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## Loyalty without Borders: In Honor of Arthur Jacobson

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# LOYALTY WITHOUT BORDERS: IN HONOR OF ARTHUR JACOBSON

George P. Fletcher†

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### I. IN GENERAL

The essence of loyalty is partiality – putting friends, political party, a particular country ahead of its competitors. The ambiguity of this definition lies in question: putting the recipients of loyalty close in what way? In the case of loyalty to a spouse, the loyal lover forswears sex with others. In voting and supporting, say, the Democrats, one does not contribute to the Republicans. By remaining loyal to the United States, one does not offer to join the military or serve in the civil defense force of another country.

As I wrote in 1993 in *Loyalty: An Essay on the Morality of Relationships*, I regard loyalty as a virtue, as an expression the historical self. By this curious expression, I meant that in coming to understand one's loyalties one clarifies where one stands in history, what the influences on his or her life have been.

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We cannot choose our loyalties by rational reflection – nor by aesthetic comparison. The notion of “brand loyalty” provides a test case. What is the purpose of advertising, particularly on television? The purpose, it seems, is to repeat the name of “Crest” toothpaste or “Ford” truck so often that when it comes to buying toothpaste or a truck, the brand comes to mind as the natural choice. The preference is not rational. It is not like seeing a Manet and a Monet painting for the first time and deciding which is more beautiful. It is not like assessing and grading a sporting competition after seeing the competitors for the first time. In loyalties we are not making choice on the basis of a blank slate. In choosing to be loyal to one group rather than another, we express who we are.

## II. ECONOMIC LOYALTY

The historical self presupposes a set of identities, perhaps a recognition of historical chance. As an American, born in the richest nation in the world, I have had opportunities that those born in most of the world could only dream of. Also, born months before the start of World War II, a child of Jewish immigrants, I had access to a first-class education at Cornell, Berkeley and the University of Chicago Law School. My parents, who could barely speak English, had economic prospects that exceeded expectations they would have had in Hungary or Slovakia. I do not believe immigrants coming today have the same chances for economic success – at least under our present policies toward the children of immigrants and an incessant policy of suspicion toward citizens south of the “border.”

The key word here is “border.” Why are borders justified, particularly in the jurisprudence of loyalty? Why should I have a greater duty to protect someone in Nebraska, whom I have never met, than to the Spanish-speaking (Chinese-speaking, etc.) immigrants I meet at every turn?

The root question, for our purposes, is whether, as a citizen of the richest country of the world, with a well-paying position as a professor of law, I am entitled to keep all of my income or whether, to the contrary, I am morally required to share my wealth with a larger set of people – at least those in the Spanish-speaking countries of the New World. The question was anticipated in the campaign for the

progressive income tax leading to the 16th Amendment to the U.S. Constitution (ratified in 1913). Although some philosophers have claimed that taxation is a form of enforced labor, i.e., by taking part of my income, since the government takes a share of my labor, this claim strikes me as confused. In every case of an income-earner, there are many individuals and groups that make this possible. These include police officers and fire fighters, sanitation workers, utility companies, this list goes on and on. Without the societal contribution of others, no one could earn a secure income. It follows that it takes a village for an individual to earn an income, and therefore the village is entitled to its share. Of course, the percentage of the share is an open political question.

The question I wish to address is whether in the history of philosophy, borders are either ignored or over-emphasized.

### III. THE HARVARD TRILOGY

The transition in the 1970's from John Rawls, to Robert Nozick, to Michael Sandel is one of the most exciting debates in the history of American philosophy. My concern is their position, explicit or implicit, on the relevance of borders.

#### A.

In 1971, John Rawls burst on the scene with his book, *A Theory of Justice*. The central requirement in choosing the principles of justice is a fair decision procedure. The notion of a fair trial is notoriously difficult to translate into foreign languages. It usually appears as a requirement of a "just" trial, in which as I have argued before (1) victims typically claim justice and (2) defendants, who might well be guilty, prefer a fair trial, an opportunity of acquittal regardless of guilt or innocence.

