

LIFE, LOVE, AND LAW: AN EPISTOLARY EXCHANGE

ESSAY

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SOME TIME AGO, PROFESSOR CARLITOS DEL VALLE SUGGESTED TO ME THAT we begin an exchange of letters, that we put our mutual interest in legal philosophy and the world of ideas to good use. I have thus finally taken up his suggestion by writing this first fleeting letter, using as my model the recent collaborative work of Robert Chang and Adrienne Davis,¹ and I have christened this project *Life, Love, and Law* to indicate the broad range of our intellectual interests.²

That said, I want to begin this paper by discussing one of David Hume's philosophical essays: *Of the Original Contract*.³ Why, however, have I chosen this particular piece as the springboard of our present epistolary exchange? I will tell you why. In a word, it is the most refreshing, thought-provoking, and dangerous essay I have read in years, and given professor Del Valle's longstanding scholarly interest in the problem of violence—specifically, the use of violence to promote social and legal change—I think he and many others will find the ideas in Hume's essay indispensable to our future intellectual endeavors.

Before proceeding, however, let me explain how I found this intriguing essay in the first place. Considering the wide range of my readings and my longtime interest in legal and political philosophy—not to mention my deep admiration of the trilogy of remarkable thinkers responsible for the so-called *Scottish Renaissance*: Adam Smith, Thomas Reid, and David Hume—I confess to you that my discovery of Hume's essay *Of the Original Contract* occurred purely by chance. Indeed, it was an economist, Roger Myerson, whose academic specialty is game

* Associate Professor at Barry University Dwayne O. Andreas School of Law. This paper is dedicated to my friend, professor Carlos del Valle, the former Dean of the Eugenio María de Hostos School of Law in Mayagüez, Puerto Rico. Over the years, we have informally discussed ideas in a variety of places. The purpose of this paper is to initiate a more formal exchange of ideas with my dear friend and colleague.

1 See Robert S. Chang & Adrienne D. Davis, *Making Up Is Hard to Do: Race/Gender/Sexual Orientation in the Law School Classroom*, 33 HARV. J.L. & GENDER 1 (2010); see also Robert S. Chang & Adrienne D. Davis, *The Adventure(s) of Blackness in Western Culture: An Epistolary Exchange on Old and New Identity Wars*, 39 U.C. DAVIS L. REV. 1189 (2006).

2 For a beautiful illustration of our approach to law and the world of ideas generally see Carlos del Valle Cruz, *Sobre ovejas eléctricas*, in BLADE RUNNER: MEMORIA, VIGILANCIA Y EL SUJETO DESECHABLE 95 (Daniel Nina ed., 2008); F.E. Guerra Pujol, *El ajedrez en Blade Runner: lecciones de la partida inmortal*, in BLADE RUNNER: MEMORIA, VIGILANCIA Y EL SUJETO DESECHABLE 105 (Daniel Nina ed., 2008).

3 DAVID HUME, *Of the Original Contract*, in ESSAYS: MORAL, POLITICAL AND LITERARY 465-87 (Eugene F. Miller ed., 1985), available at <http://www.constitution.org/dh/origcont.htm>.

theory, and not a philosopher or political theorist, who introduced me to Hume's 1748 essay.⁴

Despite my deep interest in law and philosophy, I confess that I now have little patience for the purely verbal arguments of most lawyers and philosophers. Like medieval theological disputations (such as the nature of the Holy Trinity) or futile exercises in aesthetics (what is art?), most legal and philosophical arguments tend to be imprecise and, worse yet, untestable and thus unfalsifiable⁵—hence, my intellectual turn to what I like to call the *Republic of Mathematics* and the rigorous world of mathematical models and game theory.⁶

It is thus somewhat ironic that it was a formal paper on game theory—specifically, an essay explaining the problem of cooperative games with multiple equilibria⁷—that introduced me to David Hume's thought-provoking, philosophical essay *Of the Original Contract*. But, in reality, it is not really ironic at all. Why? Because one of the underlying questions in Hume's essay is the origins of law—and the related question, why obey law?—and as I shall try to explain to you in the remainder of this letter, choice of law, choice of constitutional rules, and choice of strategy to change law are essentially what game theorists call a *coordination problem*, or how to choose among multiple equilibria.⁸

Let us now turn to Hume's 1748 essay directly. For clarity and convenience, I will first review the gist of Hume's arguments regarding political power and the origins of law and morals. Once that task is complete, I shall then explain the enormous influence of Hume's masterful essay on my thinking.

