INTRODUCTION

This volume of *Conversations on Philanthropy* grew out of papers presented at a 2011 scholarly colloquium on *The Law of Charity: History, Theory, and Social Practice*. It was unintentional, but the papers gathered for this conference seemed, upon reflection, both to amplify the importance of and reveal a lacuna in Harold Berman's magisterial study of the Western legal tradition presented in *Law and Revolution: The Formation of the Western Legal Tradition* and *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition*. To identify the lacuna requires a careful look at Berman's focus on the implications of the Lutheran Reformation; consider this passage from the first volume of Berman's study:

> The key to the renewal of law in the West from the sixteenth century on was the Lutheran concept of the power of the individual, by God's grace, to change nature and to create new social relations through the exercise of his will. The Lutheran concept of the individual will become central to the development of the modern law of property and contract. To be sure, there had been an elaborate and sophisticated law of property and contract, both in the church and in the mercantile community, for some centuries, but in Lutheranism its focus was changed. Old rules were recast in a new ensemble. Nature became property. Economic relations became contract. Conscience became will and intent. The [individual's] last testament, which in the earlier Catholic tradition had been primarily a means of saving souls by charitable gifts, became primarily a means of controlling social and economic relations. By the naked expression of their will, their intent, testators could dispose of their property after death, and entrepreneurs could arrange their business relations by contract. The property and contract rights so created were held to be sacred and inviolable, so long as they did not contravene conscience. Conscience gave them their sanctity. And so the secularization of the state, in the restricted sense of the removal of ecclesiastical controls from it, was accompanied by a spiritualization, and even a sanctification, of property and contract (2006, 29-30).

Property and contract, however, are only two of the three legs of the stool upon which the modern world has been constructed. Perhaps, to fully ground property and contract as unassailable features of our jurisprudence, we must turn our attention to a theory of *association*, which can be cast as the third leg of the stool. The Reformation, as Berman convincingly argues, precipitated a revolution in the legal nature of property and contract. Nevertheless, Berman leaves largely out of the narrative of *Law and Revolution* the story of the changes that were also transpiring in our understanding of the legal nature of associations and corporations, those formal and informal entities through which people coordinate their social and economic activities. And yet, the emergence of the *jus commune* Berman describes, a "pan-European estate of jurists" engaged in developing a new legal science, was itself an epiphenomenon of the new phenomenon of associational liberty that would set the Western legal tradition on a new course. Broadening legal recognition of nonpolitical associations gave rise not only to the early forms of incorporated commercial activity but also ushered in a new age of philanthropy anchored in grassroots, private charities.

The belief that people could associate together outside of the state or the church to create positive social and commercial benefits would eventuate in the settlement of the American colonies on a new political economy of the covenanted, and later the constitutional, society. The reader of the Mayflower Compact, John Winthrop's *A Model of Christian Charity*, much of the writings of Benjamin Franklin, Alexander Hamilton's *Federalist 1,* and much more in the literature of the American colonial and early republic periods will readily assent to the conclusion that America was also conceived of as a charitable and philanthropic society, a society in which rich lateral and voluntary associations among people promoted the general welfare, as well as a society whose members self-consciously believed themselves to be modeling a new hope for human freedom and flourishing.

Puzzling over the nature of democracy in America, which he did not believe could be easily grafted onto the Old World, Alexis de Tocqueville penned his famous lines outlining the emergence of a new science of association: "Americans of all ages, all conditions, all minds constantly unite. . . . In democratic countries the science of association is the mother science; the progress of all the others depends on the progress of that one. Among the laws that rule human societies there is one that seems more precise and

clearer than all the others. In order that men remain civilized or become so, the art of associating must be developed and perfected among them . . . ."

By science, Tocqueville may have had in mind less a positivist science in the modern sense than a deeper study and clearer articulation of the *phronesis* already embodied in the Americans' legal procedures, associational habits, and conversational traffic (not only the conversation in homes, taverns and inns but that which transpired through circular letters and a robust free press as well). If they failed to understand their unique associational practices, Tocqueville speculated that Americans would drift into "soft despotism," unable to balance their hopes for liberty and their fierce belief in equality. In this prediction, Tocqueville seems to have prophesied the emergence of the modern welfare state and its enervating effects on the philanthropic enterprise.

The present quest for "social justice" shifts us further away from an understanding of and trust in the positive social effects of private charity and independent voluntary association and seems to tighten the link between our philanthropy and our politics. A deeper examination of the philosophy of social justice suggests that the processes of secularization and sacralization are far from over, and it highlights more than ever our need to understand better our history and our present aspirations and to reflect more carefully about how each finds, or should find, expression in our legal institutions and traditions.

The papers collected in this volume thus serve as signposts back to many of the questions Tocqueville explored. They help us not only fill in missing pieces of the legal history of the role of philanthropic (and commercial and political) associations but also advance Berman's call for an integrative jurisprudence and a social theory of law that recognizes not only the inevitability of progress (revolution in Berman's sense) but also the value of tradition in helping us renew and recreate the foundations of order.

The first set of papers in this volume, comprising a symposium on "The Political Economy of Tax Exemption," should be read as a thought experiment rather than a direct move toward a policy prescription. We were intrigued when William Dennis and Robert Atkinson, beginning with divergent presuppositions about the nature of American political economy, converged in seriously questioning the desirability of exempting charitable entities from taxation.

