

THE LAWYER AS FRIEND: AN ARISTOTELIAN INQUIRY

*Stephen R. Morris**

I. INTRODUCTION

Is it useful to think of the relationship between a lawyer and his client by analogy to friendship? The suggestion was first advanced by Charles Fried and has been widely criticized since.¹ In this Article, I return to Fried's much-maligned analogy, with two purposes. The first is to re-frame it in terms of the oldest, and arguably most influential theory of friendship in western intellectual history, namely, Aristotle's.² Fried chooses not to do this, but the effort pays dividends in conceptual precision, which, I argue, clarify his own ends in proposing the analogy. Aristotle's theory proves to be quite accommodating to Fried's. Aristotle approaches friendship by way of his customary procedure: analyzing its genus (what it is most generally, or essentially), and then its various specific instantiations (what it is in certain recurrent contexts). Moreover, Aristotle is fond of reasoning by analogy—of constructing theories around family resemblances among concepts and forms. Thus, Fried's idea that a lawyer functions in relation to a client *as a kind of friend*, even if not as a *friend as such*, or a *friend in the strictest sense*, is recognizably Aristotelian.

My second objective is more amorphous. Having situated Fried's

* Stephen R. Morris practices law in New York City with the law firm of Kasowitz, Benson, Torres & Friedman LLP.

1. See Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976) [hereinafter Fried]. The critical literature is extensive, and I shall make sparing use of it here, since I am interested less in recapitulating the shortcomings of Fried's analogy than in using it as a point of departure for exploring the terrain Fried opens up. Nevertheless, I have found the following assessments of Fried's argument especially helpful: Michael K. McChrystal, *Lawyers and Loyalty*, 33 WM. & MARY L. REV. 367 (1992) [hereinafter McChrystal]; Edward A. Dauer & Arthur A. Leff, *Correspondence: The Lawyer as Friend*, 86 YALE L.J. 573 (1977) [hereinafter Dauer & Leff]; Sanford Levinson, *Testimonial Privileges and the Preferences of Friendship*, 1984 DUKE L.J. 631 (1984); Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993) [hereinafter Ogletree].

2. The theory's most thorough exposition is in Books VIII and IX of the *Nicomachean Ethics*. See ARISTOTLE, *NICOMACHEAN ETHICS* (Martin Ostwald trans., 1962) [hereinafter ETHICS].

analogy within the framework of Aristotle's theory, I offer my own interrogatory critique of it. In Aristotle's terms, the friendship between a lawyer and client is most precisely thought of as an instance of "advantage-friendship"—the kind of friendship in which each friend regards the other as such *because of* useful benefits each receives from the other. This, I suggest, offers a serviceable model of the relationship between a lawyer and a *paying* client. Moreover, as to that relationship, Aristotle's theory nicely highlights the feature of friendship with which Fried is most concerned.³ The question remains, what of the relationship between a lawyer and a non-paying client?⁴ Fried's theory, as re-framed within Aristotelian terms, is silent on the subject. It appears unable to account for how a lawyer could be an advantage-friend to a non-paying client.

At this point in the argument I pursue a line of speculation beyond the confines of Fried's analogy. Taking my cue from Charles Ogletree's suggestion that Fried's analogy "can serve as a basis for a theory of motivation for public defenders,"⁵ and his statement in elaboration on that suggestion that the analogy "has been central to my own assessment of how public defenders should relate to their clients,"⁶ I examine the line that divides the Aristotelian advantage-friendship between the lawyer and his paying client, and Ogletree's motivational ideal. I argue that Ogletree is wrong to think of the relationship between the properly motivated public defender (as Ogletree conceives of him) and his client as a kind of friendship. This relationship, unlike the one between the paying client and the lawyer, has no home within the Aristotelian taxonomy: it is not a species of Aristotelian friendship.⁷ Rather, it is better conceived as an exemplar of a different genus of ethical relations altogether: namely, loyalty. I argue that the relationship between the motivated public defender and his client cannot be friendship, because it is not, unlike the relationship between a paying client and his lawyer, reciprocal in the way that friendship must be. Thus, the loyalty of the public defender to

3. *Viz*, a willingness to adopt as one's dominant purpose the furthering of the friend's interests, regardless (up to a point, the identification of which shall become a concern in the final section of this Article) of the otherwise valid claims of the collective interest. See Fried, *supra* note 1, at 1066.