Hume begins by identifying the two major maxims or theories of law and politics of his time—(a) the *divine right of kings* and (b) the *consent of the governed*—for in Hume's time, on the eve of the French and American revolutions, politics in Europe was divided along the following ideological axes. On the one side was the old guard, the conservatives, defenders of tradition and the *ancient regime*, who saw in the person of the king the absolute and benevolent hand of the Creator. On other side were the classical liberals—the reformers, dreamers,

4 See Roger B. Myerson, *Learning from Schelling's Strategy of Conflict*, 47 J. ECON. LITERATURE 1109, 1125 (2009). A previous draft of professor Myerson's paper is available at <http://home.uchicago.edu/~rmyerson/research/statofc.pdf>. I read professor Myerson's paper, in turn, because of the reference to Thomas Schelling in its title. Schelling is one of my intellectual heroes for his brilliant insights and unorthodox approach to human behavior.

5 See, e.g., RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999).

6 I explain in full my *reverse conversion* from law to science and mathematics in my 2009 autobiographical essay, F.E. Guerra-Pujol, *Confessions of a Latino Law Professor* (2009), available at <http://ssrn.com/abstract=1516485>. As I explain in my 2009 essay, the person to whom I most owe this transformation is my close friend and colleague Orlando Ivan Martínez García. A previous draft of my autobiographical essay was published in Puerto Rico in 2004. See F.E. Guerra-Pujol, *In Defense of Intellectual Agnosticism*, 65 REV. COL. ABOG. 55 (2004).

7 Myerson, *supra* note 4.

8 See John C. Harsanyi, *On the Rationality Postulates Underlying the Theory of Cooperative Games*, 5 J. CONFLICT RESOL. 179 (1961).

and would-be radicals—the heroic generations of 1776 and 1789 who championed the fundamental rights of *the people* as the true and ultimate source of political power.

Hume’s formulation of these two contending political forces is so elegant, so timeless and eloquent, that it is well worth repeating word-for-word here:

The one party, by tracing government to the DEITY, endeavour[s] to render it so sacred and inviolate, that it must be little less than sacrilege, however tyrannical it may become, to touch or invade it, in the smallest article. The other party, by founding government altogether on the consent of the PEOPLE, suppose that there is a kind of *original contract*, by which the [people] have tacitly reserved the power of resisting the sovereign, whenever they find themselves aggrieved by that authority.⁹

Having set forth these two competing theories of law and politics, Hume then devotes the remainder of his essay to tearing them down and concludes by proposing an alternative pragmatic theory of law, politics, and morals.

First, Hume quickly disposes of the *divine right of kings* theory once and for all (Notice I say *quickly* because Hume is able to deliver the mortal blow in but a single paragraph!). Moreover, Hume refutes the divine right theory, not by denying the existence of God or by asserting the absolute separation of church and state, but rather by unabashedly embracing this theory as true and then following it to its logical but totally absurd end.

Hume’s argument, in summary, goes like this: even if the absolute authority of an all-powerful king is indeed a mere reflection of God’s benevolent will, who wisely invested political power in the king for “the good of all his creatures,”¹⁰ then one must also concede that the king’s appointed agents and trusted ministers are similarly the product of divine sanction: “The same causes, which gave rise to the sovereign power [of the king] in every state, established likewise every petty jurisdiction in it, and every limited authority. A constable, therefore, no less than a king, acts by a divine commission, and possesses an indefeasible right.”¹¹

Thus, even if we assume that the king is God’s divinely appointed agent on Earth, then so too is everyone else, or in Hume’s eloquent words: “[N]or has the greatest and most lawful prince any more reason, upon that account [i.e., divine right], to plead a peculiar sacredness or inviolable authority, than an inferior magistrate, or even an usurper, or even a robber and a p[i]rate.”¹² Hume’s *reductio ad absurdum* argument against theocracy is nothing short of brilliant: he foists the old guard conservatives upon their own divinely-inspired petard.

⁹ HUME, *supra* note 3, at 466.

¹⁰ *Id.* at 467.

¹¹ *Id.*

¹² *Id.*

At this stage, Hume next turns his attention to the other major political theory of his day, the celebrated social contract theory of John Locke.¹³ Although it will take Hume far more than a single paragraph to neutralize the social contract theory, his powerful critique of Lockean consent is no less complete, unforgiving, and devastating than his brilliant one-paragraph refutation of the divine right theory, and because the work of such modern-day thinkers as John Rawls and Robert Nozick is built on purely Lockean foundations,¹⁴ the implications of Hume's critique are tremendously important to us as well. Indeed, this is the reason why I have chosen to commence this epistolary exchange with Hume's 1748 essay.

