

# Loyalty

AN ESSAY ON  
THE MORALITY OF  
RELATIONSHIPS

---

George P. Fletcher

# LOYALTY

*An Essay on the  
Morality of Relationships*

George P. Fletcher

OXFORD UNIVERSITY PRESS  
*New York    Oxford*

Oxford University Press

Oxford New York  
Athens Auckland Bangkok Bombay  
Calcutta Cape Town Dar es Salaam Delhi  
Florence Hong Kong Istanbul Karachi  
Kuala Lumpur Madras Madrid Melbourne  
Mexico City Nairobi Paris Singapore  
Taipei Tokyo Toronto

and associated companies in  
Berlin Ibadan

Copyright © 1993 by George P. Fletcher

First published in 1993 by Oxford University Press, Inc.,  
200 Madison Avenue, New York, New York 10016

First issued as an Oxford University Press paperback, 1995

Oxford is a registered trademark of Oxford University Press

All rights reserved. No part of this publication may be reproduced,  
stored in a retrieval system, or transmitted, in any form or by any means,  
electronic, mechanical, photocopying, recording, or otherwise,  
without the prior permission of Oxford University Press.

Library of Congress Cataloging-in-Publication Data

Fletcher, George P.

*Loyalty: an essay on the morality of relationships* / George P. Fletcher

p. cm. Includes index.

ISBN 0-19-507026-7

ISBN 0-19-509832-3 (pbk.)

1. Loyalty.

I. Title. BJ1533 L8F54

1993 92-460

2 4 6 8 10 9 7 5 3 1

Printed in the United States of America

# LOYALTY

In memory of  
Gerald Goldfarb  
1940–1989  
*Loyalty's teacher*

and for  
Rachel Rose  
1988–  
*Loyalty's gift*

## Preface

The central arguments in this book were a long time in coming. If I asked about the subject of loyalty some ten years ago, I undoubtedly would have reacted as many of my liberal friends react today. I would have identified patriotism with the breast-beating zealots who threatened my generation with those billboards: "America, Love It or Leave It." I would have thought, ten years ago, that schoolchildren's pledging allegiance to the flag was tantamount to their reciting prayers in public schools—a clear violation of the neutrality that provides the framework for American pluralism. At the very minimum, I would have taken an ethic of loyalty to smack of the rhetoric of anti-Communist fanaticism, McCarthyism, and all the excesses that defined the enemies of free thought as I was coming of age.

It is not clear to me whether I have had a change of heart or whether a decade of greed (as Barbara Ehrenreich has dubbed the 1980s) simply made me more conscious of the moral importance of commitments to those with whom I share a common fate. In retrospect, President John F. Kennedy's inaugural appeal in 1961—"Ask not what your country can do for you, but what you can do for your country"—rings clearly as an appeal to our national loyalty. It is an appeal to responsibility that resonates with my basic sentiments far more than the ethic of self-interest that dominates current obsessions with tax cuts as the way to solve our problems.

Whatever the deep roots of my sentiments, some experiences of the last few years helped to crystallize my thought around the theme of loyalty. The first was a conversation with David Hartman, a rabbi in Jerusalem, with whom I had the pleasure of studying in March and April 1987. I had explained to Rabbi Hartman that I had done most of my philosophical work on the Kantian theory of law and morality. Hartman turned to me, quizzically, and said, "Fletcher, don't you know that Kant's universalistic ethics cannot accommodate

special relationships. Hartman had in mind the covenantal relationship between God and the Jewish people, but the same objection applies to all special relationships, as between friends, between lovers, and among citizens in the same polity.

Several themes in this book derive, directly and indirectly, from that conversation with David Hartman. First, I include in my analysis of loyalty the question of religious loyalty that would presumably get lost in most secular philosophical studies. Further, as a consequence of that conversation about covenant, I began to rethink the promise and power of Kantian morality and the Enlightenment ethics of impartiality in general. This book would probably never have taken shape unless I had grown skeptical of the entire tradition of impartial ethics and had come to recognize that the normal commitments of our lives—expressed as “loyalties”—provide a sounder basis for the moral life than an Enlightenment ideal that is, as I will argue, incapable of realization.

This process of re-evaluating moral theory dovetailed with another experience that led me to see the connections between national identity and the analysis of interpersonal loyalties. My interest in the Pledge of Allegiance and the instilling of national identity in our schoolchildren comes from an indelible experience I had a few years ago as I was entering the United States from Canada. The background to the border episode is an unusual feature of my family biography, of which I happen to be proud. My father, born in Széchény, Hungary, under the name Fleischer Miklos and reared as the privileged scion of a wealthy landowner, entered the United States in the mid-1920s by swimming across the Rio Grande. After having worked as an illegal immigrant for at least ten years, he went to Canada then returned to the United States, thereby establishing a legal date of entry and enabling him to qualify for citizenship in 1941. The officials at the casual Canadian border winked, no doubt, at the passing of my father and countless other aliens who had no proof of American citizenship.

