



ORIGINAL INTENT

Charles Fried

THE BARNES FOUNDATION MUSEUM in Philadelphia is one of the great collections of late-nineteenth century and early-twentieth century paintings – especially by Cezanne, Matisse, and Renoir, but it also includes works by Monet, Manet, and Seurat, with occasional masterpieces by Van Gogh, Picasso, and even the occasional American. It has also been the center of a legal and cultural controversy that illustrates the tension between, on one hand, tradition and fidelity to founding texts and founding intentions and, on the other, the pull of changed circumstances and an appreciation of evolving needs and values. The Foundation's new museum on Philadelphia's Benjamin Franklin Parkway, in addition to being an acknowledged triumph of modernist design, stands as a vivid, palpable metaphor for the controversies that rage about the best way to understand and be faithful to the principles of the Constitution and the ideals on which this nation was founded, and perhaps even of the best way to understand and apply the sacred texts and traditions at the heart of Judaeo-Christian civilization.

Albert Barnes, a Philadelphian medical school graduate who never practiced as a physician, became immensely rich at the beginning of the last century because together with a German chemist he developed and marketed an antiseptic, Argyrol, that had the sovereign virtue of protecting newborns from blindness caused by acquired gonorrheal infection. So, unlike some other famous Maecenases he

Charles Fried is the Beneficial Professor of Law at Harvard Law School. © Charles Fried, 2013.

Charles Fried

was a public benefactor twice over: in the way he acquired his wealth and in the way he spent it. He spent it by acquiring an enormous collection of paintings that he loved and valued. He designed and built a mansion in the Main-Line Philadelphia suburb of Merion to house this collection, and he rigorously directed the placement of every painting (in a display that today would be seen as eccentric and crowded). He commissioned Matisse to provide a continuous painting of dancing figures to fill the spaces above and around the windows in one of the principal galleries. And in his deed of trust he minutely and relentlessly prescribed the future of the museum: nothing was to be moved, no pictures lent, no pictures added; the museum was to be open to the public for no more than two days a week and to a limited number of visitors. Finally, at the end of his life he gave Lincoln University, a historically black institution some forty miles from Merion, the right to nominate four of the institution's five trustees.

For many years the Barnes – as it came to be known – was a somewhat recondite treasure: hard to get to, hard to visit, and best known only to specialists. (Dr. Barnes, among other things, forbade color reproductions of any of the holdings.) By the end of the last century the arrangement proved unsustainable. There was no longer a sufficient endowment to maintain the building and the collection. The restrictions in the will precluded the most obvious ways to increase revenues: higher entrance fees, longer opening hours, perhaps loans of works to other museums. So the trustees could look out and see a deteriorating institutional fabric and insufficient staff, with no way to protect the collection against climatic and other perils, including the menace – in the light of the notorious theft at Boston's Isabella Stewart Gardner Museum – of theft and vandalism. Without going into the details of the immensely complicated and prolonged legal battles, the trustees, with help from the governor and the attorney general of Pennsylvania and the promised support of three major Philadelphia foundations (Annenberg, Lenfest, and Pew), moved the collection to a stunning modernist building on the boulevard which has the Philadelphia Museum of Art at one end, and the Franklin Institute and Free Library at the other. It is accessible, has

Original Intent

all the amenities of a modern museum, and since its opening has been visited in rapt enjoyment by more people in a month than its old location could accommodate in a year. Perhaps the most remarkable aspect of this triumph is that within the new modernist structure the architects have maintained virtually the same configuration of rooms as in the Merion mansion. The paintings are hung in just the same patterns as before, against walls covered in the same materials, lit by windows that have the same shape and framing – all with the subtle difference that when the natural light is too strong (for viewing or for the well-being of the works) or too dim, shades descend electronically and artfully concealed ceiling lights take over. Dr. Barnes forbade wall signs and explanations, but you can download an app and go through the collection with your iPhone as an acoustiguide.

But not everyone is happy. Far from it. There have been two classes of objectors.

