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Tribute: An Extraordinary Lawyer

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AN EXTRAORDINARY LAWYER

*Arthur Leavens**

Charles Ogletree, Jr., is one of those persons who, by virtue of his many and varied achievements, has become almost larger than life. It is difficult to look back and see such people other than through the lens of their accomplishments. But that is my task, because I knew and worked with Charles Ogletree before he became the Charles Ogletree whose accomplishments we here celebrate.¹ Before his books, before his law review articles, before his tenured professorship at Harvard, before his well-deserved place on the national stage as a leader in the struggle for civil rights, "Tree," as we knew him, was a staff attorney with the Public Defender Service ("PDS") in Washington, D.C. Tree arrived at PDS in the fall of 1978, immediately after graduating from law school and taking the bar. A year later, I had the privilege of being in the next "class" of lawyers to join the PDS staff.

PDS was, at the time, about fifty lawyers strong, and its mission was—and continues to be—the provision of legal representation to indigent persons charged with crimes in the District of Columbia. The principal focus of our work was in the Superior Court for the District, the court in which the "local" criminal offenses were adjudicated. The District is, of course, neither a state nor within a state, but it has its own comprehensive criminal code analogous to the criminal codes of the fifty states. The Superior Court, although technically federal, is the analog of a state court, and it is there that the lion's share of the District's criminal cases are tried. While PDS at that time represented less than a quarter of the criminal defendants in Superior Court, its lawyers were appointed to represent over half of the persons charged with homicides and a substantial proportion of defendants charged with rapes, armed robberies and assaults, and other serious crimes. We were, for the most part, young and all too often inexperienced lawyers. We came from around the country, many of us leaving or turning down more prestigious (and certainly better paying) jobs to work ten to twelve hour days, six or seven days a week out of offices in the peeling basement of an ancient federal building, defending

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1. That is not quite accurate, because even at this early stage in his career, Charles Ogletree was a person of substantial accomplishment. Through his work and leadership as Chairman of Stanford's Black Student Union as an undergraduate and as National Chairman of the National Black Law Students Association as a Harvard law student, Charles Ogletree had already achieved a measure of national prominence before I ever met him.

persons who were charged with, and often guilty of, ugly and violent acts against their fellow human beings.

It was heady stuff, and we felt lucky to be there. If our law school classmates in the “uptown” offices had as their working bible the Internal Revenue Code, the Securities Acts of 1933 and 1934, or the arcane provisions of Delaware corporations law, ours was the Fourth, Fifth and Sixth Amendments to the Constitution. If they plied their trade in the board rooms of Fortune 500 companies and the quiet, well-appointed offices of major law firms, we were at the D.C. Jail or in some god-forsaken alley of a housing project that was so hard-scrabble that even the police rarely went there, and when they did, only in force. Our classmates found their law in carefully maintained, state-of-the-art libraries. We found ours in mounds of dog-eared, paper-back advance sheets that some law office had donated to the cause when the bound volumes came in. Why did we do this? We each had our reasons, but they boiled down to the opportunity to provide the best possible representation that we could to persons who never needed it more and who were too poor to pay for it themselves. If that sounds a bit abstract to sustain a person when the hours get long and the work seems overwhelming, there was the chance—indeed, innumerable chances—to help our clients in ways large and small. We also had each other, a benefit that we only came to appreciate once at PDS.

We never talked about how each of us came to be at PDS or, for that matter, what would come next. It was a here and now experience. Tree has since made the point that, but for *Brown v. Board of Education* and the principles of affirmative action that followed, he would not have been there.² That is at once a stunning indictment of our society and an incontestable demonstration of *Brown's* promise, even if that promise remains unfulfilled. That PDS and its clients would have been without not just Charles Ogletree but also the other African American lawyers in our office—lawyers who distinguished themselves as defenders of D.C.'s poor and subsequently as practitioners, judges and law professors across the country—is simply inconceivable. But for me the point is most telling as I think about Tree, because he is simply the best lawyer I have ever seen.

Upon arrival at PDS, my newly arrived colleagues and I went through several weeks of training and then were assigned to juvenile court, where we cut our teeth defending kids—at least in terms of their age—accused of everything from shoplifting to armed robbery. The stakes were high, but the courtroom procedures and judicial temperaments were a bit more relaxed, and any mistakes could usually be rectified by hard work at the dispositional phase of a case. From juvenile court we went into either appeals or misdemeanors and then to felonies. There, the atmosphere was considerably less forgiving and mistakes more costly to our clients. So, in our first felony trial or two we usually had a more experienced lawyer as our “second chair.” That is how I really got to know and see first-hand Charles Ogletree, the lawyer.

2. CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED 94 (2004).

John Styles³ was my first felony client. He was charged with rape—a felony that held out the possibility of a very long prison sentence even though he had little in the way of a criminal record—and misdemeanor assault, both growing out of an incident involving a woman who turned out to be his girlfriend’s aunt. Because Mr. Styles had a modest job—he was a part-time truck driver whose routes were confined to the D.C. area—and family ties in the area, he was released pending trial. One soon learned at PDS that if you waited a week to investigate a new case, you were probably a week too late when you got to it. A witness’s availability, memory and willingness to talk seem to decline geometrically with the passage of time. With forty cases, that truth sometimes yielded to another truth, that there is always something that needs to be done in every case. But just out of appeals and with only a handful of cases on my trial docket, I had time. I wheedled a police report out of the prosecutor⁴—who was undoubtedly emboldened by a strong case and a green-as-grass defense lawyer—and with my student-intern investigator in tow paid a visit to the complainant the next morning. This was a part of the job that I hated but one that I knew was essential. Back then there were no special victim assistance units in the prosecutor’s office, no rape crisis teams in the police department. I knew it was likely that we would be the first persons “from the court” to visit this person⁵ after the trauma of the day before,⁶ and our—really my—job was to interview her and employing all the empathy that I could muster to obtain a statement, hopefully written, that we could then use against her at trial. This was essentially a street deposition at which she was unrepresented, and it made me feel very uncomfortable.

I was not prepared for what I saw. This woman was old. Her date of birth told me she was in her early fifties; one look at her that morning suggested someone at least a decade older. She was polite but guarded, and once we told her who we were and what we wanted, she said that she did not wish to talk with us and asked us to leave. Secretly, I think I was relieved, but I still gave my “we are just trying to find out what happened, and that only seems fair” speech. She was unmoved and asked

3. In describing this case, I, of course, use a fictitious name for my client. I resurrect the facts of this case from my memory almost twenty-five years after the fact, unaided by notes, files or the like. I remember this case clearly, but as is always true with memory, clarity may not correspond exactly to truth. Any mistakes in the recounting of the case are mine alone and reflect the fragility of my memory.

4. Under the very restrictive discovery rules applicable to criminal cases in D.C. at the time, Mr. Styles was not entitled to the names or addresses of potential government witnesses, much less witness statements or police reports setting forth facts pertinent to the police investigation of the case. *See* D.C. R. CRIM. P. 16(A). *See also* 18 U.S.C. § 3500 (2006); *United States v. Holmes*, 343 A.2d 272 (D.C. Ct. App. 1975).

5. At the beginning of this and every such interview, we, of course, identified ourselves as the defendant’s attorney and his investigator, not as an officer or official from “the courts” and certainly not as her lawyer, giving her a business card to underscore that point. In spite of this “warning,” which was repeated in writing on any written statement that we took, I often wondered whether the person interviewed fully understood my role.

6. This assumes that there really was a trauma, but my experience was that there usually had been. Of course, what its nature was and who did it were different questions.

again that we leave. We did. A few days later I met with Mr. Styles to tell him what I had (more accurately, had not) learned and to find out what he could tell me. He was not much more forthcoming than the complainant. He knew her; she was the aunt of his girlfriend. He was in his late twenties. The complainant was considerably older, a fact that rang true. Nothing had happened. He did not know why she said what she had said. He was at home (a nearby apartment) that night, alone. He had no witnesses. His girlfriend, he said, knew nothing about this case, and he would not give me her name or address.

At the preliminary hearing a few days later, I learned that Mr. Styles had been arrested on the night in question, naked and unconscious, in the complainant's bed. The prosecution's sole witness was a detective who testified that my client had struck and then raped the complainant before passing out in her bed. The incident took only a few minutes, as did the hearing. My post-hearing meeting with Mr. Styles was equally unproductive. While he dropped his claim that he was not at the complainant's apartment, he persisted with his denial that anything had happened. He was neither openly angry at the complainant's accusation nor defensive or embarrassed about his earlier falsehood (indeed, neither of us brought it up). Sullenly taciturn would best describe him. We agreed to meet when I knew more.

