THE ROBERT L. LEVINE DISTINGUISHED LECTURE

MYTH AND REALITY OF UNIVERSITY TRUSTEESHIP IN THE POST-ENRON ERA

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INTRODUCTION

My subject this evening is university governance and the role of trustees in the private American university. My interest in this subject is more than merely "academic." Before my appointment to the federal bench I served as the first General Counsel of Yale University. I also have had the honor and pleasure of serving for more than thirty years as a trustee of several private universities.

A full appreciation of university trusteeship would require consideration of a number of important questions that I must leave for another day: Who becomes a trustee of our private universities? How and why are such trustees selected? How long should such trustees serve in order to be optimally useful? How are boards of trustees organized to do their work (or not to do their work)?

These questions are important and deserve extended consideration, but in the time available to me in a single lecture, I will focus on the institutional role of a board of trustees within the structure of the modern American private university.

My reflections on this subject are necessarily informed by relevant legal developments of the past decade, namely, the collapse of Enron and the

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* Judge, U.S. Court of Appeals for the Second Circuit. A.B., Columbia College; J.D., Yale Law School; M.Litt. (International Law), University of Cambridge. My lecture is based on the perspective of three decades of experience as a university trustee—at Fordham University (1974–77), Colgate University (1987–90), Yale University (1987–99), and Columbia University (2000–present) and my experience as General Counsel of Yale University (1975–79). I am grateful to Dean William Treanor and the faculty for inviting me and especially to Professor Daniel Richman, who arranged my visit. It is an honor to deliver one of the series of lectures named for Robert L. Levine, whose exemplary career at the Bar and in business is a justifiable source of pride to his law school, and an honor also to be listed among previous Levine lecturers, including Jerry Mashaw, Saul Levmore, and Louis Henkin. I am grateful to my law clerks Andrew DeFillippis and Alison Weir for their editorial assistance.

passage and implementation of the Sarbanes-Oxley Act of 2002.[1] The failures leading to Enron's collapse were widely believed to be failures of corporate oversight—more specifically, failures in the exercise of oversight by boards of directors. But the proposition that Enron's directors reasonably could have been expected to perform differently, given the information available to them, is controversial. And the legislative reaction to Enron and other corporate scandals—principally, the Sarbanes-Oxley Act, with its vast increase in the cost of compliance and doing business—has been subjected to significant criticism by commentators and public figures across the political spectrum.[2] Because universities, like business corporations, have governing boards, and because those boards are organized for legal purposes as corporations, I think it is worth pondering whether recent calls for increased accountability on Wall Street should have some resonance in the ivory tower as well.

Let me say by way of both foundation and disclaimer: I offer today neither theory nor analysis based on empirical research, but rather, some impressionistic perspectives based in large measure on personal experience and observation, as well as my understanding of the law governing these institutions. My experience and observations are limited to a small subset of institutions, including one small liberal arts college and three larger universities. I believe that the governance of public universities is substantially different. For better and for worse, public universities are embedded in the structures of state government, and thus are more frequently subject to democratic political oversight.

I note for the proverbial record that I do not rely on my experiences in any particular organization for my observations here. As they say in movies, any similarity to real persons (or real trustees), living or dead, is entirely coincidental and not intended by the author.

It often has been observed that all cultures live by myths and that those myths are often based at least partially in reality. The anthropologist Bronislaw Malinowski famously observed that "[m]yth is . . . an indispensable ingredient of all culture . . . constantly regenerated; every

1. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28, 29 U.S.C.).

2. For an example of scholarly skepticism about the Sarbanes-Oxley's corporate governance provisions, see Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 Yale L.J. 1521 (2005). Professor Romano argues that the Act had "mismatch[ed] means and ends" and suggests that provisions such as those (1) requiring independent audit committees, (2) restricting purchases of non-auditing services from auditors, and (3) requiring executive certification of financial statements "should be stripped of their mandatory force and rendered optional." *Id.* at 1529, 1533, 1544, 1585; *see also* Greg Ip, Kara Scannell & Deborah Solomon, *Panel Urges Relaxing Rules for Oversight*, Wall St. J., Nov. 30, 2006, at C1 (describing calls for reexamination of post-Enron reforms by business leaders and government officials); Charles E. Schumer & Michael R. Bloomberg, *To Save New York, Learn from London*, Wall St. J., Nov. 1, 2006, at A29 (arguing that the post–Sarbanes-Oxley regulatory climate threatens New York's preeminence in the financial sector by burdening corporations and encouraging them to move overseas).

historical change creates its mythology, which is . . . but indirectly related to historical fact."[3] Malinowski observed that "[m]yth is a constant by-product of living faith, which is in need of miracles; [a by-product] of sociological status, which demands precedent; [and a by-product] of moral rule, which requires sanction."[4]

The central myth of American private university trusteeship is this: The boards of private universities play a significant role in the day-to-day governance of their institutions, and they are concerned with the achievement of measurable goals. This myth reflects the high regard in which we tend to hold universities and, perhaps by extension, those who are said to govern them.

However, more than thirty years as a trustee of private universities in the United States leads me to this simple conclusion about the governing boards of such institutions: These governing boards govern very little. Except for approving annual budgets submitted by the university administration in omnibus form and supporting projects by their financial largesse, trustees play no role, or a very limited role, in major decisions that shape and define the vital purposes of a university. They play no role in deciding who will teach students, or what they will be taught, or shaping programs of research and related activities using the university's resources.

In approaching a discussion of the problems of university governance, we do well to recall that, however serious its problems in the past and in the present, higher education in America has been hugely successful, and the most renowned private universities have been a large part of that success. Indeed, these private universities remain renowned precisely because of their success.

That said, the concerns over the past several decades of a wide range of observers about the underachievement of our colleges and universities and the serious erosion of academic standards are, in my view, entirely and properly justified as a subject of public inquiry.

Some of the more notable recent critics, like Derek Bok, cannot be easily dismissed. After all, critics like Bok have had the distinction of actually presiding over our most distinguished universities during the very time of serious decline of intellectual standards that they now acknowledge and deplore.[5]

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3. *See, e.g.*, Bronislaw Malinowski, Myth in Primitive Psychology 92 (1926).

4. *Id.*; *see also id.* at 18 (describing myth as a "living reality"). Indeed, the legal profession also relies on certain indispensable myths, which inform the law and our understanding of it. *See, e.g.*, Lon Fuller, Legal Fictions 4–5 (1967) (calling the concept of legal fiction a "skeleton in the family of the law [that should] be taken from its closet and examined thoroughly").

5. For examples of criticism by former university administrators of the decline in academic quality and standards at private universities, see Derek Bok, Our Underachieving Colleges: A Candid Look at How Much Students Learn and Why They Should Be Learning More (2006) and Harry R. Lewis, Excellence Without a Soul: How a Great University Forgot Education (2006).

In a recent book, Bok laments the decline in intellectual standards and discipline. He attributes much of the responsibility to undergraduate curricula, curricula that "foster[] an impression [of being] little more than a vast smorgasbord," an intellectual smorgasbord that Professor Daniel Bell rightly asserts is "an admission of intellectual defeat."[6]

I. MYTH VERSUS REALITY

To better understand the gulf between the myth and the reality of American university trusteeship, let us turn first to the most important talent scout and patron of presidents of our most renowned universities in the past three decades, William Bowen.[7]

Bowen has written with elegance and high-mindedness of the wide range of areas in which university trustees (and board members of other organizations) are regarded as playing some significant role. These include guiding the organization's mission,[8] reviewing the organization's performance,[9] raising revenue,[10] policy making,[11] strategic planning,[12] legitimizing policy decisions,[13] mobilizing support for decisions,[14] giving advice to management,[15] and remaining vigilant.[16]

Bowen, however, recognizes that, in each of these areas, university boards often fail to discharge their duties, particularly when compared to the boards of business corporations.[17]

Bowen's friend and colleague, and his sometime coauthor, the redoubtable Derek Bok, even has suggested that trustees have governance responsibilities to those outside the university gates. Bok argues that "[the trustees'] function is not merely to interpret and justify the university to the larger society but to convey the legitimate needs of that society to the institutions they serve and to inquire whether more imaginative, more effective responses should be forthcoming."[18]

6. Bok, *supra* note 5 at 262 (quoting Daniel Bell, The Reforming of General Education: The Columbia College Experience in Its National Setting 291 (Anchor ed. 1968) (1966)).

