# *Trusteeship: A Combination of Institutional Principles*

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TRUST IS AN ESSENTIAL INGREDIENT OF ENDURING HUMAN RELATIONS. In its simplest and most general form it consists in a more or less realistic confidence in fulfilled expectations: that persons will behave according to the appropriate rules governing organizations and relations, that roles will be properly played, that responsibilities will be met.

Trust, then, commonly involves mutuality of expectations, and often reciprocity in services. Among friends, reciprocity of expectations may be very general, any given claim on a trusted relationship requiring no precisely counterbalancing claim but only the assurance that, should need arise, an appropriate request would be honored. Trust often applies even when calculated self-interest is assumed, as in oral contracts. And the reciprocity need not be immediate, as in lending money or extending credit for purchases. Violation of trust, of presumably shared ex-

* The author wishes to dedicate this essay to the memory of Ian Weinberg: former student, warm friend, and despite these disadvantages, brilliant sociologist. We are all poorer when an old and wise man dies; we are immeasurably poorer when a young and wise man dies.

pectations, is uniformly disruptive in social relations. It is met with sanctions ranging from mere severance and avoidance to more serious reprisals.

All fiduciary relations involve trust, but many of these, too, involve reciprocity. The investor in a corporation expects the members of company management to act in his interests to the best of their ability. The client of a professional places his trust in the professional's competence and conscientious performance in the client's interests.

These familiar examples involve normative principles that are by no means trivial. Our central interest in this essay, however, is in a highly developed form of fulfillment of trust, but without reciprocity. The trustee of a charitable trust, such as a foundation or other endowment, is expected to act honorably, fulfilling the expectations of a donor perhaps long deceased and those of his colleagues, on behalf of beneficiaries, but with no *quid pro quo*. It might be said to be an almost unrequited or asymmetrical fulfillment of trust.

The type of trusteeship with which we are primarily concerned here involves the supervision or management of resources destined for charitable uses. In the typical case the trustees of a fund or an organization constitute an organized collectivity, with discretionary powers in such matters as allocation of resources and choice of salaried staff to advise trustees or to carry out the prescribed activities. Again, in the typical case the resources supervised constitute an endowment with a long life or "in perpetuity" from one or more original donors, with varying degrees of discretion in the time limits and on the uses to which the resources may be put, including classes of possible recipients of expendable funds. Prime examples of trusteeship as examined here are provided by the independent foundations having little or no remaining influence by the original donor or his close associates. Yet most of the principles of trusteeship are little affected if the donor is alive and has a voice in supervising the trust, if the resources are to be liquidated, or if the source of funds is from current gifts rather than a past gift or legacy. Trustees of private colleges and universities commonly supervise resources that represent physical assets from prior donors, income-yielding general and special endowments, grants and

contracts for research activities, students' fees, sale of admissions to athletic events, and so on. These various sources make a difference in detail, particularly with respect to the trustees' discretion in their use, but may have little effect on the formal responsibilities of trusteeship.

Note, however, that with respect to certain funds such as gate receipts, the responsibility of "trustees" is not strictly a fiduciary one, but rather contractual. In early 1969 some Columbia University students, in an unprecedented legal action, petitioned the New York State Supreme Court—a court of first jurisdiction in that state—to dismiss the University's trustees for violation of contract. The students did not allege any misuse of trust funds, for on such a complaint they would have no cause of action, but rather that the trustees had failed to fulfill explicit or implicit contractual obligations to provide a suitable faculty and a suitable environment for higher education.[1] Since students in private universities are partly beneficiaries of charitable endowments and other gifts and, in most instances, partly contributors to the costs of their education, their relations with university authorities is complex or at least mixed.

The responsibilities of trustees of resources destined for charitable or philanthropic purposes are symbolized in some of the most value-laden terms in the language. The trustee owes the duty of *prudence* in the management of resources, for he is, after all, not handling his own assets; if he were, and acted imprudently, he might expect some high risk of loss or punishment by the impersonal forces of financial or other markets. He is not permitted such discretion on behalf of others.

The trustee also owes the duty of *loyalty*, to the general purposes established by donors, to the welfare of intended beneficiaries, and, commonly, to the ongoing organization or collectivity for which he has assumed some responsibility.

The loyalty expected of the trustee is especially interesting, for, we have noted, it is an extension of a principle that normally applies to such relationships as those obtaining between a professional practitioner and his client, or the manager of a private

[1] See Murray Schumach, "12 at Columbia Sue to Oust Trustees," *New York Times*, January 11, 1969, pp. 1, 16.

trust, in the interests of named beneficiaries. The trustees with whom we are concerned owe a loyalty to the interests of unnamed beneficiaries, though the range of possible claimants may be narrow or wide. Indeed, the norm for trustees' actions is that they will be *disinterested*: that is, not in the first instance determined by the self-interest of the trustees and, if necessary, even contrary to such self-interest.

To refer to such criteria of conduct as formal responsibilities does not necessarily imply that they are entirely and adequately codified in public law and enforced by executive agencies of the state. Much of the honorable conduct of trustees (and, of course, some dishonorable conduct) remains outside the public purview, being sanctioned by common usage and the expectations of "significant others." What legal supervision is available, particularly in the United States, appears more as an afterthought, a by-product of the concession of tax exemption, than as a forthright exercise of public concern over the management of private actions with an avowedly public purpose.

The title of this essay refers to a combination of institutional principles, and that is the view of trusteeship that will be pursued here. The most inclusive principle is that of fiduciary actions and responsibilities, which applies to trustees of charitable endowments, but also to the management of public wealth and current accounts and the savings and investments of private citizens in the form of life insurance, bank accounts, and participating shares of stock in private corporations. The principle of lay control of organizations that may be manned by professional or quasi-professional operating staffs for carrying out the organization's several missions is very extensive in American society, and by no means limited to the custody of endowments. The legal accountabilities of trustees derive from a complex body of Anglo-American law, but those rules comprise only a part of the law of trusts. Thus trusteeship as we shall examine it further represents not a total amalgamation of these institutional principles, but rather their intersection. The strategy of this exploration of trusteeship is to proceed from the most general principle, that of fiduciary relations, to the principle of lay control, and thence to the law of trusts, the final destination being the particular body of rules and administrative arrangements that influence but do

not precisely determine the actions of foundation trustees. None of these bodies of principles is singular and unequivocal, and even their combination leaves discretionary latitude to the actors in various small and large dramas. The exercise of discretion is explored here in terms of the institutional order, and by Donald R. Young in the following essay in pragmatic terms of trustee decision-making.

## The Fiduciary Principle

The first normative principle, or set of norms, that helps to define the institutional setting of contemporary trusteeship is the broadest of all. It is that certain individuals assume responsibility for the welfare of others. By extension, the principle requires that this other-regarding responsibility be fulfilled even at the possible expense of the self-interest of the person assuming such burdens. We shall call this the fiduciary principle, for that concept rather precisely encompasses the notion that many interests are entrusted to the management of others, whose position requires that they fulfill such obligations faithfully.