As this volume goes to press, there is much ink being spilled in protest against President Obama's continuing efforts to cap the charitable deduction. Much more empirical study should be done on the potential impacts of such

a policy, but the papers in this symposium approach the questions of the entanglement of philanthropy and state from a different, more normative, perspective. The President's intent certainly is to raise more tax revenue and draw welfare provision even further into the domain of the national government. It may be that we have lived with the Sixteenth Amendment authorizing the national income tax too long for those who would defend charitable giving to recall that Tocqueville witnessed a robust voluntary spirit in America long before the tax exemption or the charitable deduction existed. Incentives are important, but if our current tax regime has reduced our charitable system to one in which the central government increasingly establishes the proper ends of welfare and the people support these ends primarily as a means of tax avoidance, we may have already lost our ability to imagine together, as Tocqueville thought we must, our self-interest, rightly understood. We leave it to the reader to explore our authors' arguments and to reflect, as our symposium commentators have done, on the validity and implications of their arguments.

The second group of papers—those by Joseph Isaac Lifshitz, Richard Helmholz, and Steven Grosby—sheds further light on the contemporary political economy of philanthropy by way of historical examinations of legal theory and practice in three distinct contexts. Lifshitz orients us to the treatment of property and charity in the Jewish legal tradition and questions whether modern scholars are justified in reading today's concerns with distributive or social justice back into this tradition. Helmholz opens a window into the late medieval and early modern European laws of charity, with special attention to the negotiation between church and state of jurisdictional boundaries over wills and trusts. Grosby's examination of the early legal and political theory of associations, especially as presented in the works of Otto von Gierke and Pollock and Maitland, highlights tensions and questions about the legal foundations of associational liberty.

A third group of papers turns our attention to the implications of legal frameworks for practical applications in modern philanthropic entities. Neither the law nor philanthropy is a static institution, and Ilaria Colussi introduces us to the complexities surrounding the development of a workable legal theory to guide jurisprudence in the relatively new world of human tissue banks. David Hardwick and Leslie Marsh argue that institutional design, in theory and practice, matters, and they provide a case study of how

one Canadian hospital has navigated the space between philanthropy and the welfare state. Todd Breyfogle concludes this group of papers with a literary reflection on Willa Cather's *Death Comes for the Archbishop* which is suggestive of the ways our deeply embedded and often unexamined cultural understandings of both law and philanthropy shape our expectations of charity and our practices of giving.

Finally, we are pleased to present here a research note by George McCully of the Catalogue for Philanthropy discussing preliminary findings of a program he is pursuing to explore how the legal designations of "nonprofit" entities utilized by the Internal Revenue Service actually confuse our categorical understanding of the true meaning of philanthropy and cloud both our charitable practices and our research on the philanthropic sector.

Our cover art for this volume is a painting of *Founder's Hall* at Girard College in Philadelphia, which was founded as a school for poor, white, male orphans in 1833 by a bequest from Stephen Girard, one of the wealthiest men in America in the early nineteenth century. The development of American law regarding philanthropic trusts has proved a complex legal process, as English statutes, including the Elizabethan Statute on Charitable Uses (1601), were repealed after the Revolution, and the courts had both to look for precedents in Common Law and to align decisions with the new Constitutional order. Girard's legacy stands out, both as one of the largest charitable bequests in American history to that time and as the subject of legal contests around the law of charitable trusts in two succeeding centuries.

First, in the litigation that resulted in a U.S. Supreme Court decision in *Vidal v. Girard's Executors* (1844), Girard's heirs argued that the stipulation that the City of Philadelphia serve as trustee for Girard's trust could not be upheld and sought to take control of the estate themselves. The decision also stands among the earliest church-state rulings by the Court, which held that despite Girard's stipulation that no ecclesiastics or ministers could be employed by the school it nevertheless remained incumbent on the City to ensure that Girard's desire for instruction in the "purest principles of morality" be honored through Biblical instruction by lay teachers.

In the 20th century, in the wake of *Brown v. Board of Education*, Girard's bequest was again the subject of Supreme Court attention in *Pennsylvania v. Board of Trusts*, 353 U.S. 230 (1957). The Court ruled that the continuing enforcement of Girard's will by denying admission to Negro boys by the City

of Philadelphia constituted a violation of the Fourteenth Amendment. Subsequently, a new board of trustees was appointed, effectively privatizing the trust, which was then free to set its own admissions policies. Girard College thus became an important target for Civil Rights activists, who effected integration of the school in 1968 through popular protests and continuing litigation, which culminated in a decision by the Third Circuit Court of Appeals that the case should be decided on Constitutional rights rather than state law.

Such contestations over the fulfillment of donor intent continue into our present century, fueled by twentieth-century welfare state experiments, increasingly contentious politics regarding entitlements and social regulation, and, after the ratification of the Sixteenth Amendment establishing a federal income tax, new statutory treatments of tax-exempt entities in both Washington and the states. A judiciary increasingly prone to activism from the bench contributed to confusions about the legal place of philanthropy. The result is that American philanthropy, having become increasingly an adjunct of the state, has too often relinquished its standing as a fundamental source of social power.

—Lenore T. Ealy
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