7. Having successfully served as the president of one major American university (Princeton) from 1972 until 1988, and as president of the Mellon Foundation from 1988 until 2006, William Bowen has helped to identify, nurture, and recruit many leaders of private American universities. *Cf.* Princeton Univ., The Presidents of Princeton University (2005), http://www.princeton.edu/pr/facts/presidents/; Andrew W. Mellon Found., History: Overview, *http://www.mellon.org/about_foundation/history* (last visited Oct. 5, 2007).

8. William G. Bowen, Inside the Boardroom: Governance by Directors and Trustees 20, 23 (1994).

9. *Id.* at 20–23.

10. *Id.* at 20, 24–26.

11. *Id.* at 26.

12. *Id.* at 27–31.

13. *Id.* at 31–32.

14. *Id.* at 33.

15. *Id.*

16. *Id.* at 34–35.

17. *See id.* at 24.

18. Derek Bok, Universities and the Future of America 112 (1990).

The broad and robust conception of university trusteeship, put forth in cautiously aspirational terms by Bowen and Bok, has been repeated and embraced (but with fewer cautions) by university presidents across the land. Their stake in the myth of university trusteeship is not difficult to explain: The one thing any university president fully appreciates is that he or she became president as a result of the formal action of the trustees—who retain the power to fire as well as the power to hire and who themselves are inclined to believe the myth of broad-ranging trustee authority.

In addition, an astute president recognizes the usefulness of the trusteeship myth as a management tool—the trustees are (to borrow Holmes's familiar image) a "brooding omnipresence" that may be invoked by a president to explain to various university constituencies, in socially acceptable terms, why a president is unable to agree with a particular proposal or action. Indeed, this indirect and subtle use of the trustees by university presidents, to veto or modify proposed actions, rests on one of the most significant vestigial powers of trustees—the power to override administrators by declining to approve a particular course of action.

The myth of university trusteeship is also sustained by the notion, embraced by Richard Posner and others, that universities are fundamentally business corporations minus the profits and the dividends. Posner has written that "[w]hat 'not for profit' means in the university world is simply that a university's surplus . . . does not go to shareholders but is instead added to endowment or invested in new projects . . . ."[19]

Posner is correct that university corporations and business corporations are otherwise rather similar, but this difference is of great consequence. It is shareholders and their goals that provide a degree of oversight and accountability in the case of a business corporation. Shareholders make sure that the attention of corporate executives is appropriately focused on their primary goals—that is to say, maximizing the proverbial bottom line. Because universities have no stockholders and no true bottom line, but only a broad and varied community of so-called "stakeholders,"[20] universities are not simply business corporations minus the profits and the dividends. Universities are business corporations minus the profits and dividends and minus oversight and accountability.

19. Richard A. Posner, *The University as Business*, Atlantic Monthly, June 2002, at 21, 21 (emphasis added).

20. "Stakeholders" is a term much in fashion in some quarters, and is arguably mischievous when used in the context of for-profit entities—a way of obscuring the fundamental obligations to the shareholders of a business enterprise and of suggesting that others might have an equal claim to the duty of loyalty imposed by law in favor of shareholders. *See, e.g.*, Thomas Donaldson & Lee E. Preston, *The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications*, 20 Acad. Mgmt. Rev. 65, 81–82 (1995) (describing how corporate boards are responsible to a class of stakeholders broader than shareholders). But this word may have its legitimate uses in the realm of not-for-profit institutions, where there are no shareholders and where, by definition, profit and the distribution of earnings are not corporate objectives.

If trustees do not govern the affairs of a university in any meaningful sense, who does?

Of course, the real power in any university is, for better and for worse, the faculty. At the founding of our earliest colleges in the seventeenth and eighteenth centuries, faculty members governed the affairs of those institutions—that is to say, the governing boards were made up entirely of faculty members.[21] Today, the faculty's authority is exercised separately from, and even in spite of, the board's formally prescribed authority. Regardless of the role of the trustees as legal representatives of the university in its dealings with external forces, it is still the faculty that actually governs. Indeed, it could not be otherwise—but this reality may tend to confuse donors and other caring observers who may not fully understand that, as a practical matter, their benefactions will be managed over time by tenured professors, whose decisions will be far beyond the reach or ken of outsiders. As Bowen himself admits, "[B]oards almost never 'make policy' in any thoroughgoing way, although that is one of the responsibilities frequently ascribed to them."[22]

In other words, trustees may "legitimize" policy decisions, but these decisions are effectively made by others, only rarely influenced by the sentiments or the know-how of trustees. In practice, in the past century the governance and oversight roles of university trustees have been sharply limited by practice that has hardened into tradition and by principles of free

21. Initially modeled on their medieval British and European counterparts, our oldest colleges and universities until the late nineteenth century had governing boards consisting of trustees who were faculty members and/or clergymen drawn from their founding religious organizations. These clergymen and faculty members were deeply conversant with the circumscribed curriculum, teaching, and research at their institutions, and they were fully capable of exercising independent judgments on the academic questions that might come before a governing board. *See* George Wilson Pierson, Yale College: An Educational History, 1871–1921, at 61 (1952); *see also* Columbia Univ., The Role of the Trustees of Columbia University: The Report of the Special Trustees Committee Adopted by the Trustees (1957).

The growth and evolution of these institutions into the centers of secular learning of the current era—universities committed to education designed to meet the needs of an evolving social order—required expansion of the base of financial support and stimulated the movement toward greater participation of alumni and other independent trustees in the governance of these universities. As Professor Pierson observed of Yale's movement from Congregationalist college to modern university in the late nineteenth century, "There were those who felt that such growth was impossible under religious control. Ministers of the gospel were thought to be too narrow and dogmatic or no longer capable of raising the necessary funds." Pierson, *supra*, at 61. As Harvard President Charles W. Eliot remarked in 1876, "A University [could not] be built upon a sect." *Id.*; *see also* Kushal Dave & Una Au, *Yale Corporation at 300: Town or Gown?*, Yale Herald, Oct. 5, 2001, at 5 (noting that in 1870, W.W. Phelps, class of 1860, gave a speech criticizing the "reactionary" leadership of Yale, prompting the Connecticut legislature to replace the six trustee seats given to the six most senior state senators with seats designated for elected alumni).

22. Bowen, *supra* note 8, at 26.

speech and academic freedom that protect and empower the tenured faculty.[23]

The faculty is not merely one more stakeholder in a university. It is the mandarin class of every great American university, governing (with or without unions, with or without faculty senates) because it is indispensable and because members of the faculty are the only stakeholders who are permanent. As one insightful provost said to me long ago, "Students come and go; untenured faculty come and go; administrators come and go; presidents come and go; trustees come and go. Only we, the tenured faculty, are here permanently."[24]

At the heart of faculty power are certain university freedoms that account for the vitality, success, and influence of higher education in the Western world, and especially in the United States, and which even the severest critics of the modern American university would not wish to challenge or diminish.

These freedoms are well summarized by Justice Felix Frankfurter, himself a former faculty member at Harvard, as the freedom of a university "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[25]

These freedoms of the academy are, first and foremost, freedom from government intervention or coercion. Over time, this doctrine has been invoked by university faculties and administrators as freedom not only from

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23. *See id.*; Stephen H. Balch, *The Antidote to Academic Orthodoxy*, Chron. of Higher Educ., Apr. 23, 2004, at B7 ("Between the two world wars . . . colleges and universities effected a wholesale transfer of intellectual power from trustees and presidents to specialized faculties, wherein reason was presumed to reside. Among the incidents of that transfer were the establishment of tenure as the normative employment practice and the relegation of boards and presidents to no more than an attenuated oversight of academic hiring and curriculum."); *see also*, Vega v. Miller, 273 F.3d 460 (2d Cir. 2001) (granting qualified immunity to administrators at the New York Maritime College for discharging nontenured faculty members for allegedly inappropriate statements made in class); *id.* at 471–75 (Cabranes, J., dissenting) (noting the dangers of allowing termination of professors who "reach[] a topic that some college administrator . . . believes is . . . beyond the 'reasonable bounds of discourse'").