Mr. Styles was soon indicted, and it was then that Tree came into the case, as my second chair. Even though he had only been at PDS for a year longer than I had, and even though he never seemed to be able to keep his tie knotted at his neck (what kind of a lawyer can't keep his tie on?) he was the right guy to have on this case. When it became clear that this would lead to a trial, with Mr. Styles having the next ten or fifteen years of his life at stake, Tree became the principal lawyer and I the second chair, at my insistence. But I get ahead of myself, because after the post-indictment discovery, including the tape of the 911 call (in which the complainant haltingly, tearfully tells the police that she had just been raped), the photo of Mr. Styles being awakened by the police naked in the complainant's bed, and the photos of the bedroom in utter disarray, this looked like a plea. We would of course investigate further, but once Mr. Styles saw (and heard) this evidence, his denial would crumble and he would see the wisdom of a plea. With his (relatively) clean record, his job, his family, and our hard work on a pre-sentence report, he could probably get a relatively light sentence.

When I explained to Tree that I had tried to talk with the complainant and she had refused, and told him that my investigator had reported that none of the neighbors had heard or seen anything on the night in question, Tree said we had to go back. We could not even consider talking to Mr. Styles about surrendering his right to a trial without learning everything we could about the prosecution's case. And so on a blistering hot August Saturday, even by D.C. standards, we got into the oven with wheels that passed for Tree's car (mine was no better, offering a choice between air conditioning and forward motion) and hit the streets.

A trial lawyer brings many skills to bear, none more important than the ability to communicate. If we are taught, as we are, to listen carefully, empathetically and actively, to look for common ground and to establish a bond with whomever we speak, to speak with, not at and certainly not

down to, that person, treating him or her with respect, to speak with gentle but unmistakable confidence, then Tree is the model communicator. Many of us work hard to learn these techniques, but with Tree they seem to (and I expect do) come naturally. People end up trusting him, which is an enormous advantage in overcoming the skepticism of jurors and prosecution witnesses alike. For example, we found the neighbor across the hall from the complainant, a middle-aged man who lived alone and had earlier told my investigator that he saw nothing that night, a story he repeated to us. I was ready to leave, but Tree managed to keep the conversation going, and before long the neighbor told us that the complainant had actually come to his apartment that night, draped in nothing but a bed sheet and apparently hysterical. He had testified at the grand jury, saying he had not seen anyone else from the building other than the complainant.

We tried again to speak with the complainant and she again declined, this time exhibiting some irritation at our request. Afterwards, I expressed frustration at her attitude, but Tree was encouraged. He observed that were she to testify, it would likely go much better for us if she were combative rather than passive. While that seemed reasonable to me, it hardly inspired optimism. We talked to some other neighbors, but no one seemed to know anything about the incident or our client, Mr. Styles. I was a little surprised that Tree spent the time he did chatting with them about, among other things, the neighborhood and their impressions of the complainant. None of this seemed particularly relevant; there was no reason to think that these folks would be witnesses at trial and, even if they were, their sense of the complainant would not be admissible. When I made this point as we were riding back to the office, Tree responded, first, that you never know until you give a person a chance to get comfortable with you what he or she might say; our conversation with the across-the-hall neighbor underscored that point. Second, you can never know too much about a person whom you may have to cross-examine. Third, the neighbors' impressions of the complainant might well be shared by the jury, and that impression was thus important to try to gauge as we prepared to talk to Mr. Styles about what he could expect at a trial and whether it made sense to think about the escape hatch of a plea bargain.

Before meeting with Mr. Styles to discuss the possibility of plea discussions with the prosecutor, Tree and I went through the case again in order to carefully assess our chances at trial. The 911 tape was awful; there were the photos showing Mr. Styles in the complainant's bed and a room in disarray—a lamp knocked over and clothes thrown about. We were helped by the fact that there were some holes in the prosecution's case. There was no medical evidence to corroborate the physical act, the complainant apparently having declined treatment. When we inspected the dress that the complainant had been wearing that night, it was a relatively fancy, apparently tight-fitting party dress that was fastened in the back by a number of decorative buttons that had to be inserted into fairly tight loops. All of the loops appeared to be intact, which seemed inconsistent with the dress being ripped off, or even removed quickly. Nevertheless, things did not look very bright.

Although a lawyer is afforded broad discretion when it comes to tactical choices in defending a criminal case, the decision of trial or plea is the

client's alone to make. Certainly the criminal defendant is entitled to counsel's best advice concerning this critical decision, but in the end it is the defendant's, not the lawyer's, choice. After all, he (or, more rarely, she) will do the time. The clarity of this rule governing decisional authority obscures the difficulty of its implementation. First, while every good criminal defense lawyer appreciates and seeks to honor client autonomy, it is exceedingly difficult to watch a client walk off the cliff of a bad decision, turning down a good plea offer when you, the lawyer, know that the chances at trial are slim and none. This is especially so in a serious felony case in which the likely sentence after trial will be measured in decades, not months or even years. One thus must prepare carefully for this discussion with the client so that the evidence, good and bad, is clearly laid out, permitting your client to see for himself what his likely chances are. In effect, you try to put him in the jury box at his own trial so that he can judge the likelihood of acquittal or conviction. Second, even if that is skillfully done, presenting the likely evidence with clarity and framing the decision in terms of the burden of proof and the likely range of sentences after plea and after trial, you are most often met with some version of either, "You are the lawyer; what should I do?" or, "You are trying to sell me down the river."