The principle is thus broader than the law of trusts, which concerns the disposition of private resources on behalf of beneficiaries who may not be able to manage those resources for themselves, and in any event are not permitted to do so by the trust arrangement. The principle is also somewhat broader than the set of norms relating to lay control, but it is more closely proximate to that principle, for it admits responsible amateurism; but fiduciary relations may also be technical and thus more closely approximate the notion that trustees should be persons of *unusual* probity and prudence, discharging responsibility for the less fortunate in ability or station in life in return for their standing in the community.

There may have been a time, now overfondly recalled through the usual distortions of nostalgia, when free-born citizens of the Western world disposed of most of their economic resources at their own discretion. There is little need for fiduciary management if private property consists mainly of land and other tangible goods, and public property is poorly distinguishable from the private property of hereditary monarchs or a safely land-based

aristocracy. Private holders of usable resources might well act responsibly toward those to whom they acknowledge particular relations—for example, wives and children—but not for impersonal or anonymous others. (We shall note later that parenthood is the primordial form of trusteeship, that fiduciary relations toward *known* beneficiaries are ancient and persistent forms of social responsibility.)

*Fiduciary Relations in the Economy.* Although no exact metric appears available for measuring the degree of structural change in the management of resources, it is scarcely debatable that in modern (and therefore complex and interdependent) economies, human resources are increasingly managed in a fiduciary way. It would be too glib and misleading to say that we are busily reinstituting feudalism, the central principle of which was an orderly network and hierarchy of fiduciary relations. Yet some modern fiduciary patterns more nearly resemble feudal arrangements than they do a completely individualistic economic order.

This "abdication" of individual responsibility for tending to his own economic affairs is most conspicuous precisely in the "private" sector of societies that admit and foster private investments and transactions. One may still find individuals with discretionary financial resources who decide for themselves how those will be used: for example, in buying real estate, art objects, or other physical manifestations of wealth. Generally, however, individual (or family) economic resources are represented in bank deposits, life insurance and annuities, public or corporate bonds, or equity shares in "private" corporations and investment trusts. In effect, these investments are managed in a fiduciary capacity by the presumably responsible officials of manufacturing and financial organizations.

These arrangements are so widespread that they touch a very large part of the population. It is not only (and perhaps not primarily) persons of great affluence that have given over the management of some part of their well-being to others. The bank depositor, the investor having a few shares of stock, the purchaser of life insurance, the prospective beneficiary of a private pension plan—all these have placed their trust in the managers of funds in a fiduciary capacity.

In Western "capitalist" countries, which afford most of these investment opportunities to the individual or private collectivity (such as a labor union or professional association), a convenient and conventional fiction is maintained. That fiction is that investors are in fact represented by business managers, the weight of influence being proportionate to the amount invested. The fiduciary principle is thus a quasi-democratic one: those who control the resources of others do so in behalf of the proper clients, and are held accountable through processes of voting shares of stock (or their equivalent). In effect, however, depositors, purchasers, and investors turn out to be even less effectual than a political electorate.[2]

The essence of the problem with private, but impersonal, fiduciary relations is that the comfortable assumption is made that the actions of responsible officials in furthering their own interests will redound to the interests of other nominally represented but usually quiescent parties. This assumption is, at best, only approximately true. Few business managers, or members of corporate boards of directors, are likely to enjoy unusual prosperity while overseeing a losing enterprise—though that can happen. But when the enterprise prospers, the decision as to how the gains will be divided is entrusted to those same managers. Of the various interests to which corporate managers must be attentive (suppliers, customers, public law enforcement agencies and tax collectors, creditors, stockholders) those of the managers themselves are given very high priority.[3]

The investor, of course, is not without recourse. He can try to line up other dissidents and throw the rascals out through a "proxy fight." That is very expensive business, and he had better have backing from a major investor before trying it. He can, alternatively, simply sell his shares (the usual tactic of a dissatisfied stockholder), hoping to find a more honorable management elsewhere. He can, as a further course of action, simply sit still, in possibly grumbling quiescence, if his interest is in capital

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[2] See John Kenneth Galbraith, *The New Industrial State* (Boston: Houghton Mifflin Co., 1967), especially pp. 72–85.

[3] See Wilbert E. Moore, *The Conduct of the Corporation* (New York: Random House, 1962).

gains at market prices for his shares, and he regards the amount of current dividends as a trivial consideration. He can, finally, and with little hope, bring a stockholder's suit against the company for mismanagement of his investment. On the record, he may as well save his effort, for the courts in Britain or America seem loath to review the practices of corporate managers in their use of other people's money. The presumption runs strongly that "management knows best" in the fiduciary position. This is at times a conspicuously false presumption, but it certainly saves the courts from being burdened with tedious, technical, and often trivial litigation.

Not all investors, or beneficiaries of the efforts of others in their behalf, are in the same position as the equity stockholder in a private corporation. Owners of life insurance policies, whether in joint stock or mutual companies, have a form of investment. Collectively, the policy-owners of a mutual insurance company or a mutual savings back are owners of the company. Owners of policies in mutual insurance companies are, in almost all jurisdictions, permitted to receive dividends on their state-fixed premiums for insurance bought. Owners of savings accounts in mutual banks are less fortunate. Unlike the owners of a life insurance policy, they do not commonly have the right to vote on directors of the company. Moreover, the state banking commissioner (commonly guided by the Federal Reserve Board) sets the upper limit of interest to be paid on deposits. This means that a *good* bank management for a mutual bank has serious problems. That management must constantly dispose of new investment income, for it is prohibited from returning to the investors (depositors) the actual, rather than the administratively fixed return on investment. In sum, the depositors collectively *own* mutual savings banks, and have not even a nominal voice in their control or in the rate of return on their investments. The fiduciary principle is carried to a point that is, in a word, extreme.

By common law and statute the interests of potential beneficiaries of charitable foundations are under the purview of the attorney general of the appropriate jurisdiction, though, we shall see, this is in fact a very weak control. The protections against corporate mismanagement are even weaker, and rest with no

designated public agency other than the courts, which are ineffective. We may yet see a commissioner of corporations to add a measure of official weight to a fiduciary position that is especially subject to possible abuse. The Securities and Exchange Commission, a federal agency still not wholly beloved by the wheeler-dealers in the market for stocks and other shares in dubious enterprises, does represent a measure of control over the marketing of equities. There is simply no effective control over the current management of corporations other than the control, infrequently exercised by holders of the corporation's obligations (stocks, bonds, bank notes, and the like), with or without recourse to administrative agencies and the courts.

*Management of Public Resources.* Fiduciary responsibilities are also assumed by public officials, whether elective or appointive. The management of public property and the disposition of public funds is supposed to be in the public interest: either all citizens without apparent discrimination, or special categories of citizens (for example, war veterans, homeless children, or others lacking adequate personal and private resources) according to some explicit standards of redistribution of assets.

