

# KEEPING IT REAL: EMPATHY AND HEROISM IN THE WORK OF CHARLES J. OGLETREE, JR.

---

*Eric J. Miller\**

## INTRODUCTION

Early in his academic career, Professor Charles J. Ogletree, Jr., universally and affectionately known as “Tree,” sought to translate the many lessons learned as a public defender into a series of powerful articles discussing criminal procedure in general, and the ethics of public defenders in particular. In this tribute, I shall suggest that Professor Ogletree has used the wisdom acquired as a public defender to develop an ethics of engagement that structures his academic and professional work. A widely shared understanding is that the law is, as Lon L. Fuller suggested, a tool of governance that must work for the benefit of the people governed.<sup>1</sup> Professor Ogletree added to that vision the insights of two of his heroes, Charles Hamilton Houston and Thurgood Marshall. These great civil rights pioneers emphasized that particular care must be devoted to those least likely to have their voices heard, and that the vocation of the lawyer, whether advocate or academic, could and must facilitate that process. However, Professor Ogletree’s distinctive insight is that law must work for real people—individual clients, not abstract groups—and that “keeping it real” in this manner avoids ethical problems that undermine the validity of many legal initiatives.

As can be seen from the list of contributors and the content of their contributions, while working for those less well off, Professor Ogletree has influenced an amazingly large number of his colleagues in both academia and the wider legal world. Some of us were privileged enough to have him as a teacher or as a supervisor of our research, others as a colleague, and all of us as a friend and mentor. As a member of the academy, I would suggest that the qualities that draw other scholars to him are his fierce intellect and academic prowess; but the qualities that keep us with him are the two that I wish to celebrate here: empathy and heroism.

---

\* Assistant Professor of Law, St. Louis University Law School.

1. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 357 (1978).

## I. EMPATHY AND HEROISM

In his 1993 article *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*,<sup>2</sup> Professor Ogletree discussed the two great principles that have directed his personal, professional, and academic life: “empathy” and “heroism.”<sup>3</sup> For Ogletree, heroism is “the desire to take on ‘the system’ and prevail, even in the face of overwhelming odds.”<sup>4</sup> Empathy is “an identification with another person in distress.”<sup>5</sup>

Ogletree primarily situates the concepts of empathy and heroism within the practice of criminal law. Re-orienting criminal law practice and procedure around heroism and empathy promises major professional and personal benefits to criminal defense lawyers. Most immediately, heroism creates self-confidence in the face of a never-ending series of criminal law cases, most of which have (from the perspective of the defense attorney) negative outcomes. Empathy, understood as acknowledging the humanity of the defendant and engaging with his or her concerns, promises to re-invigorate the system of criminal justice, infusing the various stages of the process with much-needed “meaning” and ensuring that both prosecutor and defense counsel fulfill their professional responsibilities while simultaneously conveying to the defendant the expressive message that the criminal justice system aspires to deal individually with each offender and each offense.<sup>6</sup>

These ideals are, first of all, “motivation[al]”:<sup>7</sup> they provide a set of techniques to cope with burnout and rejuvenate the criminal defense attorney’s enthusiasm for legal practice under the trying situation of an overwhelming caseload and unappealing clients.<sup>8</sup> But second of all, these ideals directly address the attorney’s legal role and legal identity by redefining “how the agent envision[s him or her] self and [his or her] task.”<sup>9</sup> Third, heroism and empathy guide the manner in which the lawyer interacts with his or her client, requiring, in the case of heroism, a stance of “representing the underdog, where the scales are tipped against them”<sup>10</sup> to overcome social and legal obstacles by “conquer[ing] what others cannot,” often by bending “the moral rules society reserves for others.”<sup>11</sup> Empathy requires the lawyer to adopt “the theory and practice of client-centered lawyering”<sup>12</sup> so as “to relate to the client more closely” by “perceive[ing] a shared humanity” and “see[ing] the client as more than a criminal defendant.”<sup>13</sup>

---

2. Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993).

3. *Id.* at 1274–79.

4. *Id.* at 1243.

5. *Id.* at 1268.

6. *And*, by implication, each victim.

7. Ogletree, *supra* note 2, at 1275.

8. Ogletree notes that, “viewed dispassionately, most defendants [in the criminal justice system] are simply criminals.” *Id.* at 1273.

9. *Id.* at 1275.

