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## Lawyers and Judges As Catchers in the Rye

Stewart G. Pollock

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# TULSA LAW JOURNAL

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## REMARKS

### LAWYERS AND JUDGES AS CATCHERS IN THE RYE\*

The Honorable Stewart G. Pollock<sup>†</sup>

Lawyers are all right, I guess—but it doesn't appeal to me . . . . I mean they're all right if they go around saving innocent guys' lives all the time, and like that, but you don't *do* that kind of stuff if you're a lawyer. All you do is make a lot of dough and play golf and play bridge and buy cars and drink Martinis and look like a hot-shot. And besides. Even if you *did* go around saving guys' lives and all, how would you know if you did it because you really *wanted* to save guys' lives, or because you did it because what you *really* wanted to do was be a terrific lawyer, with everybody slapping you on the back and congratulating you in court when the goddam trial was over, the reporters and everybody, the way it is in the dirty movies? How would you know you weren't being a phoney? The trouble is, you *wouldn't*.<sup>1</sup>

Those are not my words. Nor are they the words of Oliver Wendell Holmes, William Rehnquist, or even John Grisham. They are the words of perhaps the least appreciated jurisprudential scholar of this century—that pimply-faced, prep school drop out—Holden Caulfield.

"Holden who?" you ask.

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\* These remarks were delivered at the John W. Hager Lecture at the University of Tulsa College of Law on Mar. 26, 1998. They are published here substantially as delivered. To aid the reader, footnotes have been added.

<sup>†</sup> Associate Justice, Supreme Court of New Jersey.

1. J.D. SALINGER, *THE CATCHER IN THE RYE* 223-24 (1951).

Holden Caulfield, the protagonist of J.D. Salinger's *Catcher In The Rye*, a novel written nearly a half-century ago.

The scene in which Holden Caulfield unburdens himself of his perception of lawyers takes place after he has been kicked out of yet-another prep school, Pencey Prep in Agerstown, Pennsylvania.<sup>2</sup>

His father, as you may recall, is a lawyer. Late one Saturday night, Holden returns to his parents' apartment in New York City. His parents, unaware of Holden's expulsion, are at a party in Norwalk, Connecticut. His kid sister, Phoebe, who was asleep, wakes up when she hears him. Phoebe is upset over Holden's expulsion and worried about their father's reaction. So, Phoebe says to Holden, "All right . . . . Name something you'd like to *be*. Like a scientist. Or a *lawyer* or something."<sup>3</sup>

Holden is preoccupied with authenticity, not being a "phoney"—integrity or professionalism we might call it today. In response, he delivers his homily on lawyers. But there is more.

Phoebe, who is rooted in reality, says to Holden, "Daddy's going to kill you. He's going to *kill* you."<sup>4</sup> Holden then picks up the narrative, told in the first person:

I wasn't listening, though. I was thinking about something else—something crazy. "You know what I'd like to be?" I said. "You know what I'd like to be? . . ."

"What? . . ."

"You know that song 'If a body catch a body comin' through the rye'? I'd like—"

"It's 'If a body *meet* a body coming through the rye'!" old Phoebe said. "It's a poem. By Robert *Burns*."

. . . .

"I thought it was 'If a body catch a body,'" I said. "Anyway, I keep picturing all these little kids playing some game in this big field of rye and all. Thousands of little kids, and nobody's around—nobody big, I mean—except me. And I'm standing on the edge of some crazy cliff. What I have to do, I have to catch everybody if they start to go over the cliff—I mean if they're running and they don't look where they're going I have to come out from somewhere and *catch* them. That's all I'd do all day. I'd just be the catcher in the rye and all. I know it's crazy, but that's the only thing I'd really like to be. I know it's crazy."<sup>5</sup>

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2. See *id.* at 6.

3. *Id.* at 223.

4. *Id.* at 224.

5. *Id.* at 224-25.