Any exercise of political authority, short of naked terror, rests eventually on a nonrational assumption of legitimacy: the divine right of kings, the routinized charisma ("apostolic succession") of popes, the superior political wisdom of Communist Party commissars, or the authenticating of an electorate to which genuine choices have been presented. The principle of authority will affect the accountability of authorities. For rulers and office-holders who claim, and are at least tacitly accorded, rights of rule that are not subject to current and widespread explicit consent, there is a strong tendency to emphasize consistency with tradition and the preservation and enhancement of the position of the collectivity (the church, the national state) as such. At an extreme, a French ruler could assert with dubious propriety, *"l'état, c'est moi,"* but even such an absolutist principle of political legitimacy could scarcely evade some fiduciary responsibility for present subjects, as well as those now dead and those yet to live. If current accountabilities to lesser creatures turned out to be paternalistic, and, to a distressing degree, whimsical, they still existed.

The modern democratic, or quasi-democratic state affords not only the management of public assets, but also the redistribution of what might otherwise be private assets through taxation and various forms of welfare disbursements. Some services are afforded the citizen whether he likes them or not: police and fire protection, water supply and sewage disposal, compulsory education for children, national defense budgets, contributory pension plans, and a host of other public services for general or special constituencies.

The activities of "welfare states" (and all post-industrial societies deserve that designation) shift fiduciary responsibilities from private managers of other people's money to public ones, and the mechanisms of possible self-protection from the marketplace to the voting booth (if one is meaningfully available). In both instances a nominally independent judiciary may, on occasion, protect the interests of claimants against the errors and possibly venal and self-serving acts of those who are supposed to be acting on behalf of investors, citizens, taxpayers, or other relatively helpless aggregates of persons nominally represented by others. In Britain and in America the courts have generally mantled themselves with conservatism—under the rule of precedent, the common law doctrine of *stare decisis* (let the decision stand) —even while enterprising innovators and even legislators were radically changing the circumstances of social action. Nevertheless, attention to changing circumstances has, in these latter days, shown itself in the deliberations of courts of appellate jurisdiction, with the consequence that the meaning of accountability does get redefined from time to time.

*Responsibility for Private Philanthropy.* If the fiduciary principle had a dubious propriety in absolutist political regimes, gradually asserted through electoral and judicial reforms, and still has a somewhat delicate standing in private corporate affairs, it has an ancient and relatively honorable lineage in nonprofit and nonpolitical matters of moment.

We encounter substantial numbers of selected citizens who give both time and labor to affairs other than their own, under rather severe restrictions in their discretion, and in the full light of a collectivity of similarly selected individuals who may, never-

theless, have less than consensual views on any particular issue.

Let us, as a start, take the most cynical view of motivation of what is, normally, not directly rewarded activity. A small foundation has been established by a living donor, for some combination of reasons involving public service and tax avoidance, with a board of trustees comprising several members of the family, a trusted business associate or two, and the donor's attorney. If not directly recompensed, why should these individuals serve? For a variety of reasons, including hope of future benefits and fear of immediate withdrawal of patronage, most trustees may have little option.

Let us take as another, and not rare, example, the man of renowned if circumspect success, in a managerial or professional position, recommended by associates who are current trustees as a person of wisdom, judgment, and, possibly, knowledge in an area presently represented on the board of trustees thinly or not at all. The basis for inviting him to serve may be clearer than the basis for his acceptance. For the prospective exerciser of fiduciary responsibilities, it may be an accolade, a further confirmation of his hard-won arrival at high estate. We should not reject the possibility that he wishes to be of service.

What we encounter here is a certain sense of *noblesse oblige*, which may or may not bespeak a kind of uneasy conscience, and is not at all uniform among successful men. The call to serve suggests to the individual invited to participate in decisions affecting the welfare of the less-privileged that his exalted position gives him both the acumen and the duty of spending other people's money wisely.

The fiduciary principle appears in one of its purest forms among the trustees of foundations completely independent of original donors. The executives and directors of corporations or banks and mutual insurance companies receive material rewards, as do most elective and appointive public officials. The professional stands in a fiduciary relation to his client, but normally does not go unrewarded for the trust placed in his care and competence. The trustee of a private school or college is often an alumnus, and although the familial relations signified by references to *alma mater* may not be taken too seriously, there is a kind of institutional loyalty mixed with other incentives to

serve. The typical trustee of an established foundation assumes responsibility for the welfare of an organization, and especially for its purposes and beneficiaries as a kind of philanthropic service, often untainted by other loyalties and obligations.

Any fiduciary position implies power, limited by responsibility. The modes of assuring responsibility, we have noted, are variable according to types of positions, and it is fair to say that they are not equally or uniformly effective. We shall see that the trustees of private foundations are among the least subject to effective formal controls, for most boards enjoy considerable discretionary authority, and, above all, have the virtually unchallengeable privilege of nonfeasance or inadequate performance. But boards are also collegial bodies, that is, collective bodies that have common responsibilities. Although there are social situations in which the outcome of action may be determined by the least moral participant, that cynical view is unlikely to apply to collectivities of persons who have assumed responsibility for the management of charitable funds. A better case could be made for the contrary assumption of unusual influence by those who exhibit the greatest dedication to honorable principles.

It is always proper to look for or speculate about cynical interpretations of social behavior, if for no other reason than to avoid being unduly naive. It is equally proper, however, to entertain the possibility of alternative or additional interpretations. Just as one cannot safely reject some degree of genuinely charitable motivation on the part of donors of funds, we cannot reject some interest in honorable and unrequited service on the part of the custodians of such funds.

Heirs to a long evolutionary development in Anglo-American law, a possibly equally long institutional principle of (select) lay control, and representing a fiduciary principle that is constantly more extensive and diversified in its manifestations, foundation trustees and closely comparable doers of good works exercise honorable responsibilities in private philanthropy. Their contributions of time and wisdom are generally without direct material reward and, indeed, are often unsung except among immediate colleagues. Only a minority achieve public acclaim for their duties, and those few are likely to be sufficiently well-placed occupationally and financially to indulge their interest as valuable

and valued amateurs in private service for public causes. Others serve quietly, with varying degrees of conscientiousness and wisdom. They are, of course, not alone as volunteers in worthy causes,[4] but they do oversee the expenditure of sums that seem small only in comparison with the United States federal budget, and loom large in the life-view of countless researchers, welfare organizations, artists, and producers of culture, not elsewhere classified.

## The Principle of Lay Control

Partly because of the complexity of the law of trusts, to which we shall attend later, lawyers appear with disproportionate frequency both as custodians of private trusts (for named beneficiaries) and as trustees of endowed organizations. Even in the investment trusts of "private" corporations, lawyers have played a prominent if not dominant part. Yet lawyers are not necessarily wise as substitute parents for children, to say nothing of having special knowledge of investments, manufacturing, education, hospital administration, or the support of various activities within the purposes of a foundation. Though professionals in the practice of law, they must commonly be regarded as laymen when serving as trustees.

This brings us to a second major institutional principle involved in trusteeship, the principle of lay control. Just as the legal rules affecting the powers and duties of trustees of philanthropic enterprises represent only part of the general principles of the law of trusts, the principle of lay control has wider application than that represented in trusteeship.