Although Hume readily recognizes the normative and ethical appeal of Locke's social contract theory, the problem with Locke's theory, according to Hume, is that it is wrong as a descriptive matter. In summary, Hume's main line of attack against the social contract theory is based on a purely descriptive or historical argument, and Hume's descriptive/historical argument is as simple and straightforward as can be: "Almost all the governments, which exist at present, or of which there remains any record in [history], have been founded originally, either on usurpation or conquest, or both, without any pretence of a fair consent, or voluntary subjection of the people."¹⁵

That is to say, in the real world—both in Hume's age and today—very few governments are, in fact, either democratic or based on popular consent; instead, most, if not all governments, even democratically elected ones, originated in raw acts of force and violence. In Hume's own words:

[W]ere one to choose a period of time when the people's consent was the least regarded in public transactions, it would be precisely on the establishment of a new government. In a settled constitution, their inclinations are often consulted; but during the fury of revolutions, conquests, and public convulsions, military force or political craft usually decides the controversy.¹⁶

But what of those few truly popular governments, however rare and precious, such as those in ancient Athens, or in England after the Glorious Revolution, or (I might add) in the modern-day federal republic of the United States? Whatever their tarnished historical origins in acts of force and violence, are not these cases textbook examples of Locke's *consent of the governed* maxim?

Hume's answer is clear and convincing: no. In the case of the Glorious Revolution, "it was only [a] majority of seven hundred, who determined th[e] change

¹³ JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* (J. W. Gough ed., Basil Blackwell 1956) (1690).

¹⁴ JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

¹⁵ HUME, *supra* note 3, at 471.

¹⁶ *Id.* at 474.

[in the constitution] for near ten millions,”¹⁷ while the popular assemblies in ancient Athens were not only unrepresentative of the whole population, they were also unstable and tumultuous to boot, “always full of license and disorder.”¹⁸ As for modern democracies, Hume’s general critique of elections seems apt: “It [the election process] is either the combination of a few great men, who decide for the whole . . . [o]r it is the fury of the multitude”¹⁹

Lastly, Hume breaches the social contract theory’s last line of defense, the tacit or implied consent argument, that is, the idea that we consent to our government because we benefit from its laws and protection.²⁰ But the problem with the tacit-consent argument, according to Hume, is that, as a practical matter, people do not really have a choice in deciding under which government or legal system to live. In a word, people do not really have a viable right of exit. As Hume himself states:

Can we seriously say, that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives from day to day, by the small wages which he acquires? We may as well assert, that a man, by remaining in a vessel, freely consents to the dominion of the master; though he was carried on board while asleep, and must leap into the ocean, and perish, the moment he leaves her.²¹

As an aside, how much more true is Hume’s devastating critique of tacit consent today, in a world of strict immigration and customs controls? Summing up, Hume’s rhetorical question earlier in his essay is fitting here as well: “How chimerical must it be to talk of a choice [or implied consent] in such circumstances?”²²

Having effectively demolished the foundations of Locke’s social contract theory—a great accomplishment in and of itself—Hume makes clear that his true intention is not to criticize its normative or ethical appeal as an ideal but rather to engage in the search for the truth: “I only pretend, that it [the consent of the governed] has very seldom had place in any degree And that therefore *some other foundation of government must also be admitted.*”²³

In the remainder of his essay, Hume sketches his alternative or pragmatic theory of law, politics, and morals. Hume’s own theory is essentially a conse-

¹⁷ *Id.* at 472.

¹⁸ *Id.* at 473.

¹⁹ *Id.* at 472. The first part of Hume’s description of the political process appears to anticipate Schumpeter’s influential view of democracy as a competition among elites. See JOSEPH A. SCHUMPTER, CAPITALISM, SOCIALISM AND DEMOCRACY 269-83 (Harper & Row 1976) (1942).

²⁰ Locke proposed the theory of tacit consent in his Second Treatise. See LOCKE, *supra* note 13, at 61-62.

²¹ HUME, *supra* note 3, at 475.

²² *Id.* at 473.

²³ *Id.* at 474 (emphasis added).

quentialist or instrumentalist one. What matters is not the presence or absence of consent or consistency with some preordained, divine, universal order. What matters are *results*. Those thinkers searching for the Holy Grail of consent or some such hypothetical social contract search in vain for something that is just not there. And those who would use natural law or some other divine standard with which to evaluate the goodness of existing institutions are simply deluding themselves as well.