Of course, not every plea discussion fits this mold, and our meeting with Mr. Styles fell into that category. He met with us in our office, and Tree laid it all out. Although he had met Tree only once or twice before, Mr. Styles seemed engaged as Tree outlined what we had done, explained what likely would happen next in the case, and made mention that Mr. Styles, like all persons charged with a crime, could at this juncture consider settling the case with a guilty plea. Tree's manner was open and easy but plainly professional. I feared Mr. Styles would shut it down, but when Tree broached the possibility of a plea, he listened as Tree went through the expected evidence, playing our copy of the 911 tape and showing him the photos taken by the police. When Tree asked if he had any questions, Mr. Styles shook his head. When Tree reiterated that this was the chance to take stock and decide whether a trial made sense, our client interrupted to say that he was not going to plead guilty to something he did not do. If Tree was surprised, he did not show it. After making sure that Mr. Styles did not want to consider a plea, Tree turned to the trial. Mr. Styles had yet to give us any witnesses or even his version of what had happened. He had brushed off my earlier attempts to probe "our side of the case," saying only that he had been drinking that night but that he did not rape the complainant. Period. Tree's questions in this regard—although considerably more pointed than my earlier ones—were met with a similar response, and so the meeting ended with Mr. Styles's seemingly half-hearted agreement to think back over that night and to provide us at a later meeting with any recollection, any name, anything that had anything to do with this case. Neither Tree nor I expected Mr. Styles to tell us anything more, and he did not. We were thus left to find "reasonable doubt" in the government's case, a daunting prospect as I looked at the evidence. Tree, on the other hand, seemed more confident. Once it was clear that we were going to try the case, skepticism concerning our client and his defense was a luxury we could no longer afford. We had to shift gears. And so we combed through what we had learned in

discovery and through our investigation, stitching together a plausible basis to argue that whatever happened in that apartment that evening was not rape; assault maybe, but not rape, at least not beyond a reasonable doubt.

The trial was a blur, at least for me. We split the responsibilities, but Tree pulled the laboring oar. We had none of our own witnesses, and so we did not have to worry about direct examinations. I cross-examined some witnesses; he cross-examined others, including most importantly the complainant. I made the opening statement, he the closing argument. As we got ready, Tree counseled two things. First, while we did not have to prove a thing, every question we asked, every sentence either of us said had to be directed at our theory that whatever occurred was not rape. Second, in our manner, as well as in our words, we had to convey to the jury our belief in the truth of our cause. For me, this represented—at least at the outset—a suspension of disbelief. If that was true for Tree, you would never have known it. From the first day of the trial forward, he projected a quiet confidence that was contagious. Even Mr. Styles seemed to stiffen, looking less fatalistic and more resolute.

I learned over the course of trying many cases that a criminal trial is at best managed uncertainty. Preparation reduces the chances for being taken by surprise and allows you better to adjust to those surprises that come, but you just never know what will happen once the trial begins. From the very beginning, this trial was no exception. The prosecutor led off with the complainant, on whose testimony the case rode. As she came into the courtroom, she was a different woman than I saw at her apartment. If when I first saw her she looked at least ten years older than her fifty some odd years, at trial she looked like a fifty-year-old trying too hard to look forty or younger. This fit more with the dress we had seen. Her story, which, because of the restrictive discovery rules we were hearing for the first time, was basically that Mr. Styles, her niece's boyfriend, showed up drunk at her apartment on some pretense and tried to seduce her. When she rebuffed his advances, he raped her. While certainly not beyond belief, the story did not seem to fit.

The biggest surprise came, however, when the prosecutor asked her to identify the dress that we had earlier seen as the one she had been wearing that night. In the course of this process, the prosecutor showed us the dress, still in its clear plastic evidence bag. We took the dress and looked at it, ordinarily a perfunctory task given that we had already examined it during pre-trial discovery. To our astonishment, the button loops on the back of the dress were torn, as if the dress had been ripped off. Tree's back was toward the jury when we made this discovery. He just looked at me and then turned and gave the bagged dress to the prosecutor. Rather than raising the issue with the court, making a serious charge of evidence tampering, a claim that we could neither prove nor attribute to anyone in particular, Tree waited for cross to deal with the problem. Using the crime scene photos (which seemed to show the dress lying neatly on the downstairs couch) and relying on what she would likely say given what we knew about the actual condition of the dress after the incident, Tree carefully elicited the complainant's admission that the dress was not ripped or damaged when it came off that night. If we could not show the intact button loops to the jury to underscore this admission, the prosecution could not show the torn dress to the jury.

