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A Brief History of Trusteeship in Catholic Colleges and Universities for AGB/ACCU/AJCU

Alice Gallin osu September 18,2001

The fundamental question, “Who is in charge here?” is answered, in the case of higher education, by the single word, “Trustees.” Yet, at the beginning of the 21st century there are many persons who do not understand the way in which that has come to be the answer to the question. The history of trusteeship is one of changing patterns of ownership of properties and institutions and of the relationships that arose because of those patterns. Governance is not synonymous with ownership but is closely related.

The concept of “trusteeship” deals with these patterns and these relationships.. In terms of higher education it can be found (although not by that specific word) in the medieval universities. As early as the 12th century in Spain universities were placed under the direction of a group of prominent local citizens, while in France and Italy the universities of Paris and Bologna organized themselves around a core group of faculty (Paris) or students (Bologna) who took responsibility for the life of the university. Governance had to deal with town-gown problems, with financial stability, and academic integrity. As Europe evolved into nation states such non-governmental associations as the university corporations were brought under state surveillance. Ministries of Education supervised the universities which, by statute, were directed by faculties. Appointments to the faculties, however, required Ministry approval, so they were seldom able to act independently.

Responsibility for university governance, no matter the particular form, includes three important principles: 1) fiduciary responsibility, 2) commitment to uphold the common good; 3) the obligation to act as a community of interpretation.¹ We find these principles expanded and particularized in a handbook for trustees of independent colleges and universities, published by the Association of Governing Boards².

From the earliest days of American higher education the responsibility for the universities was placed in the hands of men who accepted the role of “trustee”, i.e. holding the assets and the well-being of the institution “in trust” for future generations. Harvard University, when it was founded in 1636, created a Board of Overseers composed of “leading men” to govern the university and to represent its needs to the church and society. The Board was linked to the day-to-day life of the college through the President and Fellows who represented the academic and ecclesial purposes of the institution. This model was not generally adopted by the colleges founded in the colonial period and, indeed up until the Civil War. Unlike Harvard, colleges were small and very closely connected to a particular church, more evangelical than main-stream. It was the founding church that appointed the members of a single governing board which reported to the church body. Normally such boards were comprised of lay (meaning non-academic) and clerical men. By the late nineteenth century it was the Protestantism of the major northern denominations which colored the life and activity of New England institutions and determined the structures that

¹ David H. Smith, “The Moral Core of Trusteeship,” in John Wilcox and Irene King, eds. *Enhancing Religious Identity*, (Wash. DC, Georgetown University Press, 2000) 36-55

²Richard T. Ingram and Associates, *Governing Independent Colleges and Universities*, (San Francisco, Jossey Bass, 1993) 3-22 and 97-113.

governed them. A significant part of their heritage can be found in ^{John} Calvin's ideal "academy" in Geneva, governed (as was the church itself) by selected "elders." George Marsden, in his study of the secularization of American higher education,³ points out that the cultural leadership of New England Puritans eventually took over the other colleges, even those founded by evangelicals. And, in time, the liberal Protestant point of view led to a non-denominational or secular culture on most one-time Protestant campuses. A change in their governing structures was slow in coming; in most cases, the trustees or overseers adapted to the culture rather than challenging it. And the churches, as such, relinquished some of the control they had had over the finances and curriculum of specific colleges.

In the case of Catholic colleges a similar structure emerged. In them the control rested in the hands of the founding religious community and/or the bishop. It was only in the mid- 20th century that more complex structures appeared, most of which were developed on an *ad hoc* basis. Paul Reinert, SJ has defined trustees as a citizen group "legally designated in civil law as trustees -- a body accountable for overseeing the financial and academic responsibilities set forth in the state charter formally establishing the institution as a specified type of academic institution."⁴ Working within the framework of the 51^e different States, the colleges and universities showed great diversity in the way that such trustees were chosen and to whom they were accountable. However, the faculty and the trustees of the property in civil law were often largely members of

³George M. Marsden, *The Soul of the American University*, (NY Oxford University Press, 1994).

⁴Paul C. Reinert, SJ and Paul Shore, *Seasons of Change* (Saint Louis MO, Saint Louis University Press, 1996 p.47)

the religious community so that control remained in their hands.