But what do we mean by *results*? Is not this consequentialist concept just as chimerical as Lockean consent or divine will? Here, I think, is the beauty, power, and originality of Hume's approach to law, politics, and morals. According to Hume, there simply is no single, universal, or timeless criterion for evaluating the goodness or badness of our existing institutions. Instead, goodness and badness are dependent on whatever the majority happen to say or feel is good or bad. In Hume's words: "[T]hough an appeal to general opinion may . . . be deemed unfair and inconclusive, yet in all questions with regard to morals, as well as criticism, there is really no other standard, by which any controversy can ever be decided."²⁴

Carlitos, perhaps you are prepared to accept Hume's radical skepticism in the arena of morals, but surely not in the rights-based arenas of law or politics—especially not after the likes of Holmes and Hart effectively divorced morals from law.²⁵ But if you read Hume's 1748 essay carefully, you will see that Hume's instrumentalist or materialist view of morals applies equally to law and politics as well.

Hume distinguishes between two types of moral duties. "The *first* are those, to which men are impelled by a natural [biological] instinct . . . which operates on them, independent of all ideas of obligation, and of all views, either to public or private utility. Of this nature are love of children, gratitude to benefactors, pity to the unfortunate."²⁶ Such moral sentiments are based on Darwinian evolutionary instincts and thus require no mental reflection or sophisticated philosophical reasoning.²⁷

"The *second* kind of moral duties," according to Hume, "are performed entirely from a sense of obligation It is thus *justice* or a regard to the property of others, *fidelity* or the observance of promises, become obligatory, and acquire

²⁴ *Id.* at 486. As an aside, it is worth comparing Hume's instrumentalist or pragmatic theory of morality with Thomas Kuhn's influential theory of truth and scientific revolutions. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d. ed. 1970) (the truth of a theory is determined by its assent from the relevant community).

²⁵ See, e.g., Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 463-64 (1897); see also H.L.A. HART, *THE CONCEPT OF LAW* 185-212 (1961).

²⁶ HUME, *supra* note 3, at 479.

²⁷ It is worth noting that Hume's evolutionary approach to morality has been extended in recent times in the fields of sociobiology and evolutionary psychology. See, e.g., E.O. WILSON, *SOCIOBIOLOGY: THE NEW SYNTHESIS* (1975); see also ROBERT WRIGHT, *THE MORAL ANIMAL* (1995).

an authority over mankind.”²⁸ In other words, most people think that breaking one’s promises and theft are wrong, not because such acts are *ex ante* immoral, but rather because it is in everyone’s self-interest to keep one’s promises and refrain from stealing.²⁹

Having established this alternative or pragmatic source of morals, Hume then extends it to the realms of politics and law. In essence, Hume argues that one’s allegiance to country as well as one’s duty to obey the law share the same foundation as the moral sense of obligation. People owe allegiance to their country and are bound to obey the law, not because they have consented to do so, but rather out of pure self-interest:

But why are we bound to observe our promise[s]? It must here be asserted, that the commerce and intercourse of mankind, which are of such mighty advantage, can have no security where men pay no regard to their engagements. In like manner, may it be said, that men could not live at all in society, at least in a civilized society, without laws and magistrates and judges, to prevent encroachments of the strong upon the weak, of the violent upon the just and equitable.³⁰

Summing up, Hume—like Locke, and Hobbes before him—acknowledges that the state is a necessary evil, necessary to protect the weak and punish wrongdoers. But the fact that governments perform these critical tasks does not alter their violent origins or cure their lack of popular consent. In a word, or to be more precise, in two words, people obey the law and tolerate their governments out of necessity and self-interest.

Before concluding, let me pause and take a moment to explain the enormous influence Hume’s essay has had on my intellectual development. Simply put, no other set of ideas—with the possible exception of the brilliant ideas set forth in the first eight pages of Ronald Coase’s paper *The Problem of Social Cost*³¹ and in the first three chapters of Thomas Schelling’s masterpiece *The Strategy of Conflict*³²—has played such a pivotal role in my intellectual life.

In summary, Hume’s critique of Locke has made me see the work of both Rawls and Nozick in a new light, and at the same time, Hume’s work has provided me a criterion by which to evaluate the ideas of Rawls, Nozick, and other political and legal philosophers. Furthermore, because of Hume, I not only find the ideas of the Rawls-Nozick intellectual cartel lacking, I now feel compelled to push Hume’s ideas further and offer my own game-theoretical account of law and politics.

²⁸ HUME, *supra* note 3, at 480.

²⁹ For a modern, Humean-inspired explanation of the self-enforcing nature of moral, legal, and political norms, see ROBERT SUGDEN, *THE ECONOMICS OF RIGHTS, COOPERATION, AND WELFARE* (1986).