First were the neighbors in the rather upscale Merion suburb. (Merion has the fifth highest per capita income in the country.) They had been troublesome enforcers of restrictions on the old Barnes from the beginning: they were wary of traffic and parking problems and fearful in a generalized way of large numbers of strangers being attracted to their neighborhood. Dr. Barnes's own dislike for what he thought of as the casual museum goer worked well with the neighbors' xenophobia to create the skein of impediments to visitors: few open days, reservations necessary long in advance, very limited visitor amenities, and a notoriously haughty and unwelcoming custodial staff. Yet when the possibility of a move to Philadelphia arose the neighbors mounted a ferocious campaign, complete with yard signs to "Keep Our Barnes." One can put this down to a combination of a kind of reverse "Not In My Back Yard" instinct and pride in this prestigious neighbor whose good effect on property values results from the combination of that prestige with the severe restrictions on any actual nuisance it might cause.

Second were those who believed that a move would be a violent desecration of Dr. Barnes's vision, a high-handed disregard for the specific terms of his bequest by elitist interlopers supported by rich foundations. Perhaps they felt a particular sense that high-minded

busybodies had no right to tamper in such a radical way with the terms of a will – not even (perhaps especially not) in what some sophisticates claimed was the public interest.

Without doubt American law has been unusually scrupulous about honoring the terms of a man's will. And if that will establishes a charitable foundation – broadly defined – the law has been particularly assiduous about rejecting the interventions of third parties who want to appropriate those bequeathed assets to some worthy charitable project of their own. (There are any number of charitable establishments devoted to the well-being of dogs and cats in communities where the needs of poor children may go begging.) As there may not be any beneficiaries of the testator's generosity willing to go to court to enforce the testator's original intent, every state has designated its attorney general as the guardian in the first instance of the integrity of charitable bequests. The final enforcement of the terms of charitable trusts is for the courts. And the courts have developed a doctrine, which goes by the archaic name of *cy-près* (meaning "close to it"), to deal with cases in which changed circumstances make it impossible – or at least very difficult – to fulfill the original purpose of a bequest. In such cases, the courts may apply *cy-près* to make adjustments which come as close as possible to the original intent of the testator in the changed circumstances. It was by invoking the doctrine of *cy-près* that the Supreme Judicial Court of Massachusetts allowed the Gardner Museum to move chairs and furniture in the museum's Great Tapestry Hall so that it could house Sunday afternoon concerts. It was by that same doctrine that the same court many years later allowed the slight movement of one sarcophagus so that a new concert hall, exhibition space, and visitor amenities could be joined by a narrow glass corridor to the Old Palace, thereby allowing the Great Tapestry Hall to be returned to its original configuration. Mrs. Gardner had been as demanding and meticulous as Dr. Barnes, decreeing that if any painting or object were moved – except by thieves – the whole collection was to be packed up and sold, with the proceeds going to Harvard University.

What we have here, then, is a reverence for the word as the embodiment of the donor's intent, and that original intent in turn as a

Original Intent

sort of time capsule launched from the past into an indefinite future carrying a vision – depending on the nature of the bequest – of the good, the true, or the beautiful. We honor that intent for a variety of reasons. Sometimes because we honor the dead and maybe in the hope of attaining some kind of immortality ourselves. Sometimes because we respect that what they have bequeathed was once their property to dispose of as they wished, and this is what they wish – that is out of a respect for the property rights of the living. Sometimes because we value charitable bequests as adding to the diversity of the nation’s cultural, religious, and educational life and so as an alternative to government provision of all these things. And sometimes out of an instrumental recognition that if the wealthy of today see their predecessor’s testamentary plans thwarted or distorted they will conclude that they might just as well spend the money in their lifetimes on themselves, their friends, or families. But honor those words and intents we do, and the result is a rich and various public space, adorned with great universities, libraries and museums, cemeteries for pets, foundations for the promotion of Nobel-level research, and crackpot institutions of every imaginable kind.