In the middle of the twentieth century the role of faculty became increasingly important. The American Association of Professors, founded in 1915, became more and more a voice calling for faculty involvement in governance. In 1966 a joint statement on collegiality in the government of colleges and universities was issued by AGB and ^{AAUP}ACCU. It began with an assumption that the governing board of an institution of higher education in the United States, “operates, with few exceptions, as the final institutional authority.”⁵ Catholic colleges began to wonder if they wanted to be among those few exceptions. What would be the consequences?

Some had already begun the transition to boards possessing that final institutional authority. The governance of most Catholic colleges and universities still remained in the hands of the religious communities. While many of them had lay advisory boards and some had legal trustee authority vested in a board of laymen, the reality was that the religious community “ran” the institution. By the 1950's it had become evident that the close-interrelatedness of the religious community and the college led to confusion about the role of the different authorities, civil and religious. The leaders within the colleges saw this confusion as limiting the role that Catholic institutions could play in the wider field of American higher education. While there were over 250 of them, their image as “church-controlled” reduced the influence they exerted. It also hampered their exercise of true academic freedom in cases where a “church” position might be strongly articulated, such as anti-communism or civil rights, and individual faculty members might disagree with it. In

⁵AAUP, *Policy Documents and Reports*, (AAUP, Wash DC. 1990 ed.) 119-124.

addition, the limited funds at their disposal made growth in physical facilities, needed because of the massive influx of students under the GI Bill of Rights, and the development of research capabilities, both important indices of high academic quality, a very slow process. In some instances the commingling of funds in community and college accounts was still the practice, and finance officers functioned in both areas out of one office. Complicating the picture further, court decisions were suggesting that federal funds would not be available to colleges that were “pervasively sectarian.” The need for careful language describing the college or university made it difficult to introduce faculty (and later students) to the discussions of the trustees. What the faculties regarded as “board secrecy” the trustees saw as necessary discretion and prudence. The seventies were a time that severely tested the relationships between these two important constituencies. In addition, the men and women religious who were faculty members or administrators found themselves caught between the wishes of their religious superiors and the positions taken by faculty.

Recognizing that the documents of Vatican Council II issued in 1966 and the following years urged that stronger recognition be given to the position of laity in the church, the leaders of the colleges began to move to more independent authority for the Boards of Trustees and to far greater lay membership on the Boards. Paul Reinert SJ at Saint Louis University and Theodore M. Hesburgh CSC at the University of Notre Dame worked with their lay associates and their religious communities to allow for such a change to be made, thereby bringing about a separation of the university governance from the governing structure within the religious community. Details about the way in which they did this are recounted in Alice Gallin OSU’s *Independence and a*

New Partnership.⁶ Through the network already in place –membership in the Department of Colleges and Universities of the National Catholic Educational Association– the ideas were shared and the wisdom of shifting responsibility to the legal board became commonly accepted. The writings of Rev. John McGrath,⁷ a canon and civil lawyer, supported the argument that to change the by-laws in such a way that this transfer was truly effective did not require any decree of alienation from church authorities since the properties in question were not church property but property held in trust for the colleges under state law.

During the years 1965 to 1980 the move toward separation developed rapidly. According to a study done by Martin Stamm in 1979⁸ the administrators of Catholic higher education began to assume that the commonly-accepted “functions” of corporate boards in the higher education sector in the United States should be carried out in their institutions by an independent legal Board of Trustees.. These functions include: power to carry out the articles of incorporation and the institutional by-laws and to amend, alter, revise or dissolve them; the selection of the president or chief executive officer, the selection of the members of the Board, acquisition of new

⁶Alice Gallin osu, *Independence and a New Partnership in Catholic Higher Education*, (Notre Dame IN, University of Notre Dame Press, 1996), Seven case studies are given: University of Notre Dame, The College of New Rochelle, Saint Louis University, St. Michael’s, Mundelein, Fordham University and the University of Portland.