24. Understandably, and unavoidably, the tenured faculty of our private universities do not generally regard themselves as employees at all, except when they complain about some financial policy of the central administration. Indeed, our labor laws recognize the reality of faculty power by defining tenured faculty as "management." *See, e.g.*, Nat'l Labor Relations Bd. v. Yeshiva Univ., 444 U.S. 672 (1980) (holding that faculty's role is managerial in nature); *cf.* Nat'l Labor Relations Bd. v. Cooper Union for Advancement of Sci. and Art, 783 F.2d 29 (2d Cir. 1986) (noting that the faculty's managerial role did not include control over nonteaching staff); Brown Univ. v. Int'l Union, No. 1-RC-21368 (N.L.R.B. July 13, 2004) (holding that graduate students are not university employees for the purposes of federal labor laws). The mission and tenure of the faculty leads them to celebrate the "medieval truth" that, in the words of one preeminent university president who knew exactly what faculty liked to hear, "the professors *are* the university." *See* Peter Gay, Op-Ed., *The New Yale President's Professors*, N.Y. Times, Dec. 21, 1977, at A21 (quoting former President Kingman Brewster Jr. of Yale).

25. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (internal quotation marks omitted).

government regulation, but also from any meaningful oversight by university trustees.

The freedom from meaningful oversight has meant that, apart from the appointment of a president and (perhaps) some small number of nonacademic officers immediately under the president, trustees play no significant substantive role in the appointment of the key actors in a university—its faculty, deans, and directors of academic programs and student affairs.

There is a surface similarity here to business corporations. After all, a board of directors of a public business corporation would not be expected to be involved in the appointment of a director of marketing or the head of procurement.

But the difference is clear: There is no "bottom line" to serve as a meaningful measurement of the success of units of a university, and few if any university trustees are able to understand or evaluate the work and progress of upper-tier university officials who do not regularly interact with trustees.

In these matters, trustees at most confirm or ratify by formal action the recommendations of faculty and decanal authorities. Trustees rarely, if ever, even ask questions for their general information about the qualifications of the appointees that they are about to confirm to tenured positions or to positions of academic leadership. And if they were to ask such questions, or if they ever actually turned down a candidate for an academic appointment (say, on the basis of articulable institutional concerns), the university likely would be thrown into turmoil. The trustees would surely be charged by national organizations of faculty with violating sacred norms of the academy and maybe even violating freedoms secured by the Bill of Rights.[26]

Indeed, trustees play no significant role even on major questions relating to the external relations of universities to the government that subsidizes them in so many ways, for example, whether a university should offer its students the opportunity to participate in reserved officers' training corps (ROTC) programs.

26. *See, e.g.*, Jonathan R. Cole, *Academic Freedom Under Fire*, Daedalus, Spring 2005, at 5, 7–8. Apparently under the impression that harsh criticism of outspoken faculty members by outsiders constitutes a threat to academic freedom, even when there is no possible effect within the university, a former provost of Columbia University cites, inter alia, (1) "efforts by outside groups" to "defame and discredit [a] renowned literary critic and Palestinian advocate" and (2) letters sent by sixty-two members of Congress calling for the firing of a professor for his remarks expressing hope for an American military defeat in Iraq. *Id.* The American Association of University Professors (AAUP) has worked to protect these professorial freedoms for many years and has taken an expansive view of their scope. For an example of AAUP advocacy on behalf of faculty freedoms, see Am. Ass'n of Univ. Professors, *Report: Academic Freedom and Tenure*, Academe, Nov.–Dec. 1993, at 37, *available at* http://www.aaup.org/NR/rdonlyres/211BF38C-2B2A-43E5-8FE0-2455BD9713BE/0/bridgeport.pdf (describing the AAUP's advocacy work on behalf of two tenured professors terminated by the University of Bridgeport during a severe financial crisis beginning during the 1990 academic year).

The usual playbook is this: Trustees are informed by presidents that, for a variety of political or academic reasons, the faculty would find the return of ROTC intolerable and that any action to the contrary by trustees would make the president's own position within the university untenable. Given the power of the faculties, the president is probably right. In any case, trustees will be reluctant to make the president vulnerable in the polity he knows far better than they.

This exchange will mark the beginning and the end of the boardroom conversation on a subject that touches so sensitively on the relationship of universities to our national government—if there is any conversation on the subject at all. On such matters, trustees simply do not exercise the autonomous prudential judgment that one innocently may tend to associate with the very idea of trusteeship.

In my thirty years as a university trustee, I can recall few serious discussions of academic questions or curricular directions other than in response to a very general presentation by a dean or faculty leader regarding particular programs. Indeed, it was in these settings years ago that I first encountered the delightful expression "dog and pony show" to describe presentations to trustees by deans, designed in large measure as enervating tours of the horizon (the academic version of essays on "How I Spent My Summer Vacation"). This sort of presentation gives the appearance (but only the appearance) of substantive interaction between the faculty and the trustees on a core activity of the university.

In having such presentations, the subjects of which are invariably selected by the president or provost, there is a suggestion that trustees have a governance role in this area of university life. But the suggestion is misleading if not entirely false. When it comes to academic matters, trustees generally acquiesce passively, and routinely ratify the decisions of other stakeholders of the university. By their formal actions ratifying the extensive "recommendations" of the faculty and administration, trustees merely appear to have a role in shaping such university policies. In reality they have no role, or virtually no role, in such matters.

Should it really be otherwise? Would any of us, including those most concerned by some of the directions of the modern American university, expect things to be otherwise?

II. "GOVERNING BOARDS" THAT DO NOT GOVERN

Professor Donald Kagan of Yale, the eminent student of Ancient Greece and the history of warfare, agrees with Derek Bok's concerns about the way in which faculty power is often deployed. Rather more precisely, Kagan observes that many of the discontents in the modern American university are traceable directly to the absence of accountability and to "the simple realities of power on college campuses over the last three or four decades," which is to say that the serious and seemingly intractable problems are a

direct result of faculty power, a power that "presidents, provosts, deans or trustees . . . are largely powerless" to contest.[27]

Faculty power led to the departure in 2007 of Lawrence Summers from the presidency of Harvard, a university presidency notably strong because, among other things, Harvard's board of trustees, the Harvard Corporation, consists of only six other persons. In this instance, faculty power was exercised quite directly, by means of a so-called "vote of no confidence" of Harvard's Faculty of Arts and Sciences—a last-resort technique for attacking presidents and trustees that is now so common that a Google search for the exact phrase "faculty vote of no confidence" turns up 1630 entries as of the date of this lecture.

My own experience in the boardroom suggests there is a need for checks and balances in our universities but that, as Professor Kagan observes, "no president appears [to be] capable of taming the imperial faculty; almost none is willing to try; and no one else from inside the world of the universities . . . is likely to stand up and say 'enough,' or to be followed by anyone if he does."[28]

Understandably, those who are concerned about the state of affairs in our universities often look to the trustees of the institution for help; some even undertake campaigns to win election as college trustees (where trustee elections are possible), in the mistaken belief that the board is the repository of the authority and energy that would make it possible to deter or reverse these real or perceived trends.[29] Various "interest groups," ranging from labor unions to ideologically motivated activist groups, sometimes seek to capture a seat on the board in the belief that it will then be possible to achieve their goals through the exercise of the "real power" over the affairs of their institution. They look to trustees because they believe the myth of American university trusteeship.

But in the modern era, few if any university trustees are in a position to comment on academic questions in any detail, much less adjudicate them. The modern university trustee knows little or nothing of academic disciplines.[30] Not even the most exasperated and disaffected observer of the modern university should wish to stimulate trustees to exercise their

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27. Donald Kagan, *As Goes Harvard . . .*, Commentary, Sept. 2006, at 35.

28. *Id.* at 36.

