

# STATEMENT OF MARIE C. MALARO

## PUBLIC FORUM ON THE FUTURE OF THE BARNES FOUNDATION

LOWER MERION CIVIC ASSOCIATION  
FRIENDS OF THE BARNES FOUNDATION

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Ladies and Gentlemen:

It is very important for the public to understand that the true losers in the Barnes Case are the people of the state of Pennsylvania, not just those arguing against the move of the Barnes Collection to downtown Philadelphia. I say this because the Barnes decision sets a frightening precedent for other nonprofits in the state - a precedent orchestrated by powerful political and financial interests without regard for the long-term consequences for the public.

Our country is unique in that it has developed a very large and powerful nonprofit (or third) sector in our society. Other countries envy us this sector. One of the reasons we have this nonprofit sector is to encourage true diversity. It was recognized early on by our forefathers that even in a democratic government such as ours rule by majority vote leaves those in the minority without a voice. Also, in a capitalistic society many products and services, which can add greatly to our quality of life, never see the light of day because they are not deemed profitable. Our nonprofit sector fills these voids because it provides an environment where any group of citizens can band together to further a particular cause or provide a public service (without the approval of the party in power and without the need to attract investors), thus greatly increasing the ability of the public to hear alternative views or benefit from services that are not driven by the profit motive.

Our laws historically protect the diversity found in the nonprofit sector by refusing to condone a change in the stated purpose of a nonprofit unless it can be proven by those charged with managing the nonprofit that it is impossible or illegal to continue to promote such a purpose. Another protection the law provides is a legal obligation placed on those who control a nonprofit to remain true to the purpose of the organization. In other words, if one creates a nonprofit organization, provides for its support and states what the organization is to do, the law insists that those charged with managing the organization do what the donor instructed. Nonprofits to justify their existence do NOT have to win popularity contests, all they have to do is provide a public service that some are willing to support.

Those charged with managing a nonprofit that has a mandatory, donor-imposed purpose cannot legally deviate from this purpose unless they go into court and seek relief on the basis that it is now impossible or impractical to continue the donor-imposed purpose. As part of their case those seeking the relief also have to demonstrate that the crisis facing the organization happened despite prudent management on their part.

Those managing the Barnes Foundation sought such court relief. Their argument was that the organization was on the verge of bankruptcy and thus Dr. Barnes' instructions (to maintain a very specific method of art education using designated portions of personal and real property donated by him ) could no longer be carried out. Instead the managers put forth for court approval a plan to use the remaining (and extensive) assets under their control for a purpose that the donor would never have approved. - moving the Barnes art to a museum setting located in the center of Philadelphia.

*In the course of the court hearings on the petition it became evident that the Office of the Attorney General, the office charged by law with protecting the integrity of nonprofits in the state, offered absolutely no opposition to the petition for relief. The office never questioned the poor performance of those managing the nonprofit over the past few decades nor did it probe the apparent lack of interest of those managers in furthering the wishes of the donor. Rather, the Attorney General's Office showed only an interest in how the move of the Barnes art collections to the center of Philadelphia could be financed. The dismal performance by the Attorney General's office played into the hands of the powerful political and financial interests who were busy securing public and private money to facilitate the planned move. In the end, politics and money won. The public interest in preserving a unique cultural attraction and an independent and strong nonprofit sector lost.*

Would that the average citizen of the state realized the harm that has been done. Every time we remain silent when the law is misused we weaken the glue that holds our society together.

*Marie Malaro is a professor emerita of museum studies at George Washington University and author of **A Legal Primer on Managing Museum Collections and Museum Governance: Mission, Ethics, Policy**, both published by Smithsonian Press.*