4. There are different kinds, of course. In this Article, I confine my attention to the relationship between the public defender and the assigned "indigent" client charged with a misdemeanor or felony.

5. Ogletree, *supra* note 1, at 1253 n.81.

6. *Id.*

7. For the purposes of this Article, I am taking this claim to be equivalent to the same claim about friendship *simpliciter*. That is, I am assuming for the purposes of my argument (1) that if the lawyer-client relationship is analogous to friendship at all, the analogy is one that can be precisely stated in the terms of Aristotle's theory; and (2) that if a particular instance of the lawyer-client relationship cannot be modeled within the terms of Aristotle's theory of friendship, then it is not properly a kind of friendship at all. I recognize of course that there may be more to friendship than is dreamt of in Aristotle's philosophy, but a defense of my two assumptions would take me well beyond the scope of my task here.

his client cannot stem from a prior advantage-friendship, precisely because payment does not change hands between client and lawyer. This is not to say that the motivated public defender cannot still be loyal to his client. It is to say that the public defender's loyalty to his client is not the loyalty of an advantage-friend.⁸

So what kind is it? To this crucial question, I offer only tentative reflections in the process of considering two possibilities. One is the friendship among unequals—a category of Aristotle's theory, which I shall introduce in the context of an examination of Ogletree's description of his experience interacting with clients as a public defender. Recognizing that many public defenders may find this category discomfoting (even if their discomfort, in many instances, stems from awareness that it fits too closely the contours of their experience with clients), I explore one alternative. I derive it from an intuition: that there is a family resemblance between the loyalty of a motivated public defender toward his client, and the loyalty of the soldier toward his fellow soldiers. That is, the public defender's relationship to his client is something more like what J. Glenn Gray calls comradeship than it is any kind of friendship.⁹ I conclude by developing this intuition in some preliminary ways.

II. AN ARISTOTELIAN FRAME FOR FRIED'S "LAWYER AS FRIEND" ANALOGY

A. Aristotle's Theory of Friendship

Aristotle distinguishes three types of friendship,¹⁰ according to whether the basis of the friendship is the good, the pleasant, or the useful.¹¹ All three share the most general characteristic features of friend-

8. Nor is it plausibly either one of the two other kinds delineated within Aristotle's theory—that is, the pleasure-friend, or the character-friend. See *infra* Section II. To be sure, a lawyer could serve as her character-friend's lawyer, in either a paying or non-paying capacity. But in that situation, the lawyer is a character-friend only incidentally, not *qua* lawyer. Here I consider only the relationship of the lawyer and client as such, and so considered, the only kind of (Aristotelian) friendship it resembles is advantage-friendship.

9. J. GLENN GRAY, *THE WARRIORS: REFLECTIONS ON MEN IN BATTLE* (1970).

10. The Greek word *philia*, usually translated by the English "friendship," has a wider range of connotations. *Philia* includes the bond holding together the members of any association, whether that association is the family, the community, a club, a business partnership, or even the business relation between the buyer and seller of any good or service. The sense of the concept is perhaps best summed up by the Greek proverb: "friends hold in common what they have." It follows that any common enterprise is a fit setting for friendship, and that the varieties of friendship will be a function of the varieties of common endeavor. See generally Julia Annas, *Plato and Aristotle on Friendship and Altruism*, 86 *MIND* 532 (1977) (available at the following Internet address: <http://uk.jstor.org/journals/00264423.html>).