³⁰ HUME, *supra* note 3, at 481; see also SUGDEN, *supra* note 29, at 4-8.

³¹ Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

³² THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* (1960).

First, why do I say that I see—post-Hume—John Rawls and Robert Nozick in a new light? Because I now see these seminal thinkers as, in the main, responding to Hume's devastating critique of Locke's social contract theory. Put another way, there would be no *Theory of Justice*, no *Anarchy, State, and Utopia*, without Hume's refutation of Locke. In essence, both Rawls and Nozick feel compelled to restore and rehabilitate Locke's consent theory, though they use different strategies for accomplishing this delicate task.

Rawls's strategy in *Theory of Justice* is to posit the possibility of hypothetical consent—Rawls's deservedly-famous *original position* thought experiment, an imaginary world in which we create a new regime behind a total *veil of ignorance*.³³ According to Rawls, as long as our existing political system and laws are what we would have agreed to in the original position, negotiated behind a total veil of ignorance, then our existing institutions are fair and just and legitimate.³⁴ This strategy is ingenious since it not only permits Rawls to sidestep the real-world problems of state-sponsored as well as private force and violence, it also allows him to bring Lockean consent and ethics back into the picture.

For his part, Nozick adopts a far different strategy for responding to Hume and restoring Lockean consent; for in many respects, Nozick not only recognizes Hume's critique of the social contract, he embraces and incorporates it into his own theory of the state. According to Nozick, a number of competing *mutual-protection associations* or mafia-like cartels will inevitably spring up in a Hobbesian state of nature as various mafia-like bosses or strongmen decide to move into the protection business.³⁵ Nozick thus implicitly recognizes Hume's important point about force and violence, but Nozick then posits an *invisible-hand* process—that is, a competitive market in protection services—in which one of the mafia-like protection associations becomes *the* dominant one, not through force and coercion alone, but through voluntary agreements and healthy competition.³⁶

But Rawls's original position and Nozick's invisible-hand processes raise a further question: Are they right? That is, using Hume's descriptive critique of Locke as a criterion for evaluating the work of Rawls and Nozick, do their ingenious and highly original thought-experiments stand up? In a word, the answer has to be no. Hume's critique of Locke applies with equal force and vigor to the theories of Rawls and Nozick. Substitute the words *original contract* in Hume's 1748 essay with the words *original position* or with *invisible-hand process*, and this point becomes crystal clear.

33 RAWLS, *supra* note 14, at 15-19, 102-05.

34 *Id.*

35 NOZICK, *supra* note 14, at 10-13.

36 *Id.* at 18, 130-31. *See also* Coase, *supra* note 31, at 2-8 (discussing the possibility of voluntary bargaining over legal rights as a solution to the externality problem).

Furthermore, assuming one could somehow magically conjure up the necessary conditions to negotiate behind a Rawlsian veil of ignorance, or assuming one could actually re-create à la Nozick a competitive market in protection services,³⁷ it seems a stretch to suggest that such negotiations or markets would somehow produce the existing political and legal institutions we have now. Both Rawls and Nozick are compelled to imagine hypothetical worlds to rescue Locke, but their imaginary worlds are no less unreal, no less fanciful—alas, they are more so—than Locke’s social contract.

This leads me to my last point. Let me conclude by saying that Hume is so important to me because he has given my intellectual life a new sense of purpose and direction. Instead of merely following the blind alleys and dead-ends of Rawls or Nozick, I wish to return to Hume and find a way of modeling Hume’s pragmatic approach to law, politics, and morals. In summary, I see all three of these arenas as consisting largely of co-evolutionary arms races between cheaters and wrongdoers on the one side and cheater-detectors and rule-enforcers on the other.³⁸

Perhaps I shall develop my model in future notes. For now, however, what do we make of Hume’s critique of Locke, of his ready admission of the role of force and violence in the origins of the state, and what to make of my thoughts on these weighty matters? I hope to hear from you soon, yours truly, F.E. Guerra-Pujol.

³⁷ See, e.g., F.E. Guerra-Pujol, *Coase and the Constitution: A New Approach to Federalism*, 14 RICH. J.L. & PUB. INT. (forthcoming 2011) (proposing the creation of alternative *federalism markets* for the allocation of state and federal governmental powers), available at <http://ssrn.com/abstract=1568905>.

³⁸ See, e.g., F.E. Guerra-Pujol, *The Game of Law: The Logic of Defection* (unpublished manuscript on file with the author). See also Steven J. Brams et al., *The Geometry of the Arms Race*, 23 INT’L STUD. Q. 567 (1979).