10. *Id.* at 1276.

11. *Id.* at 1275.

12. *Id.* at 1272.

13. 106 HARV. L. REV. at 1268.

As Ogletree recognizes, these distinct perspectives pull in different directions and raise potentially troubling ethical issues, requiring us to evaluate whether the gains in motivation, sense of self, and quality of client relation are negated by the ethical losses. Heroism is plainly self-centered: it provides motivations for lawyering based upon bolstering the legal agent's self-regard. The legal agent is permitted or even encouraged to regard himself as a maverick or outlaw pitted against an uncomprehending or antagonistic legal system directed at undermining his or her client. The goal of the heroic lawyer, therefore, is to "beat the system."<sup>14</sup> Empathy focuses on others: the legal agent's task is "not simply to hear her clients, but to understand their problems [and to] have compassion for her clients,"<sup>15</sup> stressing the client's "positive attributes, [his] background[, and his] multiple needs that transcend his current criminal case."<sup>16</sup> The agent is required to replace her own biases by adopting those of the client whom she zealously represents, willing the client to "succeed" in "the complex maze of our legal system."<sup>17</sup>

Ogletree's endorsement of the twin ideals of heroism and empathy arise in the context of an adversarial contest in which the legal agent is pitted, on behalf of his or her client, against another legal agent. Heroism and empathy may apply to both sides of the contest: the prosecutor may empathetically identify with the victim<sup>18</sup> and perceive him or herself as a hero for justice, standing up against the tide of crime and ensuring that the few criminals who are caught are incapacitated to the full extent of the law. In other words, Ogletree's model fits comfortably within Herbert Packer's famous contrast of two conflicting models of police practice, the crime-control and due process models of criminal procedure.<sup>19</sup>

Due process critiques of the criminal justice system emphasize principles of proportionality and individual dignity. The individual's rights are respected and expressed through prospective, adversarial, and court-regulated constraints upon government discretion to investigate, detain, and search suspects.<sup>20</sup> Criminal defendants are afforded significant rights and protections, including rights against self-incrimination and the right to counsel. The presumption of innocence and the burden of proof establish core limits on governmental power.<sup>21</sup> The crime-control model, organized

14. Ogletree phrases this goal in terms of seeing oneself as a "Robin Hood" figure. *See id.* at 1275-79.

15. *Id.* at 1272.

16. *Id.* at 1273.

17. *Id.*

18. Ogletree presents this as a problem for the public defender. It may just as easily be identified as an essential component of the prosecutor's motivation: "she . . . find[s] that she has empathy . . . for the victim, and perhaps even for future victims whose safety would be threatened by the defendant's release." *Id.* at 1278.

19. *See* Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 1-23 (1964).

20. *See id.*

21. *See* Charles J. Ogletree, Jr., *The Rehnquist Revolution in Criminal Procedure*, in *THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT* (H. Schwartz ed., 2002); Charles J. Ogletree, Jr., & Yoav Sapir, *Keeping Gideon's Promise through Public Defender Offices: The American and the Israeli Experiences* (unpublished manuscript) (on file with the author). *See also* *Miranda v. Arizona*, 384 U.S. 436 (1966); *Massiah v. United States*, 377

around the principle of repression of antisocial conduct, affords the government wide discretion in pursuing and prosecuting criminals. Accordingly, it places great trust in the police's capacity to determine which suspects are guilty or innocent.<sup>22</sup> It rejects court-enforced legalism and rule-of-law constraints upon law enforcement in favor of highly discretionary forms of policing and prosecution.

The distinct criminal justice models combine with the different types of identification (as hero or empathetic litigator) to structure the adversarial contest and limit the potential for abuses. Under the crime-control model, the prosecutor is able to represent herself as society's hero, channeling the guilty to prison and empathizing with the suffering of the victim. Under the due process model, the defender acts heroically as an oppositional check on the system and empathetically as his client's "friend in need." The major external checks on these agents are the jury and (where she is not acting under one of the above-mentioned roles) the judge, each of whom is supposed to judge the merits in a dispassionate and impartial manner.