11. See *ETHICS*, *supra* note 2, at 1155b20. Page references are to the standard "Bekker numbers" referring to the page numbers of an edition of the Greek text edited by Immanuel Bekker in 1831. Bekker numbers appear uniformly in the margins of most editions of Aristotle's works, permitting reference across editions.

ship: "To be friends human beings must have good will for one another, must each wish for the good of the other on the basis of one of the three motives mentioned, and must each be aware of one another's good will."¹² The three motives in turn distinguish the specific types of friendship. The best, or most "complete" form is based on the good.¹³ The two other types fall short of this ideal—Aristotle claims they are called "friendship" only "incidentally"¹⁴—but are also more commonly found. Friendships based on pleasure are quick to form, among the young especially.¹⁵ On the other hand, friendships based on mutual advantage are common among the old, because as people advance in age, they do not pursue the pleasant so much as the beneficial, but are also found "among [the] young . . . and those in their prime who are out for their own advantage."¹⁶

Advantage-friendships, like all friendships, involve mutual "good will" but of a kind that is sharply circumscribed in comparison to what is found among character-friends. Advantage-friends value each other for some material benefit to be reaped from the relationship. Thus, they need not find each other pleasant company. They will be quick to terminate a relationship that ceases to reap mutual advantage. Advantage-friendships, unlike those based on character, may arise among "bad" people, or among those of indifferent character.¹⁷ Advantage-friendships are less discriminating: a person may be an advantage-friend with many, inasmuch as it is possible "to please many people on the basis of usefulness . . . since many have these qualities, and the services they have to offer do not take a long time."¹⁸ It follows, Aristotle says, that advantage-friendships flourish in commercial settings, and so proliferate among those "who frequent the market."¹⁹ It follows too that advantage-

12. *Id.* at 1156a3-5. "Each partner [in this best form of friendship] is both good in the unqualified sense and good for his friend." *Id.* at 1156b12-13.

13. *Id.* at 1156b5-11. "Those who wish for their friends' good for their friends' sake are friends in the truest sense, since their attitude is determined by [their friend's character], and not by incidental considerations. Hence, their friendship lasts as long as they are good [which is to say], a long time, since goodness, or virtue is a thing that lasts." *Id.* at 1156b9-11.

14. ETHICS, *supra* note 2, at 1156a17, 1157a32.

15. *Id.* at 1156a31-1156b5. Between the two deficient forms, pleasure-friendships bear a closer resemblance to the best kind, since they are based on shared joy, and tend to involve "a greater element of generosity." *Id.* at 1158a20. Aristotle observes that pleasure-friendships are most durable when the pleasure derived comes "from the same source." *Id.* at 1157a5. Friendships between witty people that are based on a mutual capacity to make the other laugh provide an example. Aristotle contrasts erotic friendships based on pleasure, "[f]or lover and beloved do not find pleasure in the same objects: the lover finds it in seeing his beloved, while the beloved receives it from the attentions of the lover." *Id.* at 1157a5-10.

16. ETHICS, *supra* note 2, at 1156a25-27.

17. *Id.* at 1157a18-19. "The good . . . alone can be friends on the basis of what they are, for [the] bad . . . do not find joy in one another, unless they see some material advantage coming to them." *Id.*

18. *Id.* at 1158a16-17.

19. *Id.* at 1158a21. The word Aristotle uses is "agoraios"—literally, an "Agora-man," refer-

friendships are more “subject to complaints,” since “where material advantage is the purpose of the relationship, people always want more and think they have less than they should have; they blame their partners that they are not getting all they need, though they deserve it.”²⁰

B. Fried’s Analogy as a Type of Aristotelian Advantage—Friendship

How should Fried’s lawyer-as-friend analogy be translated into the Aristotelian scheme? Evidently it is not a species of character-friendship, or pleasure-friendship: not character-friendship because the object of the lawyer-client relationship is not the other person as such, but some legal matter the resolution of which, it is hoped, the relationship will facilitate;²¹ and not pleasure-friendship because pleasure is no longer the object either of the lawyer or the client in forming a relationship.²² This leaves advantage-friendship, and two questions: is it fair to Fried’s analogy to relegate it to that niche, and if so, what does so relegating it tell us about the analogy? I take up these questions in turn.

