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"JUST LIKE A TREE PLANTED BY THE WATERS, I SHALL NOT BE MOVED:" CHARLES OGLETREE, JR., AND THE PLAIN VIRTUES OF LAWYERING FOR RACIAL EQUALITY*

*Emma Coleman Jordan***

It was a moment of unbelievable risk, a precipice of career suicide, a decision that would challenge the careful planning of more timid lawyers. His wife urged caution; a Harvard colleague explored back channels with the Senate Judiciary Committee to telegraph warning to him of unseen torpedoes that might lie in his path. Even he hesitated in the face of the immediate demands of the substantial scholarly writing required to earn tenure at Harvard. Yet, at the end of the day of October 10, 1991, Charles Ogletree, Jr., known as "Tree" to his friends, chose to step into a role for which he is now most remembered: counsel to Professor Anita Hill during her testimony about Judge Clarence Thomas's inappropriate sexual behavior when she worked for him as a government lawyer. It was a defining choice that made visible to the world the deep character traits that have made Tree a well-loved and respected figure in the legal academy, a fixture on the frontlines of the legal fight for racial equality.

This Essay is a personal reflection on the character traits and public commitments to racial equality that I have observed since I first learned who Charles Ogletree was. In 1973–1974, he was a student leader and would later become the co-president of the Stanford University student body. In that same year, I arrived at Stanford Law School as a legal research and writing instructor, a Teaching Fellow, working first with Marc Franklin and then Tom Grey, members of the faculty. I had just graduated from Howard Law School as valedictorian and editor-in-chief of the *Howard Law Journal*. Shortly after my arrival, I saw a picture of a black student

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* "I Shall Not Be Moved" is the title of a traditional African American spiritual that contains the refrain "Just like a tree planted by the waters, I shall not be moved." During the civil rights movement, this spiritual became an anthem of opposition to racism in the fight against the violence of the Jim Crow South. Walter Pitts, *Like a Tree Planted by the Water: The Musical Cycle in the African-American Baptist Ritual*, 104 J. AM. FOLKLORE 318 (1991).

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leader in the student newspaper, *The Stanford Daily*. It was Charles Ogletree. He was a young student activist with a passionate commitment to progressive political causes.

What I did not know then, and have since learned, is that we shared a set of very similar, parallel experiences as northern California children of parents who had migrated from the South. When I read his autobiography, it became clear that the reason he always felt like the smart, younger brother I never had, is that we grew up in a very similar world of unpredictably mixed educational opportunity structures.[1] It was a world where, by sheer chance, some of our high school classmates went to jail, even as we went to college. We lived with the same mix of black and white cultures, with its invisibly defined social and economic hierarchies, characterized by the unofficial racial segregation of the hills and the flatlands in Berkeley, and the railroad tracks in Merced[2] and Oakland, the Embarcadero Freeway in San Francisco, and Highway 101 separating Palo Alto from East Palo Alto. We carried the hopes and dreams for racial equality of our parents when they left the South to establish a new life in California. Professor Ogletree's parents arrived in Merced, California, from Alabama and Little Rock, Arkansas, in the mid-1940s.[3] My parents arrived in Oakland from New Orleans in the mid-1940s. We shared a black Baptist upbringing; the Ogletrees attended Antioch Baptist Church[4] in Merced, while the Colemans attended McGee Avenue Baptist Church in Berkeley.

Although as northern Californians growing up in circumstances with many points of similarity, there was at least one notable difference that strikes me as a matter of random chance. Ogletree notes that one of his public high school teachers was a black woman who encouraged him to consider applying to Stanford instead of community college. By contrast, I recall that in my tenth grade year as a student at the very large Berkeley High School, my assigned counselor was a white man who had been the principal of my junior high school and had been demoted from middle school principal to high school counselor. We never had an extended conversation about college. Instead, he simply checked the boxes for college choices based on my uninformed responses, without guidance or personal interaction. Both Tree and I recognize that for far too many African American students today, these arbitrary differences of competence or caring continue to shape the opportunity structure for an intolerably large number of African Americans and other minorities in urban public education.