In fact, Rawls' methodology is not a process, fair or otherwise. A trial entails a risk of error. There is no risk-taking behind the veil of ignorance. The abstract person who chooses the principles of justice is you, me and everyone. In fact, the person choosing the principles of justice must include future persons. But this is not tenable. The "borders" of time must surrender to a discount factor. Consider the preservation of our forests and natural resources. If we use resources

today – say, by chopping down a tree – we cannot be sure that replanting the tree would assure the maintenance of the status quo.

On the basis of this methodology, Rawls concludes that we would choose two principles of justice. “First Principle: Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.” The second principle requires that “inequalities – either social or economic – are only to be allowed if the worst off will be better off than they might be under an equal distribution.” A sub-principle states that: “offices and positions must be open to everyone under conditions of fair equality of opportunity.”

For our purposes, the relevant point is that these are universal principles of justice. Borders appear to be irrelevant. This includes borders of time as well as geography.

#### B.

The most significant response to Rawls came in Robert Nozick’s *Anarchy, State and Utopia* (1974). His primary focus is justifying a minimal state that would protect individual rights, presumably rights that are secured independently of the state or any governmental organization or de facto means of control, e.g., the mafia. The question is who is entitled to these “rights” that exist prior to the state and what is the source of these rights? Insofar as the rights are natural rights, they exist regardless of the state; indeed, they are prior to statutes and establish the necessity of the state.

One might think that the notion of a state presupposes borders, and perhaps it does. But there is nothing in Nozick’s theory (it seems) that precludes a single state for the planet. If the response is that a worldwide state implicitly recognizes borders, one can expand the notion of the state to include other planets.

#### C.

Michael Sandel, in *Liberalism and the Limits of Justice* (1982), found a middle position between the abstract universalism of Rawls and the concrete self-emphasized by Nozick.

The argument is that individuals are constituted by their communities and the resulting obligations that flow between their communal ties. This, in fact, the line I take in my book *Loyalty*.

In the late 1980's many of us, including Michael Sandel, were influenced by David Hartman and the scholars at the Hartman Institute in Jerusalem. Hartman first put me on the course of investing in loyalty by asking me sometime in the late 1980's about my interests in philosophy. I mentioned that I had been working on Kant's moral and legal theory. He queried: Do you know, Kant cannot explain the notion of covenant, by which he meant the covenant between God and the Jewish people? A good question can turn a student in a new direction. Hartman's query reoriented my interest toward biblical studies. The result was my initiating a new publication, *S'vara*, as a cooperative venture between the Columbia Law School and the Hartman Institute.

#### D.

The first issue of *S'vara*, dated Winter 1990, is a revealing document. In the lead article David Weiss Halivni explained the meaning of *s'vara*, a name I picked to capture a Hebraic analogy to the Greek notion of reason. Then there was a symposium on the law of the *rodef* – the rough equivalent in Jewish law to the justification of self-defense.

Most significantly, Arthur Jacobson had an article entitled "The Tolerant Congregation." As I interpret his claims, they are that (1) toleration in politics is a modern virtue, (2) toleration includes "suffering" the intolerant, (3) tolerance of unpopular opinions is expressed in a "congregation" (this is the concept that will interest us), (4) congregations tend to multiply to accommodate splintering groups, (5) there are subtle differences among the concepts of toleration, open-mindedness, and indifference, (6) membership in a congregation is voluntary, presumably open to all, and (7) members will be loyal to the congregation.

There are many other subtle points in this article. My take-away is an often unappreciated analogy between the Talmud and our own legal system. We listen to dissenting opinions and record them as a way of expressing respect for the minority, at the same time that we keep them in the "congregation."

In Israel today, the Knesset is the Hebrew equivalent of "congregation," derived from Beit Knesset. The notion of the congregation underlying Arthur's 1990 essay may be the *Minyan*, the *minimal* Jewish prayer group of ten.

Is there a conclusion to these meandering reflections? Yes. Arthur's views expressed in 1990 still have great relevance. And further, the notion of the "congregation" may well be the answer to our question about borders. Whenever there are ten people, i.e., a minority, we have an entity in which we try to apply philosophical principles of equality (Rawls), individuality (Nozick) and the situated self (Sandel). For this we are grateful to Arthur.