For his part, Fried claims that it would be a distortion to classify his friendship analogy in terms of advantage-friendship. He argues that the lawyer-client relationship is not like “that underlying any commercial transaction [because the lawyer has] obligations to the client . . . beyond those of other economic agents.”²³ Even if conceded, however, this fact is not inconsistent with Aristotelian advantage-friendship. Advantage-friendship may include a variety of relationships of the kind that typically underlie commercial transactions. But, it also includes relationships governed by conventions quite different from those binding upon the

ring to the central market of Athens. The word was often invoked for its pejorative connotations—to mean “lowly,” “vulgar,” or “common.” Aristotle is definitely reaching for those connotations here. Though not as hostile to the Athenian democracy as Plato, Aristotle shared his teacher’s broad elitism. See generally ELLEN MEIKSINS WOOD & NEAL WOOD, *CLASS IDEOLOGY AND ANCIENT POLITICAL THEORY: SOCRATES, PLATO, AND ARISTOTLE IN SOCIAL CONTEXT* (1978); see also Stephen R. Morris, *Socratic Perspectives on American Constitutionalism*, 1 *STANFORD AGORA* 1, 5-23 (2000), available at <http://www.law.stanford.edu/agora> (discussing the attitudes of Socrates and Plato toward the Athenian democracy).

20. ETHICS, *supra* note 2, at 1162b16-19.

21. Aristotle states:

In this kind of friendship the partners are like one another, and the other objects worthy of affection—the unqualified good and the unqualified pleasant—are also found in it. . . . It is, therefore, in the friendship of good men that feelings of affection and friendship exist in their highest and best form.

Id. at 1156b22-24 (citations omitted). It is in reference to this ideal that Aristotle makes his most famous observation about friendship: “[T]he attitude of a morally good person is the same toward himself as it is toward his friend, since a friend is another self [i.e., an “alter ego”].” *Id.* at 1166a32-33. Cf. ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 4-1.2(e) (2d ed. 1980) (“Defense counsel is the professional representative of the accused, not the accused’s alter ego.”).

22. Again, it should be said that this does not preclude character-friends or pleasure-friends happening also to be lawyer and client to one another.

23. See Fried, *supra* note 1, at 1075.

buying and selling of commodities. Thus, provisions like those to which Fried alludes to distinguish the lawyer-client relationship from advantage-friendships *tout court*²⁴ are better thought of as the defining terms of that particular species of advantage-friendship. The apple-seller contracts with the buyer on the understanding that they are entering a certain kind of relationship, which, *inter alia*, permits the seller to walk away without giving thought to the buyer in the event of the buyer's failure to pay. The lawyer-client relationship is conceived on more complex terms, but it is not different in kind. The paying client understands²⁵ at the outset that the lawyer is bound to observe a certain protocol should circumstances arise compelling him to withdraw unilaterally from the relationship. Likewise, the lawyer understands that he may not walk away from the client quite as unceremoniously as the apple-seller might should payments go delinquent. But the lawyer's and the apple-seller's *objectives* in entering into advantage-friendships bound by the conventions that define their respective fields are the same: their personal advantage, secured by the means and appurtenances of the lawyer-client, or the apple seller-buyer relationship.²⁶

Fried's objection need not deter us; it is not inconsistent with the very nature of the lawyer-client relationship to be classified as a kind of Aristotelian advantage-friendship. So, what difference does that classification make? Most notably, it makes clear that the lawyer-client relationship is analogous to friendship only where the client pays for the lawyer's services. This is because the reciprocity of interests that is the generic hallmark of friendship²⁷ is only present between the lawyer and client when the client pays. Fried's analogy has been criticized for failing adequately to address the supposed incompatibility of the role that payment plays in the lawyer-client relationship with the nature of friendship.²⁸ But this criticism proceeds from a narrower conception of friendship than Aristotle's.²⁹ Indeed, Aristotle's schema invites the question:

24. See Fried, *supra* note 1, at 1075 n.28 (In support of this distinction, Fried cites to MODEL CODE OF PROF'L RESPONSIBILITY EC 2-31, EC 2-32, as well as to DR 2-110(C)(1)(f) and DR 2-110(A)(2)). Strikingly, like their counterpart in the MODEL RULES OF PROF'L CONDUCT R. 1.16 (1983), these provisions amount to permission to withdraw for client's failure to pay, so long as steps are taken "to avoid foreseeable prejudice to the rights of [a] client" MODEL CODE OF PROF'L RESPONSIBILITY DR 2-110(A)(2) (1980), or alternatively, "to the extent reasonably practicable to protect a client's interests." MODEL RULES OF PROF'L CONDUCT R. 1.16(d) (1983). This hardly draws a line of principle between the grocer and the lawyer; it simply defines the lawyer as a particular kind of purveyor of services—namely, one whose services must be rendered according to a certain protocol, but nevertheless, which are rendered for a price, which the lawyer may take zealous measures to secure.

25. Or at least, such understanding may reasonably be imputed to the client.

26. The relational contexts are different; but the relationship in both cases is entered into following an initial determination by the parties that the relationship will advance mutual interests.

27. See *supra* note 12 and accompanying text.

28. See Dauer & Leff, *supra* note 1, at 578-79.

29. This narrower conception, and how much it differs from Aristotle's, is fairly reflected in

what is there about a relationship predicated upon the exchange of money for service that is inherently inimical to friendship? The answer as to advantage-friendship, of course, is: nothing. The money is paid in order to sufficiently advance the interests of the lawyer so that he will see it as in his interest to advance the interests of the client by way of the tendering of legal service. This mutuality of interest and motive is just advantage-friendship—incomplete, bounded, and narrow in focus as compared with character-friendship, but nevertheless, enough like it to count as a member of the genus.

In Aristotelian terms, Fried's analogy proposes that lawyers are advantage-friends to their clients. This is plausible enough as far as it goes, but it goes only as far as paying clients. Fried says nothing about the relationship of the lawyer and his non-paying client.³⁰ The Aristotelian framing of the analogy nicely highlights why this is a crucial omission, since without payment, there is no reciprocity of interest, and without reciprocity of interest, there can be no advantage-friendship.³¹ In the section that follows, I take up the problem of how the analogy might be refitted to the special parameters of one kind of relationship between lawyers and non-paying clients.

III. COMRADESHIP: A REFORMULATION OF FRIED'S ANALOGY

One of the salient themes of Fried's critics stems from an apparent conviction that, even if the analogy were a plausible way of modeling lawyer-client relations, it would nevertheless be inappropriate for lawyers to think of their clients as friends. The reason advanced is that peo-

this passage by Immanuel Kant:

Friendship cannot be a bond aimed at mutual advantage, but must be purely moral; and the assistance which each may count on from the other in case of need must not be thought of as the end and determining ground of friendship . . . , but only as the outward sign of their inner, heartfelt benevolence. . . . Friendship is not based on advantage, for each friend is magnanimously concerned with sparing the other any burden, bearing any such burden entirely by himself, and, yes, even completely concealing it from the other; but each one, nevertheless, can always flatter himself with the idea that in case of need he could definitely count upon the other's help.

IMMANUEL KANT, METAPHYSICAL PRINCIPLES OF VIRTUE § 46 at 137 (James Ellington trans., 1964).

30. See Fried, *supra* note 1, at 1075-76. Fried takes up only one departure from the norm (as posited in his theory) of fee-paying clients who are natural persons, briefly considering the circumstances of lawyers whose clients are corporations, and lawyers whose client is a governmental entity, claiming that the analogy holds as to them, once appropriately qualified to identify the "real persons" whose interests are at stake in the representation.

31. See Dauer & Leff, *supra* note 1, at 575-76. Critics have drawn attention to the lack of reciprocity generally between lawyers and their clients in faulting the analogy. The Aristotelian model makes clear that reciprocity does exist between the paying client and the lawyer (that is, reciprocity sufficient to sustain an advantage-friendship). Just as clearly, such reciprocity does not exist between the indigent client and assigned public defender—and this then is where the analogy's real lacuna lies.

ple are morally unaccountable for actions taken with respect to their friends in a way that lawyers should never be as to their clients.³² In fact, Fried tacitly concedes this point, since he believes that the bonds of friendship are no more capacious than the bonds of morality. Even if, says Fried, I may discriminate in choosing how to expend my moral energy, I may do nothing for a friend, legal or otherwise, that I may not do as a moral agent generally.³³ In this section, I wish to press the conviction Fried seems to share with his critics.