Cross-examining a rape complainant is exceedingly tricky, even one as combative as this person turned out to be. After all, on the face of her testimony—apparently corroborated by other evidence—this person has suffered a horrible and violent trauma at the hands of our client. One has to tread lightly, lest it appear that she is being violated a second time. On the other hand, her testimony must be challenged, lest it appear that its truth is being conceded. Tree was terrific. During her examination by the prosecutor the complainant did her best to appear open and forthcoming, but once cross-examination began she resisted at every turn. Tree was respectful but firm, ignoring her veiled (and not-so-veiled) insults and challenges. Instead, he employed what amounted to linguistic judo, playing off her increasing hostility to prompt statements contradicting what she had earlier told the police or the grand jury, contradicting the prosecution's other evidence, and—toward the end of her testimony—contradicting just plain common sense. Although the core of her story may have remained intact, her credibility seemed seriously damaged. Tree accomplished this attack without appearing to attack. It was a virtuoso performance, but maybe not enough. After all, the 911 tape and photos hurt our case. But even here, Tree used this cross-examination to plant a seed of doubt, unnoticed at the time.

During his cross-examination of the complainant, Tree prompted her to say that during the course of the struggle in her bedroom a lamp on the end table next to her bed was knocked to the floor. Indeed, one of the post-arrest crime-scene photos showed the lamp on the floor next to the bed. When the arresting officer testified later in the trial, we brought out on cross that Mr. Styles was passed out when they found him in the bed and that the officers took him into custody without a struggle. The prosecution overlooked the police photo of Mr. Styles lying in bed before he was arrested, which plainly showed that the bedside lamp was on the table at the time of the arrest. The lamp was knocked over, but not while Mr. Styles was in the room.

Tree used this issue about the lamp in his closing argument to great effect. He began with a theory of seduction; however, it was not the complainant that was being seduced, but an inebriated Mr. Styles. Either the seduction was more successful than the complainant anticipated or she changed her mind, but in either event she stopped things short of sex, thus provoking Mr. Styles's drunken wrath. She sought refuge at her neighbor's door with nothing but a sheet to cover her body and a hurriedly concocted story to cover her dignity. For his part, Mr. Styles passed out on her bed. Having flown the flag of innocence through a theory that was reasonably consistent with the evidence (even if not compelled by it), Tree turned to the prosecution's case and its burden of proof. He did not call the complainant a liar. He did not claim that the police staged the crime scene. He did not have to. He pointed to the evidence—including the exaggerations and sometimes demonstrably false claims of the complainant, including the misleading photograph taken by the police and offered into evidence by the prosecutor—and suggested that the prosecution's story was just that, a story, a story not worthy of belief, certainly not beyond a reasonable doubt. It was effective communication at its best; no over-reaching, no gratuitous personal attacks, no transparent hyperbole.

You never know how a jury will respond, but this one was not out long. Mr. Styles was acquitted of the rape charge; he was convicted of the misdemeanor assault charge (the jury accepted that he struck the complainant during the incident). At sentencing, the judge—a fair but nonsensical jurist who was no stranger to harsh sentences—could have sentenced Mr. Styles to a year in jail, but he instead ordered probation with a suspended sentence.

Tree performed extraordinarily well in this most difficult case, and I felt privileged to observe and participate in it from the inside. Mr. Styles was politely thankful, and he went his way, successfully completing his probation and never serving a day. I do not know if he knew how good his lawyer was or how close he came to serving serious time. As for what really happened that night in that apartment, I do not know. Criminal defense is fraught with such ambiguity, especially for a public defender. As counsel of last resort, representing those who would otherwise have no lawyer, you cannot cherry pick your cases, representing only appealing clients or causes aligned with your moral compass. Your client is very often not the “good” guy in the story; often you know, sometimes you do not. If Mr. Styles really did do it, the trial and its result nevertheless stand as a tribute to our society’s commitment, embodied in the Sixth Amendment, that even a poor person accused of an ugly, violent crime is entitled to a fair trial with effective assistance of counsel before he can be convicted. If Mr. Styles really did not do it, justice—both macro and micro—was served. Either way, he never needed a lawyer more. In Charles Ogletree, he got the best.