As I found myself in the Toronto airport, walking toward the checkpoint they call the border, my father's first legal crossing came back to me. I started thinking in the accents and rhythms that marked his speech as Habsburgian. The guard asked a question routine for travelers without passports: Where were you born? I replied, “Cheecahgo”—precisely as my father pronounced “Chicago,” with the flat “e” and broad “a” that only Hungarians can get right.

I was in trouble. My slip into a time warp, my affected accent, as well as my 1930s long German overcoat and Left Bank beret, all marked me as a suspicious foreigner. With a passport in my hand, I could have entered without much discussion, but I chose the luxury of going north and crossing back into the land of my birth without the usual papers. There would be no winking at this crossing. For the first time in my life, I encountered someone who seriously doubted whether I was an American, whether I belonged here. Bringing my speech back to normal Yankee did not help. Neither my New York driver's license nor my credit cards impressed the man guarding the gate. Perhaps he could try to determine whether I was a spy by asking me esoteric questions about Americana, the way soldiers in World War II movies uncovered German spies with trick questions about baseball. Snobbish antifa that I am, I doubt if I could have named any second baseman in the majors.

As I was getting desperate, something remarkable happened. The immigration official asked me to recite the Pledge of Allegiance. Like Sarah asked to give birth, I laughed. I was too old, I had not uttered those lines in at least twenty-five years. Surprisingly, as I started, the secular American prayer to the flag came back to me. One word followed another until, with a sense of mastery, I came to Eisenhower's emendation "under God," and then I was home free. I was back in the seventh grade engaged in one of the rituals that made me into an American.

As I pondered this incident in the years following, I began to wonder whether without the Pledge and other patriotic rituals, we Americans of diverse origins would share a common emotional bond to a country that, intellectually, we are prepared both to criticize and defend. My pride in being an American certainly does not follow from recitations of the Pledge in school. My sense of privilege derives much more from growing up in a country that permitted me, the son of a *mojado*, to nourish an unlimited sense of possibility. Yet the making of Americans from immigrant children and the descendants of slaves is not an easy task. And today, with the growing sense of defensiveness and hostility expressed by many American ethnic groups, the casting of a common cultural loyalty is becoming ever more difficult. Patriotic rituals, I have come to believe, are necessary to nurture and maintain a common national identity and a sense of responsibility for the welfare of the nation as a whole.

Some of my arguments will strike my anticipated reader as provocative and even wrongheaded. Certainly my students thought so as I presented earlier drafts in seminars on jurisprudence at the Columbia Law School. They were always polite as they confronted my passions and forced me to rethink my positions. As a result of their skepticism, I rewrote the entire manuscript several times. I was enormously aided in the restructuring of the argument by the comments of Maurice F. Edelson. I am also indebted to Jack Kint, Micah Green, Jonnette Hamilton, Mark Lopeman, and my assistant Robert Jystad, all of whom offered detailed criticism as the manuscript evolved from draft to draft. Frank J. Dalton, Merav Datan, and Rebecca J. Fletcher kindly helped me to prepare the manuscript for publication. I am very grateful to Cynthia Read, my editor at Oxford, who believed in the project after seeing it in rather imperfect form and helped me to tighten the argument. Appreciatively acknowledged as well are the Rockefeller Foundation, which provided me with ideal conditions for writing at Villa Serbelloni in Bellagio, Italy; my colleagues at the Gruter Institute for Law and Behavioral Research, who encouraged my turning toward the human sentiments driving the law; and my deans at the Columbia Law School, Barbara Black and Lance Liebman, for their support and encouragement.

Several colleagues have given me invaluable guidance. John Kleinig generously shared with me the work that he has done on loyalty. Joseph Raz proved to be a remarkably perceptive critic, first in a long conversation on the steamy summer streets of London in July 1990 and then in the fall of 1991, when he came to Columbia and we taught a joint seminar on loyalty. Herbert Morris, Ruti Teitel, Anne-Marie Roviello, Meir Dan-Cohen, Sanford Levinson, and Kent Greenawalt offered me helpful comments. And Bruce Ackerman, as always, was there as a foil for argument and affirmation of the project's value. Portions of the manuscript were offered as papers and lectures in Toronto, Montreal, Frankfurt, and Brussels, and I appreciate the seriousness with which my arguments were received.

Now you must decide how important loyalty is to you.