29. Acrimony among alumni vying for influence and/or positions on the boards of major private universities has surfaced in recent years. *See, e.g.*, Diana Jean Schemo, *Dartmouth Alumni Battles Become a Spectator Sport*, N.Y. Times, June 21, 2006, at A10. For example, in 2002, labor unions at Yale University spearheaded a controversial effort to elect Reverend W. David Lee to the Yale Corporation in an apparent attempt to increase union influence over the university. *See* Karen W. Arenson, *Union-Backed Nominee for Board Has Yale Upset*, N.Y. Times, Apr. 11, 2002, at B1; *see also* Anna Arkin-Gallagher, *Behind the Scenes of Corporation Race: Is Lee's Unorthodox Campaign Pressuring Yale-Union Negotiations?*, Yale Herald, Mar. 7, 2002, at 1.

30. *See* Bok, *supra* note 5, at 312 (noting that "after decades of preeminence in the world, American universities are showing signs of becoming self-satisfied"); *see also* Lewis, *supra* note 5 (a former Dean of Harvard College raising similar concerns).

vestigial legal authority over academic matters—abstract powers that may exist as a matter of law but powers that long ago were delegated to the faculty by trustees drawn from outside the academy who understand the limits of their competence.

Whatever may trouble the modern American university cannot readily be solved by trustees—indeed, some commentators go further, asserting that solutions are simply not to be found anywhere within the structure of the university itself. Professor Kagan, for one, concludes in a recent article that "[s]alvation, if it is to come at all, will have to come *from without*."[31]

The assessment or criticism of university trustees implicit in Professor Kagan's suggestion that "[s]alvation . . . will have to come from without"[32] is entirely right—namely, the impetus for reform or for minimal checks and balances in higher education must come largely from university donors, from legislators, and from regulators. On the matters that worry Kagan and others—"politicized faculties" that are disconnected from American life, and faculties and academic administrators who use donated funds for "side deals" and purposes to which the donors would never consent—trustees are now, alas, largely irrelevant.

If governing boards of universities do not "govern," what do they do?

It has taken me many years to reconcile myself to the idea that, in our time, trustees exercise very little authority other than their power to hire and fire presidents and their power to raise money and prudently manage the university's endowment—in support of activities over which they have little or no influence.

Generally speaking, trustees can hope to have a significant, long-term influence on their university only in collaboration with a president who has exceptional vision and subtle political skills, and whom the trustees are ready and able to protect in difficult times. With the help of friendly forces "from without" (Professor Kagan's term), trustees can do more than raise money and prudently manage money—they can support a president's efforts to sustain programs they believe are worth sustaining and create new programs and centers of learning that will avoid the grip of incumbent, self-serving faculty and administrators.

The one activity of trustees in which the trustees are preeminent is, of course, the raising and management of money. Indeed, the prudential management of the university's assets is the one activity of university trustees that is clearly prescribed by law. In no other activity is the trustees' authority so clear and unchallenged. Even the elementary task of hiring a president rarely can be undertaken by the trustees alone; nowadays the job of hiring a president will almost invariably be shared with representatives of other stakeholders of the university, most significantly, in recent decades, the faculty.

31. Kagan, *supra* note 27, at 36 (emphasis added).
32. *Id.*

But the duty to take care of an institution's assets and financial health is everywhere narrowly defined so as to (in effect) deny trustees any significant role in shaping the academic activities of the university other than in providing the wherewithal for one or another project or program recommended by the president.

This limited influence will be disguised by the circulation to trustees of massive amounts of paper providing the basis for formal votes to approve a particular presidential action or recommendation. And it will be disguised by the celebration—the entirely justified celebration—of the efforts of trustees in the inevitable campaigns, the virtually permanent, fund-raising campaigns.

For most trustees, especially those drawn from business and financial sectors or endeavors otherwise distant from the day-to-day work of a center of learning, the basic role of a trustee is to support the president until or unless he has become, for whatever reason, malodorous. At that point, the trustees perform the vital function of firing the president and helping to find a new one.

The widespread practice of trustee passivity in the absence of truly incompetent presidential performance has been described as "back 'em or sack 'em." This pithy and useful aphorism (which I first heard from fellow trustees) describes, as best I can tell, the view of most trustees of the scope of their fiduciary responsibilities. It also captures the actual practices of most boards.

No one will be surprised to learn that business executives (who make up a large part of all university boards), for example, prefer to be the sort of trustees that they would hope to have on their own boards—namely, they prefer "team players" who do not disturb the peace of the executive, who recognize the limits of their own competence (limits that are especially visible in an academic setting), and who recognize the effective limits of their authority.

The reality of "back 'em or sack 'em" boards does not mean that trustees do not discuss matters with a president, or that they do not offer advice to presidents on a wide range of matters. It does not mean that trustees are inconsequential. But it does mean that trustees generally keep out of a president's way as he manages the academic enterprise in collaboration with the faculty and as he pursues a vision of the university devised almost completely by the president, the faculty, and the upper echelons of the administration.

In turn, from the moment the senior trustee or chairman of the trustees bestows the symbolic laurels or collar of office on a new president, the president is off and running—his principal political concerns thereafter being to avoid serious public confrontations with the real governing authorities of the university, the faculty.[33]

33. *See* Stephen Joel Trachtenberg, *No Magic, Little Sleep, and Lots of Luck: Reflections from a Long-Serving University President*, Presidency, Fall 2006, at 14, 17

Of course, no president with minimal survival skills will simply ignore the trustees. After all, most trustees live by the myth of university trusteeship—they believe they are part of the governing process. If a president disabused them of this idea they might not continue to "back" him.[34]

To be seen as ignoring the trustees is to run the risk of losing their confidence, thereby perhaps stimulating the trustees to perform the only other function of which the trustees are reasonably certain—namely, the ability to "sack" the president.[35]

I hasten to repeat myself: The fact that trustees govern little or not at all does not mean that trustees do not perform many important functions, most notably, raising the vast sums that modern university presidents tell them their universities require and reviewing the sort of financial reports that provide comfort to one and all that adequate financial and audit systems are in place.

But how well do university trustees perform their indisputable and important role of overseeing the financial well-being of these institutions?

When it comes to helping raise money so that these institutions can pursue the visions of their academic leaders, trustees generally perform admirably well—indeed, so well that in recent years the richer universities have drawn some criticism about the growing inequality of wealth among institutions of higher learning.[36]

(describing university governance as a matter of the relations of a president with the faculty, and noting general faculty resistance to change and the corresponding need for presidents to "find a precedent" for all suggested reforms); *see also id.* (invoking the aphorism often used by savvy university presidents that the decision to step down from the presidency is a decision to step up to the faculty).

34. A recent example of trustees' readiness to remove presidents who apparently lack this basic understanding of the politics of small groups is the "resignation" of the president of Cornell University, Jeffrey S. Lehman, in June 2005. *See* Karen W. Arenson, *Cornell President Resigns, Citing Split with Trustees*, N.Y. Times, June 12, 2005, at 43. Lehman had served as Cornell's president for less than two years when he resigned, citing "differences" with the board of trustees regarding their "long-term vision" for the university. *Id.*

35. The importance of this board function has been recognized by leaders in the business sector. One such business leader, Warren Buffett, has described a prevailing "boardroom atmosphere" in which it is "almost impossible" for generally "well-mannered" boards to even debate the firing of a chief executive. Brendan Intindola, *Buffett Lays More Heat on Boards*, Hous. Chron., Mar. 16, 2003, at 8D. Buffett observed that "when a compensation committee—armed as always with support from a high-paid consultant—proposes a giant stock option grant for the CEO, it would be like belching at the dinner table for a director to suggest that the committee reconsider." *Id.* (internal quotation marks omitted). Although recent firings and forced resignations have signaled a change in board dynamics, billionaire investor Carl Icahn has observed somewhat colorfully that, even in the wake of the Enron scandal, boards of directors are a travesty because "[t]hey have very little idea what's going on . . . . It's like having a class of tone-deaf kids and trying to teach them the violin." *Id.*

36. *See, e.g.*, John Hechinger, *When $26 Billion Isn't Enough*, Wall St. J., Dec. 17, 2005, at P1 ("The wealthiest colleges and universities are so flush with cash that, increasingly, alumni and philanthropy experts are starting to wonder whether these schools really need more money—and why they spend so little of it."). The embarrassment of riches found in our largest private universities has afforded considerable luxuries to some college students,

Trustees are good at raising money for their universities, and in most cases they are also successful in managing the endowments their efforts help to build.[37] But even here trustees are not immune to significant political pressures from faculty and students—note, for example, the elaborate programs of ethical investment that have been in place for a generation at major universities.[38]

In any event, it bears recalling that trustees have a limited role in deciding the uses to which the monies they raise and manage are put.