Into this welter entered – or blundered – the trustees of the Barnes Foundation, fearing on the one hand the gradual deterioration or dissipation into ruin of a roughly \$80 billion collection of treasures, and hoping on the other for a future far more glorious home, brightening the days of far greater multitudes than was ever possible in the old Merion mansion. The plan aroused ferocious opposition from traditionalists who could not abide the thought that anything should change about this idiosyncratic treasure house – certainly nothing so drastic as a move to the big city – and from property rights fundamentalists, who saw any departure from a donor’s original intentions as a kind of retrospective theft. That was to be expected. What was remarkable is that the same Main-Line neighbors who – citing fear of traffic and crowds – had persuaded the local authorities to hem the original mansion museum about with extreme restrictions on its visiting days and hours, now fiercely opposed the move of the museum from their vicinage altogether. Some of these currents merged in a group calling itself “Friends of

The Barnes Foundation.” To catch the tone of their opposition one might turn to their website or to the Oliver Stone-like movie, *The Art of The Steal*. They litigated relentlessly. When they lost in the trial court and the loss was affirmed by the state supreme court they kept at it. In fact they kept at it even after the new Barnes was built and the move accomplished. Eventually the court imposed sanctions on them for continuing their vexatious litigation.

Without doubt the move to Philadelphia and much about the new home was a radical change from the old Barnes conception of his museum – nothing like the tiny changes reluctantly agreed to by the Massachusetts court in the case of the Gardner. Yet the Pennsylvania courts saw this as a choice between hewing scrupulously to the details of Dr. Barnes’s intentions while the whole institution foundered, its collection dilapidated and dissipated – perhaps in bankruptcy – and on the other hand a radical *aggiornamento*. Certainly there is a huge difference: when now one sees at a distance the new home with its elegant, cantilevered, simple Japanese lines; a greater difference still as you pass through the wall into a simple garden with a tranquil rectilinear reflecting pool, at one end of which stands a forty-foot Ellsworth Kelly sculpture, *The Barnes Totem*. And when you step into the building there is nothing of the Merion mansion. There are beautiful but simple textured materials and a long rectangular meeting and resting space, where another Kelly, a brightly colored wall sculpture on loan from the Museum of Modern Art, was temporarily displayed.

“*Quantum mutatus ab illo Hectore . . .*” you might sigh – until you pass through a small door into the museum space itself. Then you are immediately transported to Barnes’s original vision. Every room, every picture, every proportion and relation is scrupulously observed. The window mullions are the same. As before, you right away see, above the windows opposite, Matisse’s massive, exuberant wall painting of dancing figures. And if you turn around you see them echoed as an element in Matisse’s *Bonheur De Vivre*. Dr. Barnes’s vision lives. The soul of his vision surrounds you for all the hours you spend in that space. Only the lighting is better. Dr. Barnes’s conception has indeed been transformed. “*Those are pearls that were his eyes.*”

Original Intent

As I said at the outset, I was struck not only by the beauty I experienced in that visit but by the vividness of the metaphor of change and persistence through change of all things worth maintaining, worth saving from dilapidation, dissipation, destruction, and disappearance, worth maintaining not as relics of the past but as habitable human institutions. Our Constitution and our republic are much older than the Barnes and they have suffered far greater upheavals, upheavals whose like has elsewhere brought about even in our times the dilapidation, dissipation, destruction, and disappearance of kingdoms and nations and constitutions. Ours has survived an early war to bring it down, a civil war with more fratricidal killing than then known in any modern war, a brutal and relentless alteration from an agricultural to an industrial and post-industrial society, a depression that in Europe toppled crowns and led to seventy years of fascist and communist barbarity. The Tea Party is right that the vision of the nation and of the Constitution is not the same as it was in 1789 and 1791. If they had been, then we too would have sunk into dilapidation, dissipation, destruction. Would Franklin, Washington, Adams, Jefferson, and Madison approve or even recognize what has become of the nation they founded? Who can tell? Would Dr. Barnes approve of his creation's new home? Probably not. Yet they endure. They feed, enlighten, ennoble those who inhabit them.

"Those are pearls that were his eyes."

GB