# Contents

CHAPTER 1	<i>The Historical Self,</i>	1
	Friendship and Loyalty,	6
	Betrayal,	8
	The Loyal and the Liberal,	11
	Obligations of the Historical Self,	16
	Divergent Senses of Loyalty,	21
CHAPTER 2	<i>Three Dimensions of Loyalty,</i>	25
	The Loyalty of Love,	26
	Group Loyalty,	33
	Loyalty to gods and God,	36
CHAPTER 3	<i>Minimal Loyalty: "Thou Shalt Not Betray Me,"</i>	41
	The History of Treason,	44
	Crimes of the Heart,	46
	Who Must Be Loyal and Why,	52
	Pluralism and Loyalty,	58
CHAPTER 4	<i>Maximum Loyalty: "Thou Shalt Be One with Me,"</i>	61
	Patriotism,	62
	Loyalty Oaths,	65
	Ritual and Idolatry,	69
	Sexual Loyalty,	75
CHAPTER 5	<i>Loyalty as Privacy,</i>	78
	Testimonial Privileges,	79
	Surrogate Motherhood,	82
	Gift Giving and Inheritance,	87
	The Free Exercise of Religion,	89
CHAPTER 6	<i>Teaching Loyalty,</i>	101
	The French Analogue to the Pledge Dispute,	106
	From Neutrality to Respecting Differences,	111

The <i>Barnette</i> Opinion,	116
Rereading <i>Barnette</i> in the 1960s,	120
Further Misreading?	123
CHAPTER 7 <i>Rights, Duties, and the Flag</i> ,	125
The Problem of Criminal Punishment,	129
The Arguments against Protecting the Flag,	135
Three Strategies for Protecting the Flag,	141
CHAPTER 8 <i>Enlightened Loyalty</i> ,	151
Loyalty to Loyalty,	151
Higher and Lower Loyalties,	154
Intersecting Circles,	155
When Justice Prevails,	162
When Impartial Morality Prevails,	164
Kant's Utopianism,	166
Utilitarian Purity,	168
Impartial Morality: The Derived Maxims,	170
Is This the Final Word,	172
NOTES,	177
INDEX,	203

# LOYALTY



## CHAPTER 1

# *The Historical Self*

We all live in networks of personal and economic relationships—of friends and acquaintances, of families and nations, of corporations, universities, and religious communities. The ties so nurtured range from the trivial to the sublime. At minimum, we buy from these groups or live with them and work with them. In some cases these encompassing ties generate the interactions that make our daily lives meaningful. From time to time, we object to the way other people in the group are acting. We do not like the way we are treated, the service or the product we receive, the political actions or moral positions taken by others in the “community.” What do we do?

We have the choice either of leaving to search for other relationships or another community that more adequately fits our expectations or of staying and working to improve the environment that shapes our lives. Leaving has become the increasingly popular option. In the marketplace, where all that is at stake is the performance of the product or the quality of the service, the best thing to do is to leave—that is, to find the competitor who better supplies the needed good.

The exemplar of the marketplace has conquered neighboring arenas. Today we think about relatives, employers, religious groups, and nations the way we think about companies that supply us with other products and services. If we don't like what we are getting, we consider the competition. Conventional free market theory teaches that leaving is a virtue. The willingness to “switch rather than fight” engenders competition and forces inefficient producers to “shape up” or “ship out.” The marketplace works to ensure that only the fit

survive; and the condition for promoting the competent is the willingness of consumers to favor the better producer.

The values of the marketplace apply today not only in the choice of material products like toothpaste and automobiles but in our relationships with people. Most scholars and scientists have become consumers of university services, and when a competitor offers a higher salary, a better-equipped laboratory, or more interesting colleagues, there is no reason not to entertain the offer. Academic stars have become like baseball stars, willing to play for the highest bidder. There is no doubt that the free-floating academic class forces their producers—university administrations and the financial sources that back them up—to offer more to stay abreast of the competition.

The mentality of “trading up” can be made to apply to friendships, marriages, and other attachments. Shifting loyalties is an increasingly common way of coping with a weak friendship, a shaky marriage, a religious community that takes the wrong stand on an important issue, or a nation that has come into the hands of the wrong political party. The beauty of the marketplace mentality is that one can act solely on the basis of consumer preferences and by the force of one’s decisions induce those harmed to work harder to maintain their share of the market. If academics flee low-paying English universities for the United States, the move might induce conservative governments to respond with better funding for higher education. If in 1970 a whole generation of young Americans had taken refuge from the draft in Canada, the White House would have had to choose between an unpopular war and maintaining a country to govern.