Trustees approve annual university budgets, after assuring that there is enough money in the till to pay for the programs and initiatives devised by faculty and administration.

But they have little or no influence on the nature of the programs or policies pursued. Trustees make sure the check does not bounce, but the check they annually give to presidents and faculties is pretty much a blank check.

In addition, for a number of reasons unique to the structure and operations of universities, trustees are only moderately successful at

for example, no-loan (entirely grant-based) financial aid policies, see Florence Olson & Kit Lively, *Princeton Increases Endowment Spending to Replace Students' Loans with Grants*, Chron. of Higher Educ., Feb. 9, 2001, at A32, and increased availability of university-funded trips and semesters abroad, see Beth McMurtrie, *The Global Campus: Many American Campuses Connect with the Broader World*, Chron. of Higher Educ., Mar. 2, 2007, at A37.

Also, the wealthiest universities have continued to grow their endowments at impressive rates. *See, e.g.*, Jennifer Epstein, *Endowment Climbs Past $13 Billion*, Daily Princetonian, Oct. 27, 2006, at 1; Elaina Johnson, *MIT's Investment Returns Outpace Even Yale's*, N.Y. Sun, Oct. 25, 2006, at 10; Dax Tejera, *Endowment Jumps by 18% from 2003*, The Dartmouth, Sept. 30, 2004, at 1.

37. *See, e.g.*, Kate Linthicum, *Event Launches CU Campaign, $1.6 Billion Already Pledged,* Colum. Daily Spectator, Oct. 2, 2006, at 1 (describing fund-raising efforts by the president and trustees); Chanakya Sethi, *U. Prepares for Major Campaign*, Daily Princetonian, Nov. 14, 2005, at 1 (same); Steven Xian, *C.U. Kicks Off Capital Campaign*, Cornell Daily Sun, Oct. 26, 2006, at 1 (same). Efforts by the trustees of American universities to raise capital for their institutions have led universities in Britain to emulate the American model of fund-raising. *See, e.g.*, Beth Carney, *Britain's Universities Go Begging: Cash Strapped College Are Following the U.S. Example and Turning to Alumni for Help, So Far with No Great Success*, BusinessWeek Online, Feb. 4, 2005, http://www.businessweek.com/bwdaily/dnflash/feb2005/nf2005024_3888_db016.htm; *Lampl Says: Ask and You'll Receive*, Times (London) (Higher Educ. Supp.), Dec. 15, 2006, at 5. Even more recently, Oxford University considered, but failed to adopt, a proposal that would have permitted members from outside the university to serve on its governing board. *See Oxford Dons Reject Finance Reform*, BBC News, Dec. 19, 2006, http://news.bbc.co.uk/1/hi/education/6190469.stm.

38. *See, e.g.*, John G. Simon, Charles W. Powers & Jon P. Gunneman, The Ethical Investor: Universities and Corporate Responsibility (1972). One example of efforts to encourage ethical investing by universities and business corporations are the so-called "Sullivan Principles," authored originally by the Reverend Leon H. Sullivan, which seek to "support economic, social and political justice by companies when they do business." Leon H. Sullivan, The Global Sullivan Principles pmbl., http://www.thesullivanfoundation.org/gsp/principles/gsp/default.asp (last visited Sept. 30, 2007). The principles set forth ways for avoiding support of unethical behavior and enterprises through investment decisions. *See id.*

auditing the actual uses to which university budgets are put—that is, avoiding or punishing significant malpractices in spending.

From my observations as a trustee and from conversations with trustees elsewhere, audit committees of university boards vary greatly in the care and attention they are able to provide—some are totally passive until a crisis strikes, and some (usually those audit committees led by demanding lawyers) are energetic and successful.[39]

In a large university, especially those with large science and medical establishments, an internal auditing department is indispensable. But in universities these internal auditing departments tend to be weak and often ineffectual. This is so for a number of reasons: Auditors are not paid well in comparison with the auditing staffs of business corporations (or even in comparison with the faculty); they are hampered by a lack of familiarity with the special practices of different parts of the university; and they are virtually powerless in comparison with the deans of the schools and chairmen of the departments they audit.

The university polity is the land of a thousand—the land of ten thousand—special deals and unique arrangements, difficult for any outsider fully to understand. These special deals are difficult for an auditor to challenge because auditors are almost invisible in the university status and power hierarchies. Auditors are at-will employees, and they are simply no match for insistent, demanding, or defiant members of the permanent establishment. If and when an auditor does report eccentric or outrageous expenditures or practices by a favored department or by a favored member of the bureaucracy, the report may be utterly without consequence because senior administrators may be inclined to forgive and protect members of the ruling class and because senior officials are not inclined to enlarge the agenda of the trustees' audit committee.

Unlike the boards of publicly traded corporations, the trustees and faculties of private universities generally do not modify their behavior in response to the in terrorem threat of litigation because it is highly unlikely that the trustees or faculty will ever suffer personal loss or liability from any litigation against the university. Moreover, without the oversight of stockholders, the embarrassments universities may suffer from media interest or regulatory oversight are generally limited to matters that capture wide public attention, such as criminal malfeasance or misappropriation of public funds. Universities therefore are subject to less scrutiny on how they use their own funds.

It is no coincidence that when major scandals do beset private universities, they tend to emerge in areas of the campus supported by federal funds—the sciences and the medical centers—where the audit

39. Apart from audit committees, smaller universities and colleges usually have no internal auditors at all. Here, the vulnerability of having to rely entirely on outside auditors may be offset by the prophylaxis of small size. In a small place, everyone tends to know what everyone else is doing.

function is enhanced by the review processes of government funding agencies and by the occasional administrative or grand jury subpoena.[40]

Another area in which trustees would be expected to be especially active and competent is in assuring that the endowments bestowed on universities by grateful alumni and friends are spent in a manner consistent with the donors' purposes. Here too, I think it fair to say, trustees are largely passive and given little information. Development officers and campus beneficiaries of donations are, by and large, the only persons who care a whit about compliance with the expectations of donors and have the necessary attention span. And the law of charities in most states provides little or no standing to a donor to enforce his interests if university officials divert targeted funds to other uses.[41]

Because of trustee turnover, the institutional memory of a board of trustees will fade, and in the absence of effective remedies in the courts, donors may find their intentions frustrated. Only the threat to give no more, and the possibility of causing an embarrassing scandal in the media, provides donors with the protection that one assumes is ordinarily provided by fiduciaries.[42]

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40. *See, e.g.*, David McClintick, *How Harvard Lost Russia*, Inst. Investor, Jan. 1, 2006, at 62 (describing the grand jury investigation and eventual $31 million settlement triggered by the Harvard Institute for International Development's allegedly corrupt management of government funds allocated for an economic development project in Russia); *see also* Karen W. Arenson, *Manhattan Medical Center Says $1 Million Is Lost*, N.Y. Times, Nov. 26, 2003, at B6 (describing the misappropriation of money at the Columbia University Medical Center); Jennifer Levitz, *Yale's Use of Research Grants Attracts Government Scrutiny*, Wall St. J., July 5, 2006, at A2 (describing federal investigation into Yale University's alleged misappropriation of grant money received from the National Institutes of Health).

41. Thirty-seven states, including Connecticut and New York, have adopted a version of the Uniform Management of Institutional Funds Act (UMIFA), which governs the use of gifts received by various nonprofit institutions (including universities). *See* Lisa Loftin, *Protecting the Charitable Investor: A Rationale for Donor Enforcement of Restricted Gifts*, 8 B.U. Pub. Int. L.J. 361, 363 n.13 (listing all thirty-seven states to adopt a form of the UMIFA).