## II. DOING RIGHT, AVOIDING WRONG

Professor Ogletree is widely celebrated for his heroic championing of the underdog. If the plaques bursting out of his office are not enough to convince you, just take a quick (for he moves at a fair clip) walk down the street of any major city and see how often an array of people recognize him and come up to share a few moments with him. He first engaged in his fight for the outsider as a student at Stanford University and then Harvard Law School. But he has consistently and continuously worked to represent the oppressed as a law professor, as a public defender, and most recently as a leader in the reparations litigation seeking justice for the victims of the Tulsa Race Riot of 1921. For many of his students—outsiders to the legal world of practice or academia—he has made the time and taken the effort to champion our cause, too.

Nevertheless, choosing the side of the underdog is only half the battle. It is an often-acknowledged but generally underemphasized feature of public interest law that many of the most powerful advocates for the worse off members of society are least able to empathize with those they purport to serve. Derrick Bell made this point most powerfully, arguing that civil rights attorneys often put their own institutional or personal interests before those of their clients.<sup>23</sup> Yet one of the most attractive features of Ogletree (the man, scholar, and lawyer) as his friends and colleagues (and even his adversaries) would attest, is his ability to treat the most and least august of people with the same degree of respect and concern. How the heck does he manage it?

---

U.S. 201 (1964); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

22. See Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1505 (2004).

23. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 20 (Kimberle Crenshaw et al. eds., 1995).

While I do not believe the secret can be bottled, Ogletree's description of the ethical problems presented by heroism and empathy provides one diagnosis of the problems presented in representing the downtrodden. His work, both academic and professional, provides an object lesson in how to avoid the pitfalls of an ideologically motivated law practice. That solution is to engage with the person rather than the cause: to keep it real.

#### A. Ethical Challenges

The structured setting of the criminal justice system provides some ready checks on runaway zeal. Outside the criminal justice system's adversarial contest, with its procedural restraints upon heroic self-interest and practical demands of empathy with flesh-and-blood clients, ethical problems arise when the self-directed and other-directed aspects of the legal agent's reconstituted identity do not check each other, but rather combine to provide justifications for bending or ignoring rules of behavior, legal practice, or ethics.<sup>24</sup> As a "hero of the oppressed," the legal agent finds reasons for attacking or disregarding social norms. As an empathic individual, the legal agent justifies such reasons in terms of his or her client's needs or goals, as a necessary component of ensuring that the client succeeds against "the system."

There are a variety of factors that increase the likelihood of ethical missteps. The potential for the legal agent to "los[e] sight of the external moral limitation[s] on her conduct"<sup>25</sup> increases when the legal agent's heroic "empathy" is not directed towards individual clients but only towards clients as "types," manifesting a particular pathology the legal agent understands or "empathizes" with only as an expert qualified to determine the "real" conditions that have placed the client in his or her current crisis. Adopting the expert role undermines the major check on the heroic personality: the empathetic requirement of humility in the face of the client's statement of his or her interests. In the role of authoritative expert, the legal agent may not "hear [her client's] 'complex, multivocal conversations' . . . and . . . integrate [her client's goals] into an evaluation of potential solutions."<sup>26</sup> Where conceptual or practice-related justifications permit the agent, in the guise of expert, to discount the interests or outcomes that the actual client identifies as important, there is a tremendous potential for the self-directed motivational component to dominate the agent-client relationship.

#### B. Real People, Real Problems

If there is an answer to the ethical challenges presented by representing outsiders, it is precisely to represent individuals, not causes. This is no

---

24. Ogletree also notes that the "heroic motivation may also have its less benign aspects, [as when] criminal defense attorneys are often drawn to their work by a kind of voyeuristic desire to experience the 'darker side' of society—to interact with criminals and to learn about their exploits. [Furthermore,] many of our heroic images . . . embody . . . traits . . . that . . . tend to exclude certain groups." Ogletree, *supra* note 2, at 1275–76.

25. *Id.* at 1278.

26. *Id.* at 1274.

small point, for the tendency both inside and outside the academy is to let the policy or the idea, rather than the client or “real people,” dictate the solution. What is truly remarkable about Professor Ogletree is his ability to effectively see the people behind the policy: to “keep it real.”