I begin with a legal relationship that seems to fall beyond the scope of Fried's analogy as re-framed in Aristotelian terms: the relationship of the public defender to his non-paying client. Charles Ogletree, writing about his own experience as a public defender, makes the striking claim that Fried's analogy fails adequately to describe this relationship, not because the relationship is nothing like friendship, but because the analogy's conception of friendship is too narrow to accommodate the relationship:

My relationships with clients were rarely limited to the provision of conventional legal services. I did not draw rigid lines between my professional practice and my private life. My relationship with my clients approximated a true friendship. I did for my clients all that I would do for a friend. I took phone calls at all hours, helped clients find jobs, and even interceded in domestic conflicts. I attended my clients' weddings and their funerals. When clients were sent to prison, I maintained contact with their families. Because I viewed my clients as friends, I did not merely feel justified in doing all I could for them; I felt a strong desire to do so.

Fried's . . . [analogy] might be perceived as similar to my own vision of the lawyer-client relationship. However, my relationships with clients differed from the relationship Fried posits. . . . [U]nder Fried's model, the lawyer is justified in doing all that he would for a friend in trouble, but only within the context of

32. See McChrystal, *supra* note 1, at 392-93 (alleging that Fried seems to rest on a concept of friendship which involves "adopting the friend's interests as one's own, even when the friend defines her interest as requiring the commission of [a] moral [wrong]," and concluding that "[t]he continuing loyalty of the real friend is not required of the lawyer, except within the narrow concerns of confidentiality and conflict of interests"); DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 83-84 (1988) ("The friendship analogy undercuts rather than establishes the principle of nonaccountability. We are not—except for the Gordon Liddys of the world—willing to do grossly immoral things to help our friends, nor should we be."); Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219, 1259 (1990) (observing that "otherwise unethical conduct is not rendered permissible because we are doing it . . . on behalf of a friend").

33. Fried, *supra* note 1, at 1083. "Consideration for personal integrity forbids me to lie, cheat, or humiliate, whether in my own interests or those of a friend, so surely they prohibit such conduct on behalf of a client, one's legal friend." *Id.*

the legal system. My relationships with clients were not similarly bounded.³⁴

Ogletree claims in effect that his relationship as a public defender with his clients was not that of mere advantage-friendship. Thus, it is worth asking: what species of friendship was it? The tenor of his description suggests that it was something deeper, more authentic and sincere than advantage-friendship. The unavoidable impression is that Ogletree believes that his relations with clients were real friendships—what Aristotle analyzes as character-friendships.

The Aristotelian theory shows why there is reason to be skeptical of Ogletree's claim. We have already established that within Aristotle's schema public defenders cannot be advantage-friends to their clients, because the payment that generally suffices as reciprocity in lawyer-client relations is lacking. Did Ogletree's relations with his clients satisfy the reciprocity condition in some other way? His own description of them suggests that they did not. Crucially, Ogletree fails to mention how his clients reciprocated his many services to them, and thus fails to make a convincing case that the relationships he describes were "real" friendships. At any rate, he fails to make the case that they count as Aristotelian character-friendships or pleasure-friendships, even as he strains to distinguish them from what Aristotle would call advantage-friendships.