⁷John McGrath, *Catholic Institutions in the United States: Canonical and Civil Law Status*, (Wash. DC, The Catholic University of America Press, 1968)

⁸Martin J. Stamm, *Emerging Corporate Models of Governance in Contemporary American Catholic Education*, in *Current Issues in Catholic Higher Education*, vol. 2, #1 (Summer 1981)

property and assets, disposition or alienation of corporate property and assets, dissolution of the corporation, or changing the corporation's mission and purpose. In addition, the corporate authority exercises the fiduciary powers such as borrowing and lending money for institutional purposes.

In his study, Stamm found that these functions of the Board in the 134 institutions that replied to his questionnaire in 1977 were carried out in one of three basic models of corporate governance:

A.) the corporate governing body served in that capacity for several organizations, not just for the college or university in question; B.) the corporate governing body for the college or university was a distinct legal organization with full authority to carry out the functions described above.

Within this model, there were six ways that this was done; and C.) the corporation was defined as the governing body but it was explicitly required by the by-laws that the members seek approval, concurrence, or agreement from another independent corporation in order to fulfill one or more of their primary corporate functions.

Model A: At the time of this study, only three of the surveyed institutions had the first model of corporate governance. The governing functions of several organizations (schools, hospitals etc) were carried out by one corporate entity, the Sponsoring Religious Community.

Model B: Of the 134 institutions in the survey, 80 had a type of governance with only one corporation exercising the power in a single institution to carry out all of the corporate functional responsibilities. This model was regarded as the standard one for American higher education. In

this case, the Board was unicameral in form and independent in its decision-making process.

However, its independence was modified, in various ways. There are some legally independent boards which, in their by-laws, provide for a role in decision making for the sponsoring religious community or ecclesiastical authority. This role varies according to the way in which the board's relationship to the community is structured by the by-laws. Stamm gives five examples of such relationships (Models B-2, B-3, B-4 B-5 B-6), all of which allow for some inter-action between community and college with varying degrees of delegation of power from the corporate authority to the board of trustees. These models are sometimes spoken of as "two tiered" and they differ as to the presence of the members of the corporation as such on the board of trustees. In some cases the entire governing council of the religious community is *ex officio* the corporate "members" and, as such, may or may not also be trustees.

What are the issues that are relevant to the choices made regarding the model of governance adopted by individual colleges? 1) Questions about legal liability and accountability for actions of the college administration, e.g. is it possible for a tenured professor who is fired to sue not only the college but the religious community behind it? 2) Questions about financing the institution, e.g. can the college or university solicit funds on its own or does it need permission from the religious authorities? 3) Questions about authority, e.g. is the Board of Trustees the final arbiter in internal policies e.g. a decision to become coeducational or to merge with another college? Another issue that surfaces in some discussions is that of the extent to which a predominantly lay board can carry out the "mission" of the institution as perceived by the founding community

within its own mission, e.g. Sisters of Mercy. Furthermore, can the influence of the founders be continued once control is transferred to the lay/religious board of trustees? Must it be?

Because of the challenging questions facing the Boards in contemporary higher education, it is more important than ever for lay trustees to have a clear picture of the way in which the sponsoring religious community intends to carry out its own role with regard to the college. Members of the community who become *ex officio* trustees must be clear about their fiduciary responsibility to the college, a responsibility which may sometimes conflict with the stated mission or the educational philosophy of the religious community when it comes to choosing priorities in the allocation of funds.

In a follow-up study, commissioned by ACCU and done by Stamm in 1992,⁹ the data came from 125 institutions. Stamm found that by this time nearly all (96%) of them had independent corporate systems. There had been a decline from 1977 in terms of a bi-cameral structure in which the corporation was completely separate from the board of trustees. (B-2) The most frequent model today is one of over-lapping membership in which there are certain "reserved powers", reserved that is to the upper level of ~~governance~~ ^{governance} (religious community) and these cover such things as institutional mission, dissolution of the corporation, alienation of property and amending of by-laws. There appeared to be a trend in the increase of such models in the 1992 study.

In a separate survey done in 1995 by Alice Gallin osu, 164 of the 228 members of the Association

⁹Martin J. Stamm, "Report on the Governance of American Catholic Higher Educational Institutions in 1992," October 21, 1992 ACCU files

of Catholic Colleges and Universities reported that they had “independent” boards although 86 of them had some powers reserved to the members of the corporation. It is important to note that some of the corporate members were lay.