Section 7 of the UMIFA, entitled "Release of Restrictions on Use or Investment," requires the written consent of the donor or that of a court for the release of terms placed on a gift. Unif. Mgmt. Inst. Funds Act § 7, 7A U.L.A. 35 (2006). However, the commentary pertaining to this section makes clear that "[t]he donor has no right to enforce the restriction, no interest in the fund and no power to change the eleemosynary beneficiary of the fund. He may only acquiesce in a lessening of a restriction already in effect." *Id.* at 36. Accordingly, courts have found, in interpreting statutes modeled on the UMIFA, that donors lack standing to enforce the terms of their gifts. *See, e.g.*, Carl J. Herzog Found., Inc. v. Univ. of Bridgeport, 699 A.2d 995, 1002 (Conn. 1997).

42. A notable instance of frustrated donor intent was Yale University's receipt and eventual return of a $20 million gift from alumnus Lee M. Bass. In 1993, Bass donated money to support a program offering courses in Western civilization. *See, e.g.*, Joye Mercer, *Yale President Says University Was at Fault in Flap over a Returned Gift*, Chron. of Higher Educ., Nov. 14, 1997, at A44. After much delay by the university in setting up the program and working out its details, the donor demanded the return of the gift. The university later admitted it was at fault in handling the donation. *Id.*

More recently, litigation has emerged out of Princeton University's alleged mismanagement of $35 million donated by the Robertson family, heirs to the A&P supermarket fortune. The Robertsons allege that their family's money, which was donated

In sum, even in this one area where the trustees' governing authority ought to be greatest—the prudent and faithful management of the wealth of the university—trustees tend to be less consequential, and to provide less oversight, than is generally assumed by outside observers.

III. WHAT IS TO BE DONE?

For the reasons noted, there are significant limits on what can be done "from the inside" to enhance or strengthen the performance of basic fiduciary responsibilities by trustees (especially in academic matters). Nevertheless, there are some things that can be done on the inside in the service of trusteeship—that is, in the service of accountability. Some of these may seem trivial, but, in my view, they can have positive long-term consequences.

(1) The single most significant source of power remaining in university trustees is the power of the veto—the power to refuse the trustees' formal consent or agreement to a proposal or initiative. While trustees have little or no ability to assert authority affirmatively, they do have the power to deny their formal consent; trustees retain the ability to deploy this untapped resource creatively or usefully.

The possibility or promise that the veto power will be wielded with care by the trustees is a powerful countervailing force on an administration under constant pressure from other quarters in the university. As far as I have been able to observe in three decades of trusteeship, this is an underutilized governance resource. Indeed, it is precisely because trustees exercise their veto power rarely that the use of such power can have great effect. When boards do invoke their rarely utilized power to check or override the other branches of university governance, they signal to the president, and to the university stakeholders at large, that the particular matter under consideration is of great importance. While it may not be possible for trustees to engage in the day-to-day policy line drawing of a university, there are circumstances where they can draw lines in the sand which the president and the faculty may not cross.

(2) The audit committee of the trustees should be explicitly empowered in the bylaws to approve the hiring or firing of the head of the auditing department and the outside auditors. In addition, the auditing department and the outside auditors should be required to report, on a dotted line in the university's table of organization, directly to the chair of the trustees' audit

for the establishment of a foreign policy school, has been mismanaged and used as a de facto university slush fund. *See* Peter Sortino, *Poisoned Ivy: Fight at Princeton Escalates over Use of a Family's Gift*, Wall St. J., Feb. 7, 2006, at A1; *see also* John K. Eason, *The Restricted Gift Life Cycle, or What Comes Around Goes Around*, 76 Fordham L. Rev. 693, 714–32 (2007) (analyzing the Robertsons' feud with Princeton). In what is arguably a partial admission of such mismanagement, Princeton recently agreed to return a portion of the Robertson family's donation that had been used to support a graduate program which the Robertsons alleged did not further the donation's intended purpose. *See* John Hechinger, *Princeton Reimburses Donors' Foundation*, Wall St. J., Mar. 13, 2007, at A2.

committee, as well as to the normal administration chain of command. The auditing committee can direct the outside auditors to establish and oversee a system to record the intentions of donors and monitor compliance, with periodic reports by an appropriate university official to the audit committee of the trustees.[43]

There should be an unmistakable understanding that the chair of the trustees' audit committee is to be informed promptly of "breaking news" of significant financial irregularities, in advance of any formal report to the committee at a regular session. In short, the chair of the audit committee should never learn of such matters from the press.[44]

One practice by which universities can promote the free flow of information to their boards is the establishment of so-called "hotlines" for anonymous reporting of complaints and concerns. Many corporations have established such hotlines in the wake of the Enron scandal. Hotlines are a means for complying with those Sarbanes-Oxley provisions requiring business corporations to institute mechanisms for reporting dubious conduct.[45] In the university context, universal adoption of such hotlines can also have important benefits. It would give university stakeholders the opportunity and the incentive to report suspicious practices before irreparable damage is done.

(3) Trustees should also request, and be granted access to, more financial information of all kinds. The reality is that trustees receive far too little

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43. Such measures would surely help to prevent the kinds of misreporting that have plagued universities such as Princeton and Yale in recent months. *See supra* note 42 and accompanying text.

44. One of the primary purposes of the Sarbanes-Oxley Act of 2002 was to enhance the power of audit committees in publicly traded corporations. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28, 29 U.S.C.). Section 301 of the Act requires the audit committees of publicly traded companies to (1) oversee investigations of suspected wrongdoing by officers and employees, and (2) execute that responsibility with the assistance of outside advisers such as independent counsel and forensic accountants. *Id.* § 301 (amending 15 U.S.C. § 78f (2000)). In addition, the Securities and Exchange Commission rule implementing section 307 of the Act requires public companies' counsel to report material violations up the ladder to their chief legal counsel or chief executive officers. 17 C.F.R. § 205.3 (2003). If these officers fail to respond appropriately to the evidence, then attorneys must report the evidence to their companies' audit committees or full boards of directors. *Id.*

As one commentator has written, another goal of the Sarbanes-Oxley Act was to increase the meaningfulness, as well as the scope, of the audit process:

> The Sarbanes-Oxley Act thus makes outside auditors part of the audit committee's circle, rather than the CEO's. These auditors report to the audit committee any disagreements that they might have with executives over any aspect of a firm's accounting treatment. The Act also tries to prevent the establishment of direct or indirect ties between the outside auditing firm and the inner circle by prohibiting the former from providing certain lucrative non-audit services for an auditing client . . . .

James Fanto, *Whistleblowing and the Public Director: Countering Corporate Inner Circles*, 83 Or. L. Rev. 435, 528–29 (2004).

45. Requiring the establishment of such hotlines is a common feature of federal deferred prosecution agreements. *See, e.g.*, Leonard Orland, *The Transformation of Corporate Criminal Law*, 1 Brook. J. Corp. Fin. & Comm. L. 45 tbls.1 & 2 (2006).

information about a wide range of operational and financial matters within their universities. One of my board colleagues has likened the board's need for information to a baseball team owner's need for statistics regarding a starting pitcher. He states that "[w]hen the baseball-team owner, based on studying this information, decides that his manager/pitching coach is making too many mistakes and errors of judgment, then the time comes to consider the pros and cons of engaging a new manager/coach."[46] In a similar vein, even university trustees who are discharging only the limited duty to either "back" or "sack" a president can perform this function effectively only if they have a full picture of how efficiently the university's finances are being managed, and how well it is performing. Management is disciplined by requirements to provide more information, and more information makes possible meaningful board oversight.

(4) Annually setting the compensation of the president and the top officers of administration is an indispensable tool of proper trusteeship. This is a truism—indeed, a cliché—but one honored largely in the breach.

Despite the requirements of law, the compensation of top university leaders is regarded by presidents and insider trustees as one of the prime "state secrets" of the academy—a matter entitled to the highest level of confidentiality and reserved for the eyes only of the senior trustees who form the compensation committee of the board.

Why is this a problem? Because, simply stated, an annual salary review provides the only significant opportunity for trustees as a group to review the performance of the person whose salary is being set. Without such a review it is unlikely that a fiduciary can perform even the limited function of deciding whether a leader ought to be "backed" or "sacked."

Regardless of one's view of the presidency of Lawrence Summers at Harvard, and how it came a cropper in 2006, it bears recalling one seemingly minor episode in that drama—the dramatic resignation of one of the six members of the ever-so-intimate Harvard Corporation.