### C. Race, Crime, and Drugs

For example, in the criminal justice context, Ogletree has written movingly about the complex series of identifications that confound any easy solution to the problems of drugs and crime besetting urban and mostly African American communities. The issue is a simple one: the War on Drugs is directly responsible for the massive increase in incarceration over the last twenty years.<sup>27</sup> Both the 1986 Anti-Drug Abuse Act and the 1988 Anti-Drug Abuse Act<sup>28</sup> dramatically increased the tendency toward punishment,<sup>29</sup> first by targeting drug dealing, then by targeting drug users.<sup>30</sup> The rates of arrest and incarceration have had a striking effect on the prison population: “In the federal prisons . . . drug offenders constituted 22 percent of admissions in 1980, 39 percent in 1988, and 42 percent in 1990.”<sup>31</sup>

The burden of arrest, prosecution, and conviction has disproportionately affected African American men, at a terrible cost to the African American community.<sup>32</sup> Most notorious among the provisions were the draconian punishments for possession of crack cocaine.<sup>33</sup> Its disparate impact is felt both in the style of policing and in the rates of arrest, prosecution, and sentencing.<sup>34</sup> It is primarily responsible for the increased rates of arrest, conviction, and incarceration of African and Latino Americans in the last twenty years.<sup>35</sup>

---

27. See, e.g., Charles J. Ogletree, Jr., *The Burdens and Benefits of Race in America*, 25 HASTINGS CONST. L.Q. 219, 228 n.45 (1998) (comparing disparate sentencing of blacks and whites for possession of the same weight of cocaine); CARL T. ROWAN, *THE COMING RACE WAR IN AMERICA: A WAKE-UP CALL* 193–94 (1996) (suggesting that the war on drugs has disproportionately imprisoned African American men, at a terrible cost to the black community); Michael Tonry, *Toward a Rational Drug Policy: Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25, 52 (1994) (charting the “foreseeable disparate impact on Blacks” of targeting cocaine usage). See also Note, *Winning the War on Drugs: A “Second Chance” for Nonviolent Drug Offenders*, 113 HARV. L. REV. 1485, 1485–86 (2000) (noting that “the dramatic increase in African-American incarcerations has resulted from congressional attempts to stop the devastating epidemic of crack cocaine.”).

28. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4231 (codified as amended at 21 U.S.C. § 801 (1988)).

29. See DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 118, 132 (2001) (describing the War on Drugs as an event that “utterly transformed law enforcement in the USA”).

30. William D. Mccoll, Comment, *Baltimore City’s Drug Treatment Court: Theory and Practice in an Emerging Field*, 55 MD. L. REV. 467, 475 (1996).

31. Tonry, *supra* note 27, at 27.

32. See, e.g., Ogletree, *supra* note 27, at 228 n.45; ROWAN, *supra* note 27, at 193–94.

33. ROWAN, *supra* note 27, at 193–94; see also Ogletree, *supra* note 27, at 229 (comparing disparate sentencing of blacks and whites for possession of the same weight of cocaine).

34. See Tonry, *supra* note 27, at 52.

35. See MICHAEL TONRY, *MALIGN NEGLECT* ch. 3 (1995); Tonry, *supra* note 27; ROWAN, *supra* note 27, at 193–94. See also Note, *Winning the War on Drugs*, *supra* note 27, at 1485 (“The United States Public Health Service has estimated that in 1992 76% of illicit

Ogletree has counseled against simple solutions to the problems of drugs and crime in urban communities.

Our relation, as African-Americans, to our own community is not . . . straightforward . . . [Where some suggest] a radical disconnection between the criminal and non-criminal classes in the black community[, t]his is not the experience of many African-Americans today. It is certainly not my experience. I have seen family and close friends suffer the indignities of racially motivated abusive treatment at the hands of law enforcement agencies. Too many times I return home to hear what Sara Lawrence-Lightfoot described as “stories of human tragedy and defeat—the people who have been murdered or imprisoned, the old folks who have died, the children who have had babies or gotten hooked on drugs.” It is essential not to forget our indebtedness to those upon whose shoulders we stand, the people I call my “home folks.”<sup>36</sup>

Ogletree’s solution is to recognize that the problem of drugs and drug-related crime is not an individual one, to be solved by incarcerating the criminal. Nor is it a matter simply of racial solidarity, giving a free pass to drug users so long as they are poor and African American.<sup>37</sup> The solution is a social one that requires “rehabilitation, not just of the criminal, but of the community-society itself.”<sup>38</sup> The problem of over-policing minority communities requires us precisely to see past the categories of “African American” and “criminal,” and reject the “‘economy of sympathy’ by which individuals of the same race are more likely to identify with each other than with individuals from other races.”<sup>39</sup>

#### D. Reparations

The reparations movement has provided Professor Ogletree with by far his greatest public stage in recent years. He has had a profound impact upon transforming the reparations debate from a marginal and somewhat esoteric argument to a central plank of political and legal discourse.