The historic origin of that rather curious organizational principle is obscure. It may well have originated in the ancient and continuing English practice of seeking royal or noble patronage for schools, hospitals, military units, and what not. In the English higher educational system, the office of chancellor is almost purely honorific, the actual chief executive being a vice-chancellor with properly academic credentials.

[4] See, for example, David L. Sills, *The Volunteers* (Glencoe, Ill.: Free Press, 1957). (Publisher now located in New York.)

*The Layman as Cultivated Amateur.* Yet to the degree that such positions are simply symbolic, we are not dealing with lay control. It might be argued, however, that such positions were not always solely honorific, and that many lay advisory and administrative committees and boards meanwhile have persisted in placing trust in the judgment of what might be called the "cultivated amateur." Weinberg, in fact, argues that charitable benefactions in the sixteenth to eighteenth centuries—when lay trusteeship became firmly established—came from prosperous merchants who could not enter the aristocracy, and avoided both the clergy and the aristocracy as supervisors of testamentary funds.[5] Note that in most instances the persons selected for service as trustees, school board members, or similar positions do *not* represent a cross-section of the community, but rather men of some standing or eminence. One should also recall that the principle of lay control was certainly established at a time when adults with an advanced education represented a very small segment of the adult population. In England, especially, the educated minority was likely to be drawn from the nobility, the merchants, the gentry, and the clergy. And very little of that education was technical in the sense of preparation for particular occupations, but rather classical and historical, and, in that sense, liberal. Such education was considered quite proper for public administration in the civil service as well as for elective office. A society that would entrust its government to cultivated amateurs would also draw upon the same limited constituency for other important duties, including the supervision of private trusts and endowments.

At least in English legal evolution, the "secularization of philanthropy," to be discussed subsequently, meant control of charitable benefactions by trustees drawn from the laity (rather than the clergy), chiefly from the same successful mercantile groups that produced most of the bequests. Lay control thus meant freedom from *clerical* control, and supervision of the probity of

[5] Ian Weinberg, personal communication, June 11, 1968. This accords with conclusions of Jordan. See W. K. Jordan, *Philanthropy in England, 1480–1660* (New York: Russell Sage Foundation, 1959), especially p. 247. Jordan attributes to donors . . . "a disposition to vest their endowments securely in trustworthy lay hands. . . ."

trustees passed, with the Reformation, from the ecclesiastical courts to courts in Chancery (proceedings in equity rather than in law, narrowly defined).

> It was then [at the Reformation] that charity in England became an independent institution, with trusteeship as its juridical basis. Instead of making a direct or conditional gift to a religious body the property was given in trust; the donation is administered as a separate patrimony; the trustee is a person trusted by the donor; beneficiaries are all those who fall within the purpose of the gift.[6]

We should note, in passing, that the position of attorneys as trustees is ambiguous with respect to the principle of lay control, for it might be assumed that their technical skills are called upon in matters relating to the limits of discretionary action. Most commonly, however, in well-established organizations such questions are likely to arise rarely, and when they do, it is common practice to rely upon "outside" legal counsel. The disproportionate representation of attorneys among foundation and similar trustees probably arises from a combination of circumstances: (1) Of the "leading" members of the community from which trustees are selected, lawyers share with clergymen a long tradition of public service. (2) For established lawyers, such as senior partners in highly respected firms, maintenance of reputation and income has a very slight if any correlation with the length of the work week spent at strictly technical tasks. (This availability of discretionary time is also true of some clergymen and some university professors.) (3) Somewhat more than incidentally, lawyers are likely to have been involved in establishing foundations. Particularly in the smaller family foundation one or more attorneys are likely to be among the donor's trusted advisers, and when this circumstance is coupled with the ambiguity noted above, their selection is understandable.

The principle of lay control, indeed, penetrates into the heart of the legal and judicial system. Jury trials represent an assertion of the wisdom of the laity, though contesting litigants have

[6] Christian de Wolf, *The Trust and Corresponding Institutions in the Civil Law* (Brussels: Bruylont, 1965), p. 147. I owe this reference, and the general point to which it refers, to Ian Weinberg's suggested revision of this essay, noted in our Preface.

been represented by "learned" counselors, and the proceedings presided over by a "learned" judge. The importance of this judicial procedure was underscored in the early nineteenth century by no less an observer than Alexis de Tocqueville.[7]

*Selection of Suitable Laymen.* The laymen chosen to supervise matters of some public concern are by no means a random sample of adults. In addition to lawyers, bankers and corporate executives are commonly overrepresented. Yet methods of selection differ substantially among various types of organizations. The regents of state universities are commonly named by the governor, though often terms of appointment are staggered so that no governor in a single term can "control" the entire board. Public school boards are commonly elected in the United States, independently of party affiliation and in separate elections (which usually entice a small minority of the qualified electorate into voting). Some organizations substantially dependent on current contributions make contributors the electorate for selecting trustees. At least one foundation with a substantial principal fund assigns voting rights in foundation decisions proportionate to amounts given to the foundation by the donor and his descendants, in units of $1000 per vote.[8]

Private schools and colleges often permit alumni to elect some or all of the trustees, from among their own number, though other, nonalumni trustees may be selected by the board. Some organizations have charters in which the occupants of particular positions—a mayor, a chief judge of a judicial district—name some or all of the governing board. The community foundation generally follows this pattern, but with some further significant features with respect to the functions of trusteeship. Following the precedent set by the first such foundation—the Cleveland Foundation established in 1914—a distinction is drawn between the trustee in the narrow and technical sense, and the distribution committee. Trusteeship is almost uniformly lodged in one

[7] See Alexis de Tocqueville, *Democracy in America*, edited by J. P. Mayer and Max Lerner (New York: Harper & Row, 1966), p. 249.

[8] "Amended Certificate of Incorporation of the Richardson Foundation, Inc.," typescript copy on file at The Foundation Center, New York.

or more banks. The trustee is concerned with the investment management of funds, which are the pooled resources from a variety of donors. The distribution committee is responsible for the allocation of income to charitable causes, and it is the distribution committee that is typically selected by various other boards or individual office-holders acting *ex officio*.[9] Thus the discretionary powers and responsibilities normally held by foundation and other trustees is subdivided in the governance of community foundations. The division is not necessarily sharp, however, since the trustee (the board of directors of a named bank) may be among the selectors of the distribution committee.[10]

The board of trustees of nearly all other endowed foundations is self-perpetuating, that is *cooptive*. (In effect, this is also true of the boards of directors of corporations with widely dispersed equity ownership. Short of a genuine proxy fight, commonly a consequence of the attempt of another corporation or closely linked small group of persons to secure a sufficient—though minority—position to control the naming of a board and therefore to choose salaried executives, the nominal electorate for corporate directors is even more apathetic than the electorate for public offices.)

The cooptive principle means that current trustees choose their own successors. Although the election is collective, a kind of informal code could develop by which a retiring trustee is permitted to name his own successor, subject only to routine ratification by his peers. In any event, a relatively homogeneous group of trustees will generally select new members at least of their own social status, if not better. Against the presumptive advantages of continuity of policies and point of view and of capacity to identify the important intellectual and moral qualities demanded, one must set the potential disadvantages of stuffy conservatism in the face of changing situations.

