *supra* note 366, at 912-13.

> A will that orders the destruction of any property is considered the epitome of waste. Most courts refuse to uphold destruction clauses[,] . . . subrogating the testator's intent to the interests of the state or beneficiaries. This policy directly contradicts the rule that a will be read to give effect to the testator's intent, allowing testators complete control over the disposition of their property.

Id. (citations omitted).

422. *See* Wilkes, *supra* note 19, at 201; *see also* Hayes, *supra* note 249, at 1016 (likening an international fine art preservation convention to the Endangered Species Act); Jodi Patt, Comment, *The Need to Revamp Current Domestic Protection for Cultural Property*, 96 NW. U. L. REV. 1207, 1208 (2002) ("Since [cultural] objects are invaluable, limited, and nonrenewable, a world without art and cultural representations of our heritage and history would be 'psychologically intolerable.'") (quoting John Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179, 1196 (1989)).

423. *See* Wilkes, *supra* note 19, at 201.

424. 444 U.S. 51 (1979).

425. *Id.* at 52-54.

426. *Id.* at 63.

challenging parties' "Fifth Amendment property rights because the prohibition wholly depriv[ed] them of the opportunity to earn a profit from those relics."[427] The Court's brief answer was that "government regulation—by definition—involves the adjustment of rights for the public good" which often "curtails some potential for the use or economic exploitation of private property."[428] The Court elaborated:

> The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. . . . In this case, it is crucial that [the owners] retain the rights to possess and transport their property, and to donate or devise the protected birds.[429]

Even though the regulations may have prevented "the most profitable use" of the property, the owners were still able to derive an economic benefit by, perhaps, exhibiting the parts for money.[430] Simply prohibiting the sale of the lawfully acquired property did not violate the Fifth Amendment.[431]

However, in *Hodel v. Irving*,[432] Congress's prohibition on "the passing on at death of small, undivided interests in Indian lands" did effect such a taking, even though the Court and Congress agreed that "encouraging the consolidation of Indian lands is a public purpose of high order."[433] The Court said "the character of the Government regulation here is extraordinary" as amounting "to virtually the abrogation of the right to pass on a certain type of property . . . to one's heirs," a right which "has been part of the Anglo-American legal system since feudal times."[434] In declaring that "a *total* abrogation of these rights cannot be upheld," the Court distinguished *Andrus*, which upheld only the "abrogation of the right to sell endangered eagles' parts as necessary to environmental protection regulatory scheme."[435]

That passing reference to *Andrus* sparked a short but intense battle of the concurring opinions. Justice Scalia (joined by the Chief Justice and Justice Powell) fired this shot:

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427. *Id.* at 64.
428. *Id.* at 65.
429. *Id.* at 65-66 (citations omitted).
430. *Id.* at 66.
431. *Id.* at 67-68.
432. 481 U.S. 704 (1987).
433. Id. at 717.
434. *Id.* at 716.
435. *Id.* at 717.

> I write separately to note that in my view the present statute, insofar as concerns the balance between rights taken and rights left untouched, is indistinguishable from the statute that was at issue in *Andrus* . . . . Because that comparison is determinative of whether there has been a taking, . . . in finding a taking today our decision effectively limits [*Andrus*] to its facts.[436]

Justice Brennan (joined by Justices Marshall and Blackmun) returned fire: "I find nothing in today's opinion that would limit *Andrus* . . . to its facts. Indeed, . . . I am of the view that the unique negotiations giving rise to the property rights and expectations at issue here make this case the unusual one."[437] Justice Stevens, in his concurring opinion, joined by Justice White, elected not to join this battle.[438]

It thus was somewhat more than surprising when, five years later in *Lucas v. South Carolina Coastal Council*,[439] Justice Scalia, in a majority opinion, wrote that "the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in [the] legitimate exercise of its police powers."[440] Citing *Andrus*, Justice Scalia wrote that "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)."[441]

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436. *Id.* at 719 (Scalia, J., concurring) (citations omitted).

437. *Id.* at 718 (Brennan, J., concurring).

438. *Id.* at 719-34 (Stevens, J., concurring).

439. 505 U.S. 1003 (1992).

440. *Id.* at 1027. For a discussion of the *Lucas* decision, see Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281 (2002). Arnold states that:

> Scalia distinguishes between real property and personal property, recognizing greater traditional protection of rights to make productive economic use of real property than of similar rights in personal property. Scalia's foundation for this distinction is the American people's time-honored and judicially respected expectations of greater security in real property, in contrast to more limited expectations in the traditionally regulated arena of commercial goods and personal property.