As he has argued on a number of occasions, however, reparations advocacy is not a popularity contest. Reparations advocates do not seek the endorsement of the majority of the American population, or even the majority of the African American population, for what they do. In reparations, however, Ogletree has succeeded so astonishingly because he has emphasized the central elements of his credo:

We do not seek your vote, your support, or even your encouragement when engaging in this type of advocacy because the motivations that sustain us come not from public accolades but from em-

---

drug users were white, 14% were African American, and 8% were Hispanic—figures that approximate the racial and ethnic composition of the United States. Yet African Americans account for 35% of all drug arrests, 55% of all drug convictions, and 74% of all drug sentences.”).

36. Ogletree, *supra* note 27, at 245.

37. *Id.* at 248.

38. *Id.* at 247.

39. *Id.* at 247–48.

pathy with our clients: those who made it through the violence heaped upon them during slavery and segregation and those who did not. One of the fundamental goals of reparations for African Americans is to memorialize the slaves and citizens who were brutalized and repressed through the law or with the lawmakers' and law-enforcers' blessing.<sup>40</sup>

In filing *Alexander v. Governor of the State of Oklahoma*,<sup>41</sup> a reparations lawsuit seeking compensation on behalf of the African American victims of the Tulsa Race Riot of 1921, Ogletree demonstrated that reparations litigation was neither frivolous nor unwarranted. As someone who worked with him on that litigation, I can attest that he provided an object lesson in combining academic and practical interests to forward the cause of justice. But perhaps most remarkable was the bond between Ogletree and his clients.

Where others, myself included, were caught up in the momentous legal arguments, Professor Ogletree always had time for the survivors of that terrible riot. In particular, his act of helping 101-year-old Otis Clark up the steps of the Supreme Court to file the petition for certiorari in that case was profoundly moving for all of us. He has (along with the august group of lawyers and scholars he organized to work on the case), spent a tremendous amount of time connecting with his clients to ensure that the case and the cause never trumped their own desires, despite the often intense ideological conflicts among the legal team over the best direction for the litigation.

I learned from Professor Ogletree that reparations are more than an exercise in education and remembrance. Reparations are yet another expression of the demand for political, social, and economic equality that has been stifled and suppressed in this country since the failure of the civil rights movement in the 1970s. In addition to wealth redistribution, the major goal of reparations litigation, but one that is generally underemphasized, is knowledge redistribution. Knowledge redistribution engenders the empathy that may enable all Americans to see themselves as members of one community; it also publicizes the voices of the alienated African Americans. These outsider voices must not only be represented, but addressed, for the sake of white, as well as African, Americans.

## CONCLUSION

I shall conclude by suggesting that Professor Ogletree's embodiment of empathy and heroism taps into a peculiarly deep and American ethical tradition. In his essay on self-reliance, Emerson famously asked, "Are they my poor?"<sup>42</sup> For Emerson the answer is clearly "Yes." He understood that our consent to participating in our community and our system of civil government was not given simply by being born or naturalized Americans, or by some contract the Founding Fathers, long dead, were sup-

40. Charles J. Ogletree, Jr., Speech delivered at Boston College (Mar. 14, 2003).

41. No. 03-CV-00133 (N.D. Okla. filed Feb. 24, 2003).

42. Ralph Waldo Emerson, *Self-Reliance*, in *SELECTED ESSAYS, LECTURES AND POEMS* 148, 152 (1990) (1841).

posed to have drafted. Instead, we all have a duty to speak out about the condition of our country. Emerson described the heroic posture this way: “Whoso would be a man, must be a nonconformist.”<sup>43</sup>

Emerson recognized that the task of becoming a representative American is to reject the path of conformity. Instead, one must choose the path of empathy to retain an interest in what Lyndon Johnson called “The Great Society.” The poor, the marginal, the forgotten in American society are in need of non-conformist, empathetic heroes willing to take up the challenge of representing all the people in our society. For his ability to see the poor and dispossessed in their individuality, to remember their names, embrace them (quite literally), and represent them when they are in trouble, Professor Charles J. Ogletree, Jr., is my hero—as he is to many others in the academy, in practice, and on the streets.

---

43. *Id.* at 151.