Now, what does all this have to do with being a law student, a law professor, or a lawyer? Why is a New Jersey Supreme Court Justice prattling on about it? I mean, as Holden Caulfield might say, "Is this guy some kind of phoney, or what?"

Notwithstanding Holden Caulfield's doubts—and maybe even yours—I think there is something to be learned from Holden's conversation with his kid sister.

The lesson does not concern fine points of law or current trends in legal philosophy, the kind of subject that often provides the theme for a presentation such as the Hager Lecture. Instead, it focuses on something closer to the purpose of the Hager Lecture, the relationship between law and justice. The lesson that I draw from the conversation between Holden and Phoebe addresses something more compelling than abstract legal analysis, as important as is such analysis. For me, the dialogue illustrates the crucial battle being waged for the soul of the legal profession.

The first thought that occurs to me is that Holden Caulfield should cast his hat in the ring for the next appointment to the Supreme Court of New Jersey, Oklahoma or whatever state in which he resides. By this time, he would be about the right age to serve on a court of last resort, and he would certainly bring a refreshing perspective to a court's deliberations.

Why do I think that Holden Caulfield would make a good Supreme Court Justice? The reason is that he has figured out, perhaps without realizing it, what state court judges do. In today's world, state courts are the catchers in the rye. For so many people, state courts are all that stands between them and the edge of the cliff.

That cliff endangers the poor, the homeless, and the jobless. It threatens public school children in impoverished school districts with an inadequate education. It imposes intolerable conditions on people living in penal and mental institutions. The cliff condemns anyone who falls over its edge to poverty, ignorance, and isolation. Ultimately, it puts us all at peril of living in a world of lawlessness and injustice.

Even the nicest people may confront the loss of a job, run the risk of drug and alcohol addiction, or endure a terminal illness. Anyone can become a participant in a custody dispute, the victim of a toxic tort, or the parent of a child with special educational needs. Injustice, like any precipice, does not distinguish between those who do and do not deserve to fall over its edge.

Several reasons support the conclusion that state courts provide a refuge in a time of need. When J.D. Salinger wrote *The Catcher In The Rye* in 1951, the Warren Court was in its heyday. The Warren Court ordered the integration of public schools,<sup>6</sup> established procedural protections for welfare recipients,<sup>7</sup> and expanded the Constitutional rights of criminal defendants.<sup>8</sup>

Underlying the decisions of the Warren Court, to quote one of its outstanding members, Justice William Brennan, was a compassion "for the poor, for the members of minority groups, for the criminally accused, for the displaced persons of the

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6. See BERNARD SCHWARTZ, *INSIDE THE WARREN COURT* 91-102 (1983).

7. See *id.* at 268-71.

8. See *id.* at 167-69, 172-80.

technological revolution, for alienated youth, for the urban masses, for the unrepresented consumer—for all, in short, who do not partake of the abundance of American life.”<sup>9</sup>

Over the past twenty-five years, the Court has changed; some think for the better, others for the worse. Wherever you stand, however, all agree that the United States Supreme Court no longer is the last best hope of those who, in Justice Brennan’s words, “do not partake in the abundance of American life.”

As the United States Supreme Court has relinquished its responsibility as “the catcher in the rye,” state courts across the United States have assumed new responsibilities. The state court with which I am most familiar is, of course, the New Jersey Supreme Court. Consequently, I shall draw most of the examples from the opinions of that court. As we shall see, however, the Oklahoma Supreme Court, perhaps without realizing it, also is a “catcher in the rye.”

As you may recall, in the landmark case of *San Antonio Independent School District v. Rodriguez*,<sup>10</sup> the United States Supreme Court decided that the equal protection clause of the Fourteenth Amendment did not protect public education as a fundamental right.<sup>11</sup> That decision closed the doors of federal court houses to public interest lawyers seeking to assure a specified level of education for public school students. Consequently, public interest lawyers turned to state court houses for relief. In two cases, *Robinson v. Cahill*<sup>12</sup> and *Abbott v. Burke*,<sup>13</sup> the New Jersey Supreme