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[9] See F. Emerson Andrews, *Philanthropic Foundations* (New York: Russell Sage Foundation, 1956), pp. 32–34, 65–66.

[10] See *Ibid.*, Appendix E, for the charter of the Mount Vernon (Ohio) Community Trust. In this instance two banks serve as trustees, and their boards of directors select two of the five members of the distribution committee.

We thus reach a paradox that needs to be explicated and explored. The paradox is that the principle of lay control should keep professional staffs and salaried administrators responsive to the diverse and changing character of constituents, potential beneficiaries, and other public interests served by a philanthropic organization. Yet the pragmatic situation is that the salaried administrative or professional staffs for whom the trustees hold themselves accountable are, in the nature of the case, more likely to know about, and to be attentive to, change than are the part-time amateurs who are the trustees. A self-perpetuating board may well achieve a kind of self-satisfied insularity that almost defies attention to fundamental change in the conditions appropriate for sensible policy.

Unless there is a rather extensive and often informal exchange of information and opinion between salaried officers (university administrators and professors, hospital chiefs, foundation staffs) and trustees, there may well develop a situation in which the laymen seem to be superseding the views of the active practitioners, and the practitioners feel it necessary to line up with the intended beneficiaries against the trustees. Beneficiaries have no legal and little practical access to trustees, but salaried staffs may become their spokesmen.

The deeper-lying paradox is really a simple restatement of the last few paragraphs. The idea of achieving responsibility to public interest through lay control by conscientious trustees has several inherent limitations. (1) Whatever the mode of selection of trustees, there is no certain way to ensure that current trustees are either generally competent or specifically attentive to changing circumstances of operation. (2) Since current trustees are more likely to be representative of their peers and predecessors than of relevant staffs, clients, and constituencies, the principle of lay control may be effectively subverted by the relative immunity of trustees to current accountability as long as broad discretionary limits are not transgressed. (3) The paradox deepens by viewing alternatives. Election of trustees by recognized constituencies (which, like the urban Negro poor, may not recognize themselves as meaningful constituencies), or having guardians named by an elective political official, may aggravate potential difficulties rather than resolving them. There is no reason

to suppose that choices made by the uninformed will be superior to those made by custodians who are at least informed by the past if not anticipating the future.

*Lay Trustees and Professional Staffs.* The system that provides accountability to a lay board for the actions of professional, or at least salaried, officers of organizations is another example of the principle of checks and balances. It would be both surprising and disturbing if quiet consensus uniformly prevailed, for that would deny the basis for having potentially divergent interests weighed in. What is suggested here is that the professional staffs of universities or foundations owe a duty to participate in the "socializing" of new trustees, partly to complement and partly to offset the do's and don'ts they will receive from their fellow overseers.

Boards of trustees are commonly comprised of individuals who are professional, or at least exceptionally successful, each in his own occupation or field of endeavor.[11] Yet the trustees commonly remain laymen in the area of primary interest represented by a school, a church, a charity, a foundation. The nuances of the relations between "professional" staffs and highly selected and therefore unrepresentative lay trustees are highly instructive, though difficult to typify, and even more difficult to quantify.

We can draw some extreme examples or types from extant knowledge, but we should not be so bold as to assign frequency distributions to the types.

One type of trustee-staff relationship is represented by the situation in which a highly competent (perhaps, in his own field, a professional) trustee is hoodwinked into going along with an essentially silly proposal by salaried professionals, on the ground that the professionals must know what they are about. (The extreme example is the school board member or uni-

[11] We did not undertake a new survey of the occupational composition of foundation or other boards of trustees. Casual examination of trustees identified in Marianna O. Lewis, editor, *The Foundation Directory, Edition 3* (New York: published for The Foundation Library Center by Russell Sage Foundation, 1967) reveals the expected predominance of lawyers and business executives. For an earlier survey, see F. Emerson Andrews, *Philanthropic Foundations*, previously cited, pp. 63–91.

versity trustee, who in dealing with educational matters, is given the false assurance of doctrine by professional spokesmen.)

An opposite extreme can be readily found: the lay trustee pretending, perhaps because of his protected position, to be an expert on matters about which he is profoundly ignorant. This situation may display itself in many forms:

Item: A prominent lawyer as trustee assumes that since law is a ubiquitous aspect of social relations, he correctly understands social relations.

Item: A father of several children, all well-behaved and appropriately striving after goals consistent with parental aspirations, assumes that he understands the cross-section of public school children. He runs a successful campaign for the school board.

Item: A college trustee, named in the hope that his wealth from a self-made successful business may in part come to his college, would like the curriculum to be more practical, and especially to emphasize subjects appropriate to a business career.

Item: A trustee, successful in his occupation, has become a fairly knowledgeable amateur, an *aficionado*, of a subject represented by a member of the professional staff. He professes to lack confidence in the professional staff member, for reasons ranging from childish petulance for not having been given suitable deference or welcomed into the limited confraternity of the profession, to a seemingly superior show of technical judgment.

Some morals follow from these only faintly hypothetical examples of trustee-staff relations. The first moral is that the definition of trustee powers and responsibilities cannot end with legal responsibilities. Those responsibilities are notably broad, and therefore notably imprecise. In technical effect, trustees *own* and administer resources for various purposes of public welfare. Yet the trustees are bound in by legal and conventional rules of conduct, for they are obliged to use those resources for broad or stipulated public purposes, but almost never for their own.

The second moral is that the relations among various centers of poorly specified powers and responsibilities is bound to produce tensions. Any social system that would make technical experts accountable to lay supervision in their technical activities

has to have an underlying suspicion of technicians. Yet any social system that would grant broad privileges and immunities to its technicians before any hint of external control sets in has to have a kind of confidence in people who know things.

We began this portion of the essay with an inquiry into the principle of lay control, and we have necessarily come full circle to the question—who's in charge here? The principle of professionalism is so strong that one might guess that it would emerge in triumph. Yet there was invented, a few centuries ago and no doubt for rather different reasons, a system of lay supervision of what might otherwise be considered purely professional concerns. That principle persists, and has a basis in law and lore that is partially represented by the law of trusteeship, though that law is scarcely singular and certainly not without unresolved ambiguities.

## Legal Evolution of Trusteeship

The notion that some members of society may have rights, or deserve concern, without effective means for assuring their proper interests is not a modern invention. Indeed, throughout the human species infants are unable to sustain life unaided, and were they not cared for by others (by biological parents in the vast majority of cases), the species itself would cease to exist. Persons who take, or have thrust upon them, the nurturing of the young thus may be viewed as the primordial type of the trustee. (Whether parents or their substitutes have absolute discretion over the lives and fortunes of their helpless charges is an issue that has been resolved in many ways. Its exploration here would take us too far afield. Suffice it to say that in most "primitive" societies children represent, among other things, a future investment as compensation for current care, and in highly modernized societies, public interest in the young can supersede private control when necessary.)