Conrad K. Harper, a distinguished leader of the American Bar, resigned from his position on the Harvard Corporation in protest of the refusal of the Senior Fellow to place on the Corporation agenda the matter of the president's salary.[47] Apparently, the president's salary had been decided by a rump group of trustees without the formal consideration and consent of the full Corporation.

46. Letter from Stephen H. Case to author (Oct. 3, 2005) [hereinafter Case Letter] (on file with author) (quoted with the permission of Stephen Case).

47. *See Board Member's Letter of Resignation*, N.Y. Times, Aug. 2, 2005, at A17 (excerpting portions of the letter of resignation of one of the members of Harvard's governing board); Marcella Bombardieri, *Harvard Corporation Member Resigns*, Boston Globe, July 29, 2005, at B1; *see also 2005: A Year in Review*, Diverse Issues in Higher Educ., Dec. 29, 2005, at 34 (noting the resignation of Conrad K. Harper, a member of Harvard's top governing board, over a proposed raise for President Lawrence H. Summers).

The media accounts of the resignation focused on the fact that the Harvard trustee who resigned in protest was no fan of Summers and did not favor a presidential pay raise.[48]

But there was a larger and simpler story here, one far more important than Summers and his salary. The resignation of Conrad Harper revealed beyond doubt that even the famously intimate six-person board of trustees of America's oldest institution of higher learning was unwilling or unable to hold a regular meeting at which all trustees would discharge together the basic fiduciary duty of evaluating the performance of its chief executive.

Bylaws should require the compensation committee of the trustees to present recommendations regarding the compensation of the president and the top administrators to the full board on an annual basis.

This presentation should occur in an executive session (that is, in the absence of the persons whose salaries are being discussed) and should be made at the beginning of the work session—not when trustees are heading for the exit.

The full board should be required to act on specific, clearly stated recommendations presented in a memorandum that permits trustees to compare compensation with that afforded by peer institutions.[49] In the case of publicly held business corporations, information on compensation is required by law to be placed on the public record.[50] Accordingly, such matters are not likely to be a mystery to directors.

The Internal Revenue Code requires universities, like other not-for-profit corporations, to file an annual form called the Form 990, which discloses, among other information, the compensation of officers and the five highest paid employees.[51] By law this form must be made available to any member of the public who requests a copy,[52] on penalty of a daily fine for refusal to disclose.[53] This requirement has been in existence since 1987. But incredibly, this information—available, in principle, to anyone in the

48. The prophylactic effect of regulations penalizing excessive compensation in the nonprofit sector, see *supra* note 47, arguably is limited by the fact that such regulations contain a "safe-harbor" provision establishing a "presumption that a transaction is not an excess benefit transaction" if certain procedures are followed in determining compensation. *See* 26 C.F.R. § 53.4958-6 (2006). The provision dictates that the presumption will apply if the salary of the person in question is (1) determined by a compensation committee within the organization which (2) examines relevant data and (3) documents its decision-making process. *Id.*

49. Since 1996, federal statutes and regulations have imposed tax penalties on employees of nonprofits who receive "excess compensation" and on the managers of the nonprofits who employ them. *See, e.g.*, 26 U.S.C. § 4958 (2000) (setting forth general conditions under which tax penalties apply); 26 C.F.R. 53.4958-4(b)(1)(ii) (implementing statutory tax penalties through, inter alia, comparison of salaries received by nonprofit employees with salaries for similar or equivalent work in the for-profit sector).

50. *See, e.g.*, 17 C.F.R. §§ 228.10, 229.1100, 232.10, 245.100 (2006).

51. *See* 26 U.S.C. §§ 501(c), 527, 4947(a)(1).

52. *See* 26 U.S.C. § 6104.

53. *See* 26 U.S.C. § 6652(c)(1)(C).

general public and available online to the sophisticated[54]—is rarely, if ever, made directly available to the full board of trustees; many trustees learn of a president's salary from the student newspaper. (Indeed, some years ago I had the dubious distinction of photocopying the Internal Revenue Service form and distributing it to my fellow trustees, to prove to them that they had not been given basic information that, under the law, was available to any passerby who cared to inquire.)

An annual meeting of all trustees to evaluate top executives and set their salaries is a minimal requirement of sound trusteeship.[55] It should be required by the bylaws. If this effort cannot be undertaken in good faith by boards of trustees themselves, then perhaps Congress or the state legislatures should impose the requirement by statute.

(5) Another means of enhancing university trusteeship "from the inside" is for concerned benefactors to target their benefactions with care; this is disparagingly referred to as giving with "strings attached." Yale Professor Frank Turner, the historian who served with distinction as provost of Yale, has suggested several simple ways in which donors can ensure that their donations are spent as intended.[56] First, Turner has suggested that like-minded donors "pool their donations [and] establish carefully structured independent foundations charged with directing funds to a particular institution for the fulfillment of their specific intentions."[57] One example of such an arrangement is the gift of Yale's Class of 1937 to the Directed Studies Program of Yale College, a distinguished elective Great Books program for freshmen.

Second, Professor Turner suggested that donors leverage their financial "largesse" in order to demand "careful financial reporting" from their beneficiaries. More specifically, Turner has proposed that alumni donors "divide their contributions into stages, with an initial donation provided with the understanding that the balance will follow only if the university *uses the money in the way it agreed.*"[58]

Professor Turner's proposals are a good start, and the insight underlying them is a crucial one: Universities are not likely to fulfill the expectations of their benefactors unless those benefactors make their continuing interests clear, that is, unless their checks are staggered, so that the first check presages the checks to follow; in that way, even large checks do not become blank checks. Benefactors who hold a view of higher education that is at odds with the prevailing views of the faculty need not face a Hobson's

54. *See, e.g.*, GuideStar, http://www.guidestar.org (providing wide-ranging data on nonprofits to the public, including copies of Form 990s for thousands of not-for-profit corporations).

55. *See* Richard P. Chait, Thomas P. Holland & Barbara E. Taylor, Improving the Performance of Governing Boards 36–46 (1996) (describing the benefits of annual board retreats).

56. Frank M. Turner, *How Donors Can Keep Universities Honest*, Wall St. J., Sept. 10, 1997, at A22.

57. *Id.*

58. *Id.* (emphasis added).

choice either to give faculties a carte blanche with their donations or to abandon their college altogether. Rather, they can and should carefully target their donations to programs they admire and which can be reviewed from time to time.[59]

In sum, philanthropy with strings attached is a good thing, especially in keeping skeptical benefactors usefully engaged with their university while targeting funds in ways that may be free of the dead hand of incumbent elites.

Of course, these modest proposals for enhancing university trusteeship are not a cure, much less a complete cure, for what ails many private American universities. These proposed actions from the inside—trustee-initiated changes to their own procedures, encouragement of financial best practices, and increased attention to the wishes of donors—are only as good as the ability of trustees to maintain an attention span and a vigorous sense of duty. But if implemented, these modest measures would shed light on some of the darker corners of a university's operations and prevent irresponsible or reckless actions by entrenched faculty and administrators sitting on large endowments without strings.

That said, even these modest suggestions will, I suspect, be greeted with reservations, resistance, and perhaps alarm by university power holders who are not accustomed to even minimal oversight.

If reliance on the so-called "inner conscience" of the university is not enough, we should turn to another type of conscience, suggested long ago by (of all people) H.L. Mencken, namely, the type of conscience that he described as "the inner voice that warns us *somebody may be looking*."[60]

If Professor Donald Kagan is correct, then the "somebody who may be looking" will have to be someone "from the outside." But how specifically can universities be helped "from the outside," and who on "the outside" should do the helping?

The most promising source for enhanced oversight of university affairs are the great laboratories of our American democracy: state legislatures. In particular, state legislatures might have a role to play by imposing some limited audit and financial disclosure requirements that universities may be reluctant to impose on themselves.[61] Of the state actors who have proposed reforms for the nonprofit sector, former New York Attorney General Eliot

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59. In doing so, they would merely be emulating programs of teaching, advocacy, and activism which are commonplace on the campuses of private universities.