Id. at 328-29 (footnotes omitted).

441. *Lucas*, 505 U.S. at 1027-28 (citation omitted); *see also* Cordes, *supra* note 369, at 1058.

> [T]he Court and commentators have also recognized the notion of "regulatory risk," a concept that helps inform the reasonableness of any investment-backed expectations. . . . [T]he risk of regulation is part of economic life, which includes the distinct possibility of economic loss. The Court has noted this is particularly true with regard to activities that "[h]ave long been the

The Court's most recent use of *Andrus* occurred in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[442] which questioned whether imposing a development moratorium while "devising a comprehensive land-use plan constitute[d] a *per se* taking" under the Fifth Amendment.[443] The Court acknowledged that although there are many relevant factors in analyzing regulatory takings claims, the focus must remain on "the parcel as a whole."[444]

> This requirement . . . explains why, for example, a regulation that prohibited commercial transactions in eagle feathers, but did not bar other uses or impose any physical invasion or restraint upon them, was not a taking [in *Andrus*]. . . . In [this and other] cases, we affirmed that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking."[445]

Taken together, these cases indicate that "governmental regulation could significantly alter the common-law rules applying to personal property ownership, particularly in a context of cultural resource protection which has policy goals that are similar to those of environmental protection and endangered species protection, which was at issue in *Andrus* itself."[446] The Barnes Collection merits such protection. It is a singular cultural ensemble, the elements of which are irreplaceable. There are no substitutes for these originals; there is no duplicate for the manner in which they are displayed.[447]

VII. CONCLUSION: PROCESS PROTECTS ALL INTERESTS

It is the very heart of modern government to identify and advance the public welfare.[448] We expect government to be active rather than merely reactive. We also expect government action to be subject to review. We want government to do what it should, not

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source of public concern and the subject of government regulation." *Id.* (internal citations omitted).

442. 535 U.S. 302 (2002).

443. *Id.* at 306.

444. *Id.* at 327 (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 131 (1978)).

445. *Id.* (quoting *Andrus*, 444 U.S. at 65-66).

446. Gerstenblith, *supra* note 72, at 239. Gerstenblith notes that distinguishing *Andrus* in *Lucas* "seemed to open the door to a broad range of regulation of personal property." *Id.*

447. *See* Dane S. Ciolino, *Rethinking the Compatibility of Moral Rights and Fair Use*, 54 WASH. & LEE L. REV. 33, 76-77 (1997) (discussing the difference between seeing an original work of art and seeing a duplicate).

448. *See* Talmadge, *supra* note 73, at 861 ("The exercise of political power—governmental action to advance public health, safety, peace, and welfare—has long been a part of the very nature of government itself.").

whatever it wants.[449] We have come to recognize that government should act to preserve our cultural inheritance while acknowledging that such action requires explicit protection of both the private owner's and the public's interests.[450]

If "art, mirrors life, so does the law pertaining to art."[451] Both change over time as our needs and values change.[452] We have come to appreciate that destruction of our inheritance "diminishes [our] sense of self and [our] quality of life."[453] There are works of art that are socially significant, and their preservation is of social significance, even if that preservation subrogates private rights to the public interest.[454] This requires an adaptive legal approach, one that

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449. *See* Glenn H. Reynolds & David B. Kopel, *The Evolving Police Power: Some Observations for a New Century*, 27 HASTINGS CONST. L.Q. 511, 528 (2000).

> State legislatures and local governments have a police power to enact laws for the benefit of public safety, health, welfare, and even morality. But those laws are subject to judicial review as to whether the legislation is reasonably related to those purposes. And the purposes, while broad, are not infinite.

Id.

450. *See* Phelan, *supra* note 21, at 107. Phelan notes that "[a]n understanding and appreciation of a nation's cultural origins and heritage and a study of a country's cultural resources are mandatory elements of the process [of developing 'wisdom and vision in its citizens'] because, in reality, the culturally impoverished nation is sterile." *Id.* (quoting 20 U.S.C § 951(4) (2000)). *See also* Gerstenblith, *supra* note 178, at 463 ("[P]ublic art, which should be taken to include both architecture and art placed in public places, requires an explicit balancing of the interests of the author, the present owner, and the public.").