Various civilizations, ancient or modern, have also recognized formal obligations for persons other than infants who are thought to deserve protection or assistance not directly available to them. Since morally endowed custom widely supported is not readily distinguishable from law in the proper sense of rules

impersonally applied, it is scarcely worthwhile debating whether the care of the weak by the strong is an ancient and widespread legal principle. Laws and customs have varied, and except for the care of the young, variation is more evident than uniformity.

It seems more useful to sketch the direct legal antecedents of contemporary trusteeship. Two types of development in English law are of particular interest. The one may be called the *secularization of philanthropy*, and the other the *depersonalization of trusteeship*. We may well agree with Henry Allen Moe that "religion is the mother of philanthropy."[12] Certainly charity on behalf of the poor and otherwise disadvantaged was a prominent element in Judæo-Christian teaching, and not unknown in the Græco-Roman civilization with which it became combined. And certainly also in the predominantly Christian traditions of the Western world, the church was viewed for hundreds of years not only as itself a worthy direct recipient of gifts for holy purposes (not to mention guilt-assuaging payments for essentially private if other-worldly purposes, such as saying masses for the deceased donor), but also as an agency for redistribution on the behalf of the deserving needy.

*Secularization of Philanthropy.* With the Reformation in England, the supervision of charitable bequests passed from the clerical courts to the Chancellor and the Chancery courts under his supervision. This meant, somewhat more than incidentally, that actions "in equity" were freed from the feudal principles still strongly prevalent in the "common" law courts. Thus property, and that especially meant land, could be "alienated" (bought and sold on the market). This transfer of responsibility also signalized what we have called the secularization of philanthropy. For, as Jordan notes,[13] extensive *private* endowments came to be supervised by lay (and in that sense secular) trustees. Yet the primary political purpose of this change was the assertion of the supremacy of the crown over the church. And that,

[12] Henry Allen Moe, "Notes on the Origin of Philanthropy in Christendom," *Proceedings of the American Philosophical Society*, vol. 105, April 21, 1961.

[13] W. K. Jordan, previously cited, pp. 126–142, 240–250.

in turn, signified an assertion of *public* interest in what we should now call welfare.[14] It follows that one should be cautious in viewing the "welfare state" as a strictly modern invention. Rather, it would appear that what is exceptional, certainly as among various modern countries, and also historically in the Anglo-American legal system, is the appearance of philanthropy that is both public and private and, above all, secular. Such philanthropy is public in the sense that its goals are consistent with widely held values, but private in its management and control of resources. Such philanthropy may also be religious in the very formal and technical sense of being subservient to unquestioned values, and even in the motivational sense of being prompted by explicitly religious motivations. Lines of distinction between underlying motivation and organized sponsorship may not be sharp. Yet it has been common for several centuries to draw a difference, if not an exact distinction, between "humanitarian" purposes and purposes specific to a particular religious organization. Philanthropy refers to "love of man," and not exclusively Presbyterian or Roman Catholic man, and if philanthropy has not distributed benefits with a perfectly equal, or even equitable, hand, part of the benefits certainly have been distributed without examining into the religious affiliation of beneficiaries or successful supplicants for foundation grants. Indeed, at least part of philanthropy has been secular concerning organized religion but also secular concerning organized polities; for the rights and privileges of citizens may be broader than the proper concerns of religious groups, but still narrower than (or at least different from) the claims of persons who appeal to values that cut across such identifications, such as scientific researchers, wherever located, or the poor, everywhere.

The secularization of philanthropy took place over a long period, and is and probably will remain partial. Aside from works of welfare supported by taxes collected by a secular state, a considerable portion of private charitable funds go to, and some of them through, religious bodies.[15] What is of immediate moment

[14] I owe this interpretation to Ian Weinberg from the unpublished essay noted in the Preface to this volume.

[15] See F. Emerson Andrews, *Philanthropic Giving* (New York: Russell Sage Foundation, 1950), pp. 73, 172–187.

is that portion of private philanthropy that is independent of constituted religious orders.

*Depersonalization of Trusteeship.* It is in the management of private philanthropy (and especially philanthropic endowments) that the "depersonalization of trusteeship" assumes significance.

From perhaps as early as the thirteenth century testamentary rights were clearly established,[16] with wills coming under the supervision of ecclesiastical courts. After the Reformation, the same powers were taken over by the royal courts, but specifically by the Chancery courts, not those of the "common law," which were exceptionally bound by customary (and therefore usually feudal) law. Moe[17] argues that the famous Elizabethan statutes on charitable trusts recognized a development that had been going on for some time: he traces it to William Langland's "The Vision of Piers the Plowman" of the fourteenth century. That development was a change of emphasis from strictly pious uses (masses for the dead, tapers for altars) to works of public welfare.

What were subsequently to be regarded as ends worthy of charitable gifts or bequests were laid out in the famous Elizabethan Statute of Charitable Uses.[18]

The preamble to the Statute noted that sovereigns and other well-disposed persons were making bequests, and gave examples:

> . . . some for releife of aged impotent and poore people, some for maintenance of sicke and maymed souldiers and marriners, schooles of learninge, free schooles and schollers in universities, some for repaire of bridges portes havens causewaies churches seabankes and highwaies, some for education and preferments of orphans, some for or towardes reliefe stocke or maintenance for howses of correction, some for mariages of poore maides, some for supportacion ayde and helpe of younge tradesmen, handiecraftesmen and persons decayed, and others for releife

[16] See Henry Allen Moe, "Notes on the Origin of Philanthropy in Christendom," previously cited.

[17] Henry Allen Moe, "The Vision of Piers the Plowman and the Law of Foundations," *Proceedings of the American Philosophical Society*, vol. 102, August 27, 1958, pp. 371–375.

[18] My source is W. K. Jordan, previously cited, at pp. 112–113. The particular Statute is cited, in legal fashion, as 43 Elizabeth, c.4 (1601).

> or redemption of prisoners or captives, and for aide or ease of any poore inhabitants concerning paymente of fifteenes, [and] settinge out of souldiers and other taxes.

(It is of some wry interest that worthy ends not enumerated in the Statute have been held to be invalid charitable trusts by some courts, though in context the original entries were clearly examples, and that bequests that use such terms as "philanthropic" or "benevolent," even if (redundantly) linked with "charitable" in the language of a will have been held to be too broad to qualify as proper charitable trusts. It is perhaps not unreasonably parochial to note that that kind of nonsense is less common in American jurisdictions than in England.[19] This may help to explain the rather radically reduced discretion of the courts in philanthropic dispositions now prevailing in England, discussed a little later.)

Actions in Chancery courts were actions "in equity" rather than "in law." This had the effect (and in part the purpose) not only of secularizing the administration of charitable endowments, but also of removing them from the precedents of feudal custom. That the removal was not total is symbolized by references to trustees as feoffees[20] (meaning originally a conditional grant of property—normally land—for the use of another in return for various feudal duties). The distinction between law and equity has lost most of its significance with the establishment of courts of general jurisdiction. Moreover, precedent came to have the same importance in equitable actions as those actions technically "in law."