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1. When I was a junior at San Francisco State University in 1967, the first Afro American Studies department on a predominantly white college campus in the nation was established after a university-wide student strike. *See* NOLIWE ROOKS, WHITE MONEY/BLACK POWER: THE SURPRISING HISTORY OF AFRICAN AMERICAN STUDIES AND THE CRISIS OF RACE IN HIGHER EDUCATION (2006).
2. CHARLES OGLETREE, JR., ALL DELIBERATE SPEED 22–23 (2004). Ogletree remembered about his childhood growing up in Merced that "[r]acism hung like a persistent cloud over the world of Merced . . . [t]he railroad tracks in Merced established critical boundaries in the 1950's and beyond. It was the dividing line between blacks and whites, between opportunity and despair. While there was no sign at the track saying 'whites only' or 'coloreds only' there were other signs of a divided community." *Id.*
3. *Id.* at 25.
4. *Id.* at 24.

We share a passion to change the impact of these elements of arbitrary selection in a system of affirmative action characterized by "sponsored mobility"[5] for talented first-generation college-bound young people today.

For Tree and me these largely unspoken, subconscious shared perceptions and experiences constitute a stable bond of intellectual and political commitment to improve conditions for African Americans. No wonder, then, that I trusted him like a younger brother. No wonder that I felt I could successfully appeal to his conscience to become the lead lawyer on the Hill legal team when he clearly had other plans. He was my baby brother in the law—powerful, smart, and committed. Only later would my intuition about his values and character be confirmed with the facts spelled out in his autobiography.[6]

The coincidence of our formative experiences in northern California and our career paths in the law had brought us to share a moment of history that required trust and shared political and racial understanding. It was in that moment that I recognized that Charles Ogletree had the unique combination of intellectual gifts and emotional intelligence that made him ideally suited to be the unmovable force that I chose to be the lead counsel to Professor Anita Hill.[7] He was born and bred to face the withering opposition of the Republican Senators on the Judiciary Committee and the various strategies of the White House determined to seat Clarence Thomas on the Supreme Court. He could be trusted to be a good technical lawyer and a skilled political tactician with racial fortitude. Ogletree was "like a tree planted by the waters." He would not be moved.

Today, almost fifteen years later, it is easy to forget the treacherous vortex of rapidly changing sexual and racial norms that swirled around the Clarence Thomas confirmation hearings. Men, both black and white, felt challenged, confused, and defensive about an allegation that unwanted conversations of a sexual nature and pressure to date colleagues or subordinates at work could be wrong, even actionable. The Senators on the Judiciary Committee were all white men. The most powerful, and usually most effective, liberal voice on the committee sat shamefaced and largely silent.[8] Democrats held the majority in the Senate and had the power of

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5. Sponsored mobility is the term Professor Lani Guinier incorporates in her work *Comment Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratice Ideals*, 117 HARV. L. REV. 113 (2003), at n.156. Citing sociologist Ralph Turner's definition ("Under sponsored mobility elite recruits are chosen by the established elite or their agents, and elite status is given on the basis of some criterion of supposed merit and cannot be taken by any amount of effort or strategy"), Guinier further observes that "[t]he words 'sponsored' and 'sponsorship' also carry with them the sense that decisionmakers have a 'stake' in their choices-and that the process is, to a certain extent, characterized by decisionmakers 'sponsoring' those students who look like or seem like themselves, even if they are unaware of this self-perpetuating bias." *Id.*
6. OGLETREE, *supra* note 2.
7. Ogletree tells the story, the exact details of which we have had a long running, good-natured dispute, of how my colleague Professor Susan Deller Ross and I came to his hotel to persuade him to replace the more senior law firm partners who had been designated to be lead counsel for Professor Hill. *Id* at 207–09.
8. Jane Mayer and Jill Abramson describe Senator Ted Kennedy's predicament as follows: "Kennedy, who had been rendered almost speechless by his own transgressions, was also repentant, giving an address in Boston in which he acknowledged that his disastrous personal behavior was interfering with his political effectiveness; he