60. Joshua B. Nix, *The Things People Do When No One Is Looking: An Argument for the Expansion of Standing in the Charitable Sector*, 14 U. Miami Bus. L. Rev. 147, 148 (2005) (citation omitted). I am not the first to invoke this quotation in the context of not-for-profit governance.

61. There are, of course, exceptions to this general reluctance to embrace wide-ranging reform. For example, in August 2004 Drexel University became the first private university to voluntarily adopt some reforms modeled on the Sarbanes-Oxley Act. *See* Mike Mathis, *Drexel Models Rules After Sarbanes-Oxley*, Philadelphia Bus. J., Aug. 11, 2003. That said, some caution in adopting potentially Sarbanes-Oxley reforms whole cloth may be justified. *See supra* note 2.

Spitzer offered perhaps the most convincing argument for adoption of mandatory disclosure requirements for nonprofit entities. He rightly observed that "governmental oversight of the nonprofit sector is in some ways *more* important than oversight of the for-profit sector because for-profit companies have shareholders with a strong financial interest in preventing fraud, waste and abuse of corporate assets."[62]

Therefore, it might be appropriate to consider additional, *public* disclosure requirements on universities and their boards. In other words, universities should make more information available to their various stakeholders and to the public at large, not just to their trustees. Requiring publicly available audited statements that go beyond the Form 990 required for tax-exemption purposes could also go a long way toward instilling or enhancing an ethic of accountability in our universities. As one of my fellow trustees has observed, financial disclosure "keeps management on their toes, sometimes preventing molehills from growing mountain sized."[63]

Disclosure has even more importance in the university context because trustees, unlike their for-profit counterparts in business corporations, act with de facto impunity. Such impunity is a result of the fact, noted earlier, that trustees are rarely if ever held personally liable for failure to perform their fiduciary duties. The rarity with which such liability is imposed is evidenced by the fact that the removal of board members, when it does occur, is the subject of newspaper headlines. In 1996, for example, the New York Board of Regents garnered a great deal of public and press attention when it took the unusual step of removing all but one of the trustees (and the president) of Adelphi University for a breach of their fiduciary obligations.[64] Heightened disclosure requirements might have the

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62. Eliot Spitzer, Attorney General's Legislative Program Bill No. 65-05, at 2 (n.d.) (emphasis added) (describing proposed legislation that would impose new reporting and audit responsibilities on large nonprofit organizations and their boards). The proposal eventually was withdrawn due to opposition from nonprofit organizations.

63. Case Letter, *supra* note 46.

64. In April 1996, the New York Board of Regents acted to remove eighteen of the nineteen trustees of Adelphi University, along with the university president. The actions culminated in the trustees' voluntary resignation while court challenges to their removal were pending. *See* Bruce Lambert, *18 Adelphi Trustees Resign, Abandoning a Court Battle*, N.Y. Times, Feb. 14, 1997, at B2. The accused trustees and president were found by the board to have "violated legal procedures, neglected [] fiduciary duties," overcompensated the university president, and allowed conflicts of interest for two trustees doing business with the university. *Id.* The single trustee who was not the subject of removal proceedings was Professor Donald Kagan, quoted *supra* notes 27–28. *See* Courtney Leatherman, *New York Regents Vote to Remove 18 of the 19 Adelphi Trustees of U.: Professors Are Jubilant over an Action Rarely Taken by the State Against a Private College*, Chron. of Higher Educ., Feb. 21, 1997, at A26.

Although Adelphi University is a private institution, New York Education Law § 226(4) (McKinney 2000) vests in the Board of Regents the obligation and authority to review the propriety of trustee actions alleged to constitute a neglect of duty, misconduct, or failure to carry out the institution's educational purposes. For a copy of the report and decision of the Board of Regents, see Comm. to Save Adelphi v. Diamandopoulos (Bd. of Regents of the

salutary effect of nipping such problems in the bud before any such high-profile removals are necessary. Of course, the usefulness of heightened disclosure requirements will always depend on the ability of university "stakeholders" and others to take notice of such disclosures.

Another possibly beneficial legislative reform would be a recasting of donor standing restrictions. Although the law of most states technically imposes a duty of obedience on recipients of a donation regarding the terms of the gift,[65] common law doctrines and state standing laws often do not allow private parties to enforce this duty.[66] Attorneys general—who do have the power to enforce the fiduciary obligations of nonprofit entities—use this power rarely, and often lack the resources to exercise their power. Alumni and other private donors are legitimate stakeholders of private universities, and they ought to have a role in assuring the proper use of their gifts.

Therefore, legislatures might be well-advised to modify their nonprofit corporation statutes to provide private rights of action for donors to enforce the terms of their gifts where they have explicitly reserved the right to do so.[67] I note that the potential effects of donor litigation are currently being tested in the courts of New Jersey, where members of the Robertson family have claimed that the trustees of Princeton University have, over time, converted a fund given for the establishment of a foreign policy school into

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Univ. of the State of N.Y. Feb. 5, 1997), http://www.regents.nysed.gov/adelphi.html http://www.regents.nysed.gov/adelphi.html.

65. *See* Restatement (Third) of Property § 10.1 (2003) ("The donor's intention is given effect to the maximum extent allowed by law."); s*ee also id.* cmt. a ("The organizing principle of the American law of donative transfers is freedom of disposition. Property owners have the nearly unrestricted right to dispose of their property as they please.").

66. *See* Restatement (Second) of Trusts § 348 cmt. f (1959). Courts have again and again rejected efforts by donors to enforce gift restrictions. *See, e.g.*, Carl J. Herzog Found. v. Univ. of Bridgeport, 699 A.2d 995, 997 (Conn. 1997) (noting that "[a]t common law, a donor who has made a completed charitable contribution, whether as an absolute gift or in trust, had no standing to bring an action to enforce the terms of his or her gift or trust unless he or she had expressly reserved the right to do so" and holding that a state statute did not alter the rule).

An exception to this tendency of state courts to deny donor standing is the decision of the New York Appellate Division, First Department, in *Smithers v. St. Luke's-Roosevelt Hospital Center*, 723 N.Y.S.2d 426 (App. Div. 2001). In *Smithers*, the Court granted standing for a widow to enforce the terms of her deceased husband's $10 million gift to the defendant hospital. The hospital allegedly misappropriated the funds, originally given for the purpose of establishing an alcohol rehabilitation center, for other hospital projects. *Id.* at 431–36 (Friedman, J., dissenting). The court found that the plaintiff had standing because New York Estate Powers and Trusts Law § 8-1.1 (McKinney 2002) did not designate the attorney general as the sole representative of charitable donors for enforcement purposes. *Id.* at 433.

67. At least one expert in nonprofit law has suggested such an approach. *See* Letter from Professor Evelyn Brody, Chicago-Kent College of Law, to Sen. Chuck Grassley, Chairman, S. Comm. on Fin., & Sen. Max Baucus, Ranking Member, S. Comm. on Fin. (July 15, 2004), *available at* http://www.senate.gov/~finance/Roundtable/Evelyn%20Brody.pdf (describing a draft proposal that would deny standing unless there was "an enabling provision in the gift instrument").

a sort of general university slush fund.[68] Whatever one might think about the merits of the Robertson litigation, it is undeniable that such litigation, or at least the threat of such litigation, will cause universities to think twice before disregarding the wishes of donors who are, after all, the lifeblood of any private academic institution. If the fear of litigation encourages universities to be more open and accountable with respect to the gifts they receive from donors, then making it slightly easier to sue universities, in the limited circumstances where a donor has reserved his right to sue, may not be such a bad idea.

CONCLUSION

My observations are intended to underscore the need, in any institution, for robust and creative leadership accompanied by appropriate oversight and accountability. The challenge for private universities, in a time of skepticism driven in large measures by the universities themselves, is to maintain trust in trusteeship, and to bring the reality of university trusteeship somewhat closer to the myth of university trusteeship.

68. *See Give and Take*, Chron. of Higher Educ., Aug. 16, 2002, at A29; Kelley Heyboer, *Big Stakes as Donor's Heirs Fight Princeton: Suit to Regain Gift Could Spark Others*, Star Ledger (Newark), Nov. 28, 2004, at A1; Maria Newman, *Princeton University Is Sued over Control of Foundation*, N.Y. Times, July 18, 2002, at B5; *see also supra* note 42.