It would have been pleasant, and properly consoling to the sociologist seeking common origins as well as common structures and outcomes, had there been a rather unitary law of trusts in the Anglo-American legal system. That law, if sensible, would have had to rest on a common fiduciary principle: wise and prudent men would attend to the properties of widows, of orphans, and other incompetent charges of a deceased man of

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[19] See Marion R. Fremont-Smith, *Foundations and Government: State and Federal Law and Supervision* (New York: Russell Sage Foundation, 1965), especially pp. 55–58.

[20] See W. K. Jordan, previously cited, pp. 113, 219, and *passim.*

substance; men of alleged business acumen and unusual opportunities to gain high returns would accept, indeed welcome, contributions of other investors, and establish "trusts" for collective investment; men of substance and charitable impulse would establish perpetual funds for various worthy causes, and bind certain trusted individuals and their chosen successors to carry out their responsibilities.

The law of trusts is not, however, wholly unified; there are separate and still ambiguous bodies of legal regulations relating to fiduciary responsibilities. For purposes of quick (though not absolutely reliable) identification, we may distinguish strictly private trusts (for named beneficiaries), trusts that have a charitable intent (without named beneficiaries), and trusts that simply legalize pooled investments for nothing more laudable than the mutual financial benefit of participants. Had those rules evolved from some common legal or customary source, reference to the regulations as *the law* of trusts would make some sense. What is common to these forms of trusts is that all concern fiduciary relationships. Those relations, we have seen, are considerably broader than what is conventionally treated as the law of trusts.

Both in origin and current use, the closest relation is that between private and charitable trusts, which do not differ in the duties of trustees but rather in the mode of enforcement and in certain exemptions for charitable trusts that we shall explore. Since we are interested in the current conduct of charitable trusts, peculiarities of historical origin are consequential only if they have explanatory value in current practice. Genetic (that is, historical) explanations of current policies and procedures would have little value if they stopped at that. Forms may persist while their original rationale has become meaningless. In the law of trusteeship persistence is real, and thus guides current action.

*Public Supervision of Private Trusts.* A leading legal problem, early and late, has been that of public supervision of charitable trusts.[21] The Chancery courts could themselves initiate action if

[21] The leading authority on the law of trusts is Austin W. Scott, *The Law*

trustees were failing in their duties, or if the purposes of the trust were no longer in the public interest. In most American jurisdictions the courts retain that authority. However, courts as such generally lack investigatory staffs, and the prime supervisory duty became that of the attorney general. Here a further difficulty arises, particularly in the United States. Attorneys general also have other duties, and unless the common-law principle has been reaffirmed by statute, many of them may be too inadequately versed in the law of charitable trusts to perform this responsibility. Getting the attention of the attorney general is likely to be difficult, for the layman, too, is obviously ignorant of the law. In the case of charitable trusts and corporations, with unnamed beneficiaries, there are likely to be no true "parties at interest," even if all concerned were suitably knowledgeable and proficient.

Attempts to tighten and rationalize public supervision of charitable trusts have produced a pair of anomalies. In England, the home of the common law, and of Chancery courts for actions in equity, much of the supervision of charitable trusts has passed from the attorney general and courts to administrative agencies: the Ministry of Education and the Charity Commissioners.[22] Both of these agencies have considerable discretionary authority in changing the donor's purposes, in combining endowments and the like without judicial *cy pres* action. (The *cy pres* doctrine is to the effect that if the purposes of a trust cannot be fulfilled, or sensibly fulfilled, or would be against public interest, the trustees or the attorney general must present to the court a "scheme" that will be a worthy purpose as close as possible to the donor's original intent.) Not all American legal jurisdictions even recognize the *cy pres* doctrine, though in some the doctrine of *deviation* has been extended to include a change of purpose. Technically,

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*of Trusts*, 2nd ed. (Boston: Little, Brown & Co., 1956). A much more concise review of the law of charitable trusts is provided by Marion R. Fremont-Smith, previously cited.

[22] Our source for this interpretation is again the work of Marion R. Fremont-Smith. The current English legislation and practice, some of it dating only since a legislative reform in 1960, incorporates many recommendations of a Parliamentary Committee, chaired by Lord Nathan. See Committee on the Law and Practice relating to Charitable Trusts, *Report*, Cmd. 8710 (London: H. M. Stationery Office, 1952).

*cy pres* refers to a change of purpose of a charitable trust, whereas deviation refers to some administrative provision of the trust instrument (such as number and selection of trustees, investments permitted, and the like).[23] A good example of a vain appeal to the principle of deviation was provided by the attempt of the trustees of The Duke Endowment to be relieved of the requirement of keeping its original investments in the Duke Power Company. The North Carolina courts[24] held that the relative hardship of being barred from possibly more advantageous investments was not great enough to warrant a deviation.

Among those jurisdictions where the courts at least nominally recognize the *cy pres* doctrine, or will extend the doctrine of deviation to include purpose, there is a substantial variation in the willingness of the courts actually to exercise discretionary powers. Strict construction, both as to purpose and as to procedure, is the general rule. In American practice, as in England, court action is relatively rare, given the great number of charitable trusts of all sorts. The American anomaly is that the principal policeman of foundations has become a tax-collecting agency, the Internal Revenue Service. That agency, too, has other duties, which are likely to be far more rewarding in terms of tax revenues, and, in any event, the privilege of tax exemption is not the crucial issue with respect to most charitable foundations. Abuse of tax exemption (such as engaging in an unrelated business) is among the least of the ways foundations and similar organizations may fail in proper performance of their philanthropic missions.

Some early difficulties in the clarification of the law of charitable trusts are of sufficient continuing relevance to warrant brief examination. One potential difficulty has been the "rule against perpetuities." According to this rule, a private trust for specified beneficiaries may not run more than 21 years after the death of the last beneficiary living at the time the trust is established. The rule, which is related to the mortmain rules next discussed, is technically that "no real property interest shall vest

[23] See Marion R. Fremont-Smith, previously cited, pp. 78–79, 91–93.

[24] The final decision is represented in Cocke v. Duke University 260, N.C. 1, 131 S.E. 2d 909 (1963).

after 21 years after the end of a life in being at the creation of the interest." It is not precisely true that charitable trusts and foundations are exempt from the rule, for the rule technically is not against the duration of a trust but against remoteness of vesting. Yet the nuances of the law are such that it is approximately true that charitable perpetuities are exempt, and certainly true that there is nothing illegal about self-perpetuating boards of trustees.[25] The presumed rationale for the rule is the avoidance of perpetual trusts in family lines. The rule is waived for charitable trusts for unnamed beneficiaries. Here the presumed safeguards are public supervision, including *cy pres* action if warranted.

A second difficulty in legal clarification might be called the "specter of mortmain," that is, the permanent removal of property from the market and its use determined by a "dead hand." Yet the safeguards already noted also apply here. Moreover, the perceived evil of mortmain originally was the perpetual removal of *land* from the market, and its holding by *corporations*. The post-Reformation charitable bequests tended to be money and intangibles (though land-rents might also be part of a bequest). Trustees were often given the discretionary power to buy and sell properties or equities, and courts could order release from specific limitations by the donor.[26]

The discretion of trustees is limited by several enduring principles. Perhaps the most basic one is the duty of *loyalty*. Loyalty is due to the *terms* of the trust and thus, at least inferentially and indirectly, to the donor. Loyalty is also due to the *purposes* of the trust and thus, again at least inferentially and indirectly, to the intended beneficiaries. (Note, however, that the beneficiaries, being unnamed at least as individuals, rarely have a basis for insisting on loyal performance. The proper conduct of the trustee comes from his own integrity, his responsibility to peers, or from outside authority.)