The problem Ogletree seems reluctant to confront is that his relationships with his clients are what Aristotle would have understood in terms of a category of the theory that I have not yet introduced: namely, the friendship between unequals.³⁵ Paradigm instances are the friendships "between father and son, and, in general, between an older and a younger person, between husband and wife, and between any kind of ruler and his subject."³⁶ Friendships between unequals, of any kind, are in turn different generically from the three categories of friendship among equals.³⁷ Most distinctively, friendships among unequals are predicated not on each person's receiving the same thing from the friendship (be it advantage, pleasure, or a community of shared virtue). Rather, an unequal friendship endures only so far as each party to it derives something different and proportionate. So, for example, where one partner receives a greater share of material services and advantages than the other, the other should receive in due proportion a greater share of honor and defer-

34. Ogletree, *supra* note 1, at 1272-73 (citations omitted).

35. See generally ETHICS, *supra* note 2, at Book VIII, chs. 7, 14.

36. *Id.* at 1158b12-13.

37. As to these, Aristotle invokes an ancient epigram of Pythagoras, that "Equality is friendship." *Id.* at 1157b36. "Friendship is equality and likeness, and especially the likeness of those who are similar in virtue." *Id.* at 1159b3.

ence.³⁸

Ogletree's relationships with his clients seem clear instances of Aristotelian friendship among unequals.³⁹ It seems just as clear that Ogletree would not appreciate this characterization. He might protest that his relations with clients were not premised on presumptions of his superiority in any respect, and that feelings of real affection and regard did take root between him and his clients.⁴⁰ But Aristotle's theory rests upon an objective standard of inequality, and by such a measure, Ogletree was the person with authority, resources, professional status, and skill. His clients, on the other hand, were the

poor, uneducated, . . . from single-parent families, [often with] a history of drug abuse . . . [whom we at the District of Columbia Public Defender Service] were taught to view . . . as . . . victim[s]—[people] who had endured suffering and deprivation, and who would continue to suffer without our assistance.⁴¹

The conclusion is irresistible: Ogletree's relationships with his clients, notwithstanding his desire to think of them otherwise, are what Aristotle would have classified as friendships among unequals, if they are friendships at all.⁴²

Is there any other way to think of the public defender's relationship to his clients? My answer begins where this section began: the place of loyalty in the relationship between public defenders and their clients. It strikes me that loyalty is fundamental in these relationships, and indeed, pre-eminent. Moreover, loyalty offers a far more attractive basis for sustaining the relationship between the public defender and his client than

38. *Id.* at 1158b 22-28; 1163b 1-4, 13-17.

39. I do not mean to impugn Ogletree's integrity or sincerity. My intention is to locate the relationships he describes within Aristotle's theoretical schema.

40. *Id.* at 1159b2-3. Aristotle observes that affection between the partners of unequal friendships is not uncommon, and can induce the illusion of equality.

41. Ogletree, *supra* note 1, at 1286.

42. The Aristotelian friendship between unequals was realized in a social institution of the Roman Empire that has special resonance for contemporary lawyers: the relationship between the "patron" (*patronus*) and his "client" (*cliens*). This relationship originated in the early Republic with the practice among wealthy families of attaching poorer citizens to themselves, to whom were given financial or legal assistance in return for political services or social deference. Subsequently, the patron-client relationship took hold between manumitted slaves and their former masters (in the process becoming subject to legal recognition and regulation). In the later Republic, the function of legal assistance by *patroni* to their *clientes* was extended to include cases where professional forensic speakers supported litigants in return for a fee. It is said that a genuine feeling of friendship often subsisted between *patroni* and their *clientes*, but there was never any pretense of equality between them. Indeed, the very premise of the relationship was inequality. See MATTHIAS GELZER, THE ROMAN NOBILITY (Robin Seager trans., 1969); Arnaldo Momigliano, *Patronus*, OXFORD CLASSICAL DICTIONARY 791 (N.G.L. Hammond & H.H. Scullard eds., 1970); G.E.M. DE STE. CROIX, THE CLASS STRUGGLE IN THE ANCIENT WORLD: FROM THE ARCHAIC AGE TO THE ARAB CONQUESTS 341-43 (1981).

any attempt to establish friendship—since the most that can be hoped from such an attempt is the friendship of unequals, with its attendant risks of paternalism and hypocrisy.⁴³