Whatever the model followed, the laicization process itself has gone forward . Stamm found in 1992 that 98% of the governing boards of Catholic colleges and universities had one or more voting lay members. By that time laypersons comprised nearly 71% of the national Catholic higher education trustee population; they occupied the position of Chair in 80% of the institutions. At 23% of the institutions surveyed both the Board Chair and the President were lay people.

While the presence of lay persons is evaluated positively by respondents to the survey, there remains some ambiguity about the long range satisfaction on the part of the religious community. Colleges have become more clearly independent in their operations, and sponsors have become more unsure of their position. Stamm reports that from 1977 to 1992 45% of the colleges changed their by-laws to amend their corporate governance structure. Unfortunately, the survey did not ask about the direction of the changes.

Later studies done by Melanie Morey and Dennis Holtschneider CM and published by AGB (2000) are based on a survey of some 172 Catholic colleges. Both presidents and representatives of the sponsoring religious body were questioned with 70% of the presidents and 65% of the religious superiors responding. Their data shows that lay people are “fast becoming the primary stewards of Catholic higher education.” However, the realization of this has caused some

religious to restructure the shared-governance format of the post 1960's in order to strengthen the role of the sponsoring religious community in a variety of ways. The decline in the numbers of religious and the consequent loss of their influence within the institutions is causing some groups to rewrite by-laws in such a way as to weaken the independence of the Board.

It is important to note that the use of the term "sponsorship" as applied to the relationship of the religious community to the college it founded has no civil or canonical basis. It is a term that means whatever the two parties want it to mean. Morey and Holtschneider suggest that the relationship is experienced in three ways: 1) through the direct influence of members of the congregation who are present within the institution; 2) through the congregation's structural governance control; and 3) through the commingling of resources.

Trusteeship, as understood in American higher education, is not "representative government." Each trustee is chosen because of the wisdom, willingness to work, and wealth that he or she is able to bring to the task. To think of members of the religious community as individual board members "representing" the religious community goes contrary to this understanding of trusteeship. Some sponsoring groups are now rewriting by-laws and other documents to make clear the authority of the religious congregation and to do this they prefer power in the hands of a Council rather than in the hands of individual trustees. But one can ask whether or not the members of the Council, if included as trustees within the Board structure, must not attend to their fiduciary responsibility for the welfare of the college rather than for that of the congregation. Conflict of interest is bound to be a problem.

One can also question those who are revising by-laws in favor of more authority in the hands of the religious community as to the reason for these changes. The authors of the study suggest that they are driven by the reduced number and aging profile of the religious themselves; they see or foresee a need to have control of the resources of the college if they lack resources to care for their aging and sick sisters. They also suggest that as the presence of the religious is reduced on campuses, the congregations seek to maintain influence by other means. Not only are their numbers down but very few are interested in ministry in higher education. During the period under study about 12.5% of the congregations were seeking to maintain control by moving to two-tier boards, the upper one often being the Council *ex officio* of the community whether or not the members have any background in higher education. This finding suggests that the direction of change found by Stamm was probably toward two-tier boards.

Another mechanism that has been introduced in order to prolong the influence of the sponsoring religious community is an Office of Vice President for Mission within the college, presumably held by a member of the Congregation. Since the responsibility of safeguarding the mission is one of the key features of trusteeship it will be important to see how this vice president relates to the Board.

The status of Boards of Trustees in Catholic Colleges and Universities will probably continue to evolve. It will be linked to the future of religious orders, especially to vocations among those who are suited for the work of higher education. The mutual relations of college and community will be a test of how lay persons in the church can and wish to carry on the mission of education

begun and nurtured by the religious men and women of the past. The focus of any such test will certainly be the Board of Trustees.

Further Reading

Alice Gallin, *Independence and a new Partnership* (Notre Dame, IN, University of Notre D
Dame Press, 1996)

Negotiating Identity (Notre Dame, IN, University of Notre Dame, 2000)

Clark Kerr and Marian L. Gade, *The Guardians: Boards of Trustees of American Colleges and
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