451. Liemer, *supra* note 61, at 41.

452. *Id.*

453. *See* Cotter, *supra* note 27, at 34 & 34 n.177. "Works of art that are not remote from common life, that are widely enjoyed in a community, are signs of a unified collective life . . . [and] are also marvelous aids in the creation of such a life." JOHN DEWEY, ART AS EXPERIENCE 81 (1934). *See also* Duncan, *supra* note 54, at 1153-54.

> The Constitution permits community consensus about the parameters of property, and the obligations attached to it, to change over time as the needs and values of the community change. Thus, because the community had come to understand that destruction of its heritage diminished its sense of self and its citizens' quality of life, it could enforce private *obligations* with respect to preserving landmarks without necessarily having to compensate landowners.

Id. at 1154 (citations omitted).

454. *See* Note, *Protecting the Public Interest in Art*, *supra* note 354, at 141 n.103. *See also* Gerstenblith, *supra* note 178, at 462.

> Landmarking, . . . because it serves only the public interest and is asserted only on behalf of the public . . ., is now granted priority over even the rights of the landowner. For a society and a legal system, which purport to value the individual so highly, this subrogation of the individual's rights to those of the public represents an interesting paradox . . . .

Id.

respects the interests of all involved.[455] Although private preservation might well be the ideal, we must deal with the real.[456] When the preservation is designed to sustain something as irreplaceable as the Barnes Collection, public intervention is often a necessity. There is a *droit patrimoine*, a collective right to see and save our cultural inheritance.

Public intervention will be fair and be perceived as fair only if the process by which it is accomplished is fair.[457] A fair process will

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455. *See* Zlatarski, *supra* note 17, at 238.

> On a philosophical level, once we recognize the moral nature of public art, we realize that the truth of the claim of the moral impact and importance of public art is universal to all humans. However, it is precisely this universal role of public art in forging moral meaning and making sense of our environment that necessitates different solutions, artistic as well as legal, to the problems of variously situated human beings.

Id. See also SAX, *supra* note 38, at 199.

> [T]he views of an owner . . . are by no means to be ignored as mere self-interest, and should not lightly be set aside. Neither should mere ownership be determinative. In such matters, communities can choose between regulation . . . and more modest process requirements designed only to guarantee some form of public discourse. Either may work, and both may fail, but in no event should the public stake in protecting masterworks of architecture be put at naught.

Id.

456. *See* Settlemyer, *supra* note 419, at 2322.

> Another mechanism for ensuring public access to creative works . . . is the free market. If the public's interest in access to a creative work is great enough, it will usually be willing to pay a reasonable price for that access and owners will accept the reasonable price. The free market, functioning properly, should also generally guarantee . . . that owners will preserve, care for, and distribute the works they hold in a manner that will maximize their value.

Id. Cf. Lewinsohn-Zamir, *supra* note 412, at 787.

> Voluntary preservation should be deemed successful if [some, though not all, landmarks are preserved]. An important exception is the unique or "one-of-a-kind" structures. Their exceptional worth, coupled with the lack of close substitutes, requires much greater caution and care and justifies intervention if the private market cannot provide for their protection.

Id.

457. *See* F. Patrick Hubbard, *Palazzolo, Lucas, and Penn Central: The Need for Pragmatism, Symbolism, and Ad Hoc Balancing*, 80 NEB. L. REV. 465, 515 (2001) (discussing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)).

> *Penn Central*'s balancing test is based on a candid admission that there is no standard. Instead, the best that can be achieved is to use a fair process that tries to fit evolving contradictory views about property rights to the circumstances of a regulatory limit[ation] . . . . [*Penn Central*] demonizes neither regulators nor property owners. Instead, it respects both and thus provides a framework for the judicial process to balance the conflicting values at issue.

Id. See also Zlatarski, *supra* note 17, at 235.

> The fabric of United States public art law is rich and its strands many . . . . It

quantitative concept.[465] We cannot do this by numbers. We can do it by procedures that identify the worthy past, do honor to the present interests, and preserve the values for the future.

465. *See* Harding, *supra* note 12, at 324-25.

> There may very well be public and future generation rights in cultural heritage that provide adequate support for protective measures, but such rights do not fully explain the ubiquitous sense of duty, respect and obligation toward cultural heritage. If we are protecting cultural heritage for future generations, essentially we are making a statement not just about for whom we are acting, but additionally about the appropriate normative attitude with respect to cultural heritage. . . . We do not protect cultural heritage to give future generations the option of neglect and mistreatment, we protect it because we think it should, to the extent possible, be around for all generations.

Id.