The signal advantage of loyalty for justifying and motivating the public defender's relations with his clients is that loyalty is not conditioned on reciprocity. The public defender may be loyal to his client, without regard to the client's attitude or disposition toward him.⁴⁴ So construed, loyalty stems not from friendship, but from what J. Glenn Gray described as comradeship:

The feeling of loyalty, it is clear, is the result, and not the cause, of comradeship. Comrades are loyal to each other spontaneously and without any need for reasons. Men may learn to be loyal out of fear or from rational conviction, loyal even to those they dislike. But such loyalty is rarely reliable with great masses of men unless it has some cement in spontaneous liking and the feeling of belonging.⁴⁵

Gray was writing of his experience in the U.S. Army during World War II. But in considering Ogletree's account of his initial encounter with a client accused of a brutal rape and murder, one senses the inception of something very like what Gray was describing:

[I]t was clear to me that he was frightened. He did not know what would happen to him that day or thereafter. In telling me about his life, his family and his fears, Strong revealed that his father had been murdered when Strong was young. . . . As awful as his crime was, I could see that he wanted someone—anyone—to say "I'm on your side."⁴⁶

The soldier realizes his attachment to comrades in combat not through sober consideration of the character of his fellow-soldiers, but through the compulsion of shared suffering and danger.⁴⁷ Similarly, the

43. Fried is not unaware of these risks, but he nevertheless sets them aside. See Fried, *supra* note 1, at 1066 n.17 (noting "the lawyer's benevolent and sometimes not so benevolent tyranny over and imposition on his client," and conceding that "[d]omineering paternalism is not a normal characteristic of friendship").

44. The same is never true of friendship, in Aristotle's view. Even friendship between unequals requires reciprocity, albeit from different sources, in varying proportions.

45. Gray, *supra* note 9, at 40.

46. Ogletree, *supra* note 1, at 1263-64.

47. Compare ETHICS, *supra* note 2, at 1156b25-27 (observing of "complete" friendships that they require "time and familiarity" since, "as the proverb has it, people cannot know each other until they have eaten the [requisite] <measure> of salt together.") with Gray, *supra* note 9, at 89 (observing that "[o]nly those men or women can be friends . . . who possess an intellectual and emotional affinity for each other," and that "[s]uffering and danger cannot create friendship, but they make all the difference in comradeship").

public defender (as Ogletree depicts him, through the prism of his own experience) first conceives of his connection to his client by way of the sense of solidarity naturally aroused by close proximity with someone who is alone, in trouble, and facing danger. In that moment, the public defender becomes a comrade to his client. It is that comradeship, thereafter, that sustains the public defender in zealously defending his client, in setting doubts aside about the morality of his stand on behalf of his client, and in doing whatever must be done to help and support his client through his odyssey in the criminal justice system. As comrade rather than friend, the public defender never thinks of reciprocity—since the loyalty of comradeship derives not from shared advantage, pleasure, or virtue, but from a certain “self-taught concreteness”⁴⁸ and an “unswerving fidelity to the real.”⁴⁹

IV. CONCLUSION

A problem remains, with which I conclude, without resolving. The loyal comrade, as such, is not constrained by moral strictures in acting on behalf of those to whom he is loyal. A loyal lawyer, presumably, must be. So too a loyal public defender? Inevitably, he will be torn. So far as he is a lawyer, he will need to draw lines at certain points—between his comrade-client, and the bounds of professional ethical propriety, if not conscience.⁵⁰ So far as he is comrade, however, those lines will often appear to be no more than troublesome obstacles, to be eluded on behalf of an imperiled comrade, to whom, in some recess of his soul, he once swore undying faith.

48 Gray, *supra* note 9, at ix (from Introduction by Hannah Arendt).

49. *Id.*

50. See *supra* note 32 and accompanying text; see also Henry Louis Gates, Jr., *The End of Loyalty*, THE NEW YORKER, Mar. 9, 1998, at 34, 44 (arguing that “loyalty—the morality of mine and thine”—is a “premodern” virtue, regard for which declined in the wake of the Enlightenment, and observing that in modern politics, loyalty is typically subordinated to considerations of “principle”).