In an illuminating monograph,<sup>1</sup> Albert Hirschman challenges this way of thinking, even as applied to the core cases of choosing between products and job offers. *Exit*, or leaving, is contrasted with *voice*, the medium used by those who stay and fight. The starting point of the argument is that voice, defined as “any attempt to change . . . an objectionable state of affairs,”<sup>2</sup> is sometimes more effective than exit, even as a stimulus to better economic performance. The options of voice range from making a personal complaint, mobilizing the opinions of others, negotiating, reasoning with and forming alliances against management, and, not to be ignored,<sup>3</sup> using legal devices, such as stockholder remedies and conduct-changing tort claims. In exercising any of these options, the con-

sumer takes on a greater personal burden than simply pulling out, shifting ties, and moving on. Voice in place of exit can help an endangered firm survive—by providing, first, necessary feedback on the breakdown in performance and, second, a cushion of time and support that will permit the firm to recover.

However useful voice may be, in organizational politics as well as the marketplace, exit is likely to prevail. This is particularly true in the American way of thinking, based as it is on the mentality of the frontier—on the solving of problems by pulling up roots and starting over. Voice requires creative thinking, patience, a willingness to gamble on an investment of time and energy. Those who exit cannot be faulted for assuming that newly planted roots will yield greener grass.

This is the point at which, in Hirschman's thinking, loyalty enters as a virtue both in the marketplace and in institutional life. Whether we are talking about shopping, investing, or staying with a group of people, loyalty tends to check our preference for exit over voice. The hallmark of loyal behavior is "the reluctance to exit in spite of disagreement with the organization of which one is a member."<sup>4</sup> Loyalty fulfills its function, Hirschman reasons, when the costs of exit are otherwise nil and there are close substitutes—that is, a comparable product to buy or a similar club, firm, university, or city to join. Within a few months of the Berlin Wall's crumbling in November 1989, a million East Germans, 6 percent of the population, left for the West. Not only was the Federal Republic's "product" similar in history and language to life in the East, but the costs of exit were minimal. Only loyalty to the socialist way of life could have saved the German Democratic Republic as a separate state, and it was clear from the outset that economic welfare was more important than the state's preservation.

Feelings of loyalty raise the cost of exit by exacting a psychological price. The price may be irrational, but it serves a rational purpose of ensuring, in Eric Erikson's *bon mot*, that people "actively stay put."<sup>5</sup> In a word, loyalty is the beginning of political life, a life in which interaction with others becomes the primary means of solving problems. Loyalty is the means by which politics triumphs over self-interested economic calculation. In personal relationships, loyalty expresses the relationship's assuming an external force, holding lovers or friends in a bond that transcends temporary disaffection.

Against the background of Hirschman's defense of loyalty, con-

sider a significant concession Alasdair MacIntyre makes in an otherwise sympathetic treatment of loyalty and patriotism: "Patriotism turns out to be a permanent source of moral danger. And this claim, I take it, cannot in fact be successfully rebutted."<sup>6</sup> Obviously, he has in mind the slippery slope toward fascism, of blind, unthinking adherence to "my country right or wrong."<sup>7</sup> Blind adherence to any object of loyalty—whether friend, lover, or nation—converts loyalty into idolatry. There is a moral danger in thinking that any concrete person or entity could become the ultimate source of right and wrong, but the moral danger is no greater in the case of patriotism than it is in friendship, erotic or filial love, or political commitment.

To counteract this danger, exit remains a critical supplement to the loyal voice. The commitment to voice could become a moral trap unless there are limits beyond which exit becomes the sensible turn. Further and more practically, the ever-present threat of exit renders the loyal voice a more powerful medium for institutional correction.

### *Friendship and Loyalty*

In thinking about the nature of loyalty, we cross philosophically untraveled territory. The prior treatments of the subject in the literature skip over foundational matters.<sup>8</sup> Yet one subject close to the core of loyalty has received considerable attention since Aristotle. Friendship, writes Aristotle in the *Nicomachean Ethics*, "is a virtue or implies a virtue and is besides most necessary with a view to living."<sup>9</sup> Reflecting on Aristotle's treatment of friendship, we begin our investigation of the foundations of loyalty.

In Aristotle's system, character dispositions are called virtues if they contribute to our *telos*, or end as human beings—an end that today we call "human flourishing" or more commonly, the good life. The precise connection between friendship and virtue remains vague, however, for Aristotle appears to be ambivalent about whether friendship is but one of the virtues or whether it is the universal precondition for the good life.<sup>10</sup> The better reading, it seems, is that rooting the personality in a nexus of relationships is the condition for the evolution of personality toward *eudaemonia*, or happiness.

Aristotle concedes that friendship comes in lower and higher