party solidarity to deny the President the appointment, on justified grounds. Yet it took seven Congresswomen[9] and Senator Barbara Mikulski of Maryland, the lone female Democratic senator, to stage a march from the House to the Senate to urge the Democratic majority leader to give the matter even the superficial legal process of a hastily arranged hearing.[10] In the beginning, it was not certain that even a hearing would be held. The venerable NAACP was mired in its own race and cultural confusion about whether the sexual harassment allegations should be the basis for opposing Clarence Thomas. It was not surprising that the NAACP faced the conundrum of whether race should trump gender; less than three years later, the executive director of the NAACP resigned amid allegations of a pattern of sexual misconduct with the black women who worked in his office.[11]

For many, the now famous picture of Tree, with yellow pad raised to screen his whispered advice into Professor Hill's ear as she sat at the witness table in the Senate hearing room, is iconographic. It is the photographic representation of the drama and conflict embedded in the hearings themselves. Clarence Thomas was then a very conservative, black, Republican appointee to the District of Columbia Circuit Court of Appeals, a well-established feeder circuit for Supreme Court Justices. He had been nominated to replace the first black Justice, Thurgood Marshall. The succession of black Justices represented a solemn moment. It was a moment when the entire nation could, in a single appointment, maintain its commitment to keeping "the path to leadership visibly open to talented and qualified individuals of every race and ethnicity."[12]

There were very few lawyers with the talent, fortitude, and personal reputation for gender equality[13] who could have stepped into that treacherous terrain to play a leading role. The heat of White House opposition was intense. In the public eye Tree was called a "slick lawyer" by Senator

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vowed to reform." JANE MAYER & JILL ABRAMSON, STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS 354 (1994).

9. Congresswoman Eleanor Holmes Norton describes this experience in *Anita Hill and the Year of the Woman*, *in* RACE, GENDER, AND POWER IN AMERICA: THE LEGACY OF THE HILL-THOMAS HEARINGS 242 (Anita Hill & Emma Coleman Jordan eds., 1995).
10. Dennis E. Curtis, *The Fake Trial*, 65 S. CAL. L. REV. 1523 (1992). *See also* Judith Resnik, *From the Senate Judiciary Committee to the Country Courthouse: The Relevance of Gender, Race and Ethnicity to Adjudication*, *in* RACE, GENDER AND POWER IN AMERICA, *supra* note 9, at 177 (noting that "while the Senators invoked a 'due process' model (with much discussion of the 'burden of proof' and 'fairness'), none of the formal trappings of a trial were in fact present.").
11. *See* Emma Coleman Jordan, *Prisoners of Sex: Will the NAACP Get the Message That Equality Begins at Home?*, WASH. POST, Aug. 21, 1994, at C03 (arguing that the history of the civil rights movement was riddled with sexism and sexual exploitation of black women who participated in the civil rights struggle and quoting Judge Thelton Henderson, then Chief Judge, District Court, Northern District of California, as saying that "in SNCC many men acted on their belief that women should do three tasks: fix the food, fill out the line in the marches, and keep the bed warm for the men of the movement at the end of a day of protest").
12. Grutter v. Bollinger, 539 U.S. 306, 332 (2003).
13. It was further testament to his reputation for gender equality that the two lawyers he called upon to round out the legal team were chosen from among his personal friends and former colleagues. They were black women with whom he had worked in the District of Columbia Public Defender's Office in the 1980s, Kim Taylor and Michele Roberts.

Orrin Hatch.[14] More important than name-calling, as recent investigations have made clear,[15] Washington *hardball* included many options for personal retaliation against those who opposed White House appointments, or policies. This retaliation could include personally painful disclosures or financially ruinous attacks.