The further implication of the duty of loyalty is the avoidance of self-serving at the expense of the intended beneficiaries.

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[25] See Robert J. Lynn, "Perpetuities: The Duration of Charitable Funds and Foundations," *UCLA Law Review*, vol. 13, May, 1966, pp. 1074–1099.

[26] See W. K. Jordan, previously cited, p. 121.

There are, of course, certain gray areas of conduct where mild degrees of self-serving do not effectively damage the interests of beneficiaries. But, unlike the director of a business corporation, the trustee is expected to have a *disinterested* dedication to his duties. What we encounter, then, is the duty of loyalty to a charitable principle.

For most foundations (as well as the endowments of educational and other organizations) the duty of loyalty applies to the collectivity of trustees *in perpetuity*. Thus after the initial trustees have been replaced, their successors are expected to be backward-looking by being attentive to precedent, but also forward-looking with a view to adaptation to changing conditions.

Somewhat more than incidentally, the idea of a perpetual endowment is still subject to query, for it does raise some time-honored questions: (a) the problem, akin to mortmain, that properties held in trust may not be fully subject to market transfers; (b) the question of obsolescence of functions, and thus the problem of getting *cy pres* action; (c) the subtler question as to whether it is reasonable to permit a kind of worldly immortality to donors, laying upon future generations of trustees the duty of carrying out of purposes that may still possibly be commendable but increasingly unimportant; and (d) the problem that the rapid growth of foundations and their assets, along with other perpetuities accumulated by colleges and other organizations, may lead to unreasonable economic concentration—the specter of mortmain once more.

The wider the discretion accorded to trustees both in the management of resources and in the selection of beneficiaries, the greater the importance of another principle of proper conduct by trustees: they have the duty to act *prudently*. Known in law as the "prudent man doctrine," the idea is simply that trustees should conduct foundation or similar affairs with circumspection. They are supposed to avoid excesses of speculative risks, excesses of caution, and even excesses of loyalty to the donor's original wisdom. Obviously, criteria of prudence may vary in time and place, as well as in the judgment of conscientious individuals. The fact that boards of trustees are collegial bodies has at least the potential merit of a collective determination of what constitutes prudence. (It may be noted in passing

that the authority and responsibilities of foundation trustees are not substantially different whether the foundation is organized as a charitable trust, strictly speaking, or as a charitable corporation.[27] Since charitable corporations have no stockholders, the accountabilities of their trustees or directors remain public, not private.)

There remain some critical issues in the law and practice of trusteeship. One set of issues relates to the assurance of responsible stewardship. Since trustees are normally organized into collegia of various sizes, gross misfeasance or malfeasance would require an improbable conspiracy to go unchallenged. Nonfeasance is more difficult to deal with, for that may be the result of mere lethargy and neglect. And since potential beneficiaries normally have no standing in court, about the only course of action available to someone knowledgeable and aggrieved at inaction or inadequate action would be an appeal to the attorney general to intercede. He may be too busy, or too ignorant, to comply with the request.

The stewardship of foundation trustees relates not alone to the management of assets and the assurance of income for current grants and operations. Within the discretionary limits permitted by the foundation's charter and relevant laws, trustees are also responsible for disposing of the income. The prudent man doctrine relates to property management, not to expenditures of income. Thus trustees of unexceptionable prudence in the technical sense may still allow (or even foster) expenditure of income on trivial or frivolous projects. The restraints on such irresponsibility derive more from collective judgment (often involving salaried staff as well as trustees) than from any realistic threat of suit or prosecution. It is the principle of *loyalty* to honorable and charitable purposes that applies to sensible expenditures. How the decisions are made is discussed in some detail in the accompanying essay by Dr. Young.

A further aspect of responsible stewardship is the duty, again shared by trustees and the attorney general, to keep the uses of an endowment from becoming impossible or mischievous. In the United States the attorneys general have commonly failed

[27] See Marion R. Fremont-Smith, previously cited, especially pp. 154–157.

in this duty, except in a few jurisdictions (notably California and New York) where definite statutory provision has been made for regular reporting on the part of foundations. Trustees themselves may be laggard in their responsibility to seek permission to update the purposes for which funds may be responsibly used. And American courts have perhaps too much respect for the whims of donors and too little respect for the public interest, which alone would justify original tax exemptions and the current and enduring management of perpetual funds in a changing world.

Critical as one may be of the performance of some trustees, and even of some boards of trustees, one must note that their record of public-spirited (or philanthropic) service has been remarkable. Jordan, writing of some long-established charitable trusts in England, notes some failures of trustees to keep current with economic (or other) changes, yet on net judgment makes an appraisal that deserves partial quotation:

> This large group of trusts is in average terms well over three centuries old. For the most part, the trust instruments were drawn before the law of charitable trusts was well formulated and before men of the western world had gained much experience in the administration of this extraordinary legal and social instrumentality. Most of these trusts were relatively quite small, many very small indeed, and most of them were entrusted to laymen possessed of no particular administrative experience or financial sagacity. None the less, so important has society conceived their purposes to be, so competent were the safeguards erected by the Elizabethan legislation, and so faithful has been the unbroken succession of unpaid and almost unnoticed feoffees that over this long span of time only 174 of the total number of these trusts [2121] have been lost, through negligence, or malfeasance, or merger with other funds. This means, of course, that only 8 per cent of these trusts have disappeared; that perpetuity has in fact been largely achieved even for the smallest and most eccentric of these many endowments. . . .[28]
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> But fire, pestilence, wars, and panics have not over a long span of three centuries seriously impeded good and faithful men as they have discharged with brilliance and steady purposefulness social burdens laid on them by men they never

[28] See W. K. Jordan, previously cited, p. 123.

> knew, but who like them were charged with a vision of a fairer habitation for all mankind.[29]

Trusteeship, resting upon a set of legal principles and restraints that have evolved over several centuries, also represents special applications of a broader class of fiduciary relations and the remarkable principle of lay control over matters of public interest and welfare.

Given the severe restraints on self-dealing, the minimal indirect benefits to business or professional careers from trustee service, the generally nominal or nonexistent payment for service, one must credit the assumption, argued previously, that trustees, too, are likely to be charitably disposed. And the generally effective operation of this remarkable combination of institutional principles clearly owes more to the conscientious and mutually reinforced sharing of these principles than to formal regulation and supervision.

Trusteeship, uniting distinct but compatible institutional principles, preserves an area of discretionary social action that is in considerable measure independent of both the marketplace and the political considerations appropriate to the state. It is a curious, and on close examination, a generally heartening phenomenon.

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[29] *Ibid.*, p. 125.