In the years since the hearings, we have shared friendly rivalries and collaborations. He made a valuable contribution to the first book published with Professor Hill's own reflections on her experience.[16] Professor Ogletree's chapter in *Race, Gender and Power in America* details his role as lead counsel and his commitment to a client-centered focus.[17] I established a program at Georgetown University Law Center for Future Law Professors. I copied the program from the Hastie Fellowships, founded by Professor Jim Jones at the University of Wisconsin Law School, and a similar program at Stanford Law School founded by then-Dean Paul Brest. When Charles Ogletree called to ask me to send my files on the program to him, I sent the files without hesitation, just as Jim Jones and Paul Brest had sent their files to me without hesitation. Little did I know that Ogletree would establish a similar program at Harvard, and that we would often lose some of our most promising prospects to his Harvard Law School, with its Charles Hamilton Houston and Reginald Lewis Fellowship Programs.

All was forgiven when he and Professor Randall Kennedy recommended to me a stellar young black woman who had been their protegé at Harvard Law School and a Supreme Court Clerk. Our committee selected Professor Ogletree's protegé, Robin Lenhardt, to be the 2003-04 Fellow in the Georgetown Future Law Professor Program. Robin Lenhardt had worked on the *Grutter v. Bollinger*[18] case with John Payton, a partner at Wilmer, Cutler, Pickering, Hale & Dorr and another friend of Professor Ogletree's. Robin Lenhardt was spectacular. She worked directly with me, and I learned as much from supervising her LL.M. thesis on Stigma Theory[19] as she learned from me. So, as in all things Ogletree, I ultimately did not regret having shared the files for the Future Law Professor Program with him. The passionate commitment to racial justice that I observed when he was an undergraduate student was still burning strong in every-

14. Richard L. Berke, *The Thomas Nomination; Thomas Backers Attack Hill; Judge, Vowing He Won't Quit, Says He Is Victim of Race Stigma*, N.Y. TIMES, Oct. 13, 1991, at A1.
15. *See* Press Release, Dep't of Justice Office of Special Counsel, White House Official I. Lewis Libby Indicted on Obstruction of Justice, False Statement and Perjury Charges Relating to Leak of Classified Information Revealing CIA Officer's Identity (Oct. 28, 2005), *available at* http://www.usdoj.gov/usao/iln/osc/documents/libby_pr_2810 2005.pdf (last visited Feb. 24, 2006). The investigation concerned an alleged conspiracy to retaliate against former Ambassador Joseph Wilson for writing a newspaper op-ed piece critical of Bush administration justifications for the war in Iraq. The indictment alleges that Libby committed perjury and made false statements to the grand jury when he testified about his role in disclosing Ms. Plame's identity to a newspaper reporter.
16. *See* Norton, *supra* note 9.
17. Charles J. Ogletree, Jr., *The People vs. Anita Hill: A Case for Client Centered Advocacy, in* RACE, GENDER AND POWER IN AMERICA, *supra* note 9, at 142.
18. 539 U.S. 306 (2003).
19. R. A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803 (2005).

thing that he did. The Houston and Lewis fellowship programs at Harvard have expanded, and they make an important contribution to improving the pipeline of outstanding candidates for law teaching jobs.

In recent months, we began a new collaboration. With the publication of my casebook on *Economic Justice*,[20] Professor Ogletree agreed to work with me to develop a structure to facilitate an interdisciplinary conversation among economists, sociologists, and legal scholars on the persistent harms of economic and social inequality. So our collaborations continue. It will be my pleasure to watch as Charles Ogletree, Jr., the Jesse Climenko Professor of Law and director of the Charles Hamilton Houston Institute for Race and Justice at Harvard Law School, joins with me to extend his formidable roots into changing the race-based economic and social inequalities of this nation. He is truly "like a tree planted by the water"; he will not be moved.

20. EMMA COLEMAN JORDAN & ANGELA P. HARRIS, ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS, CASES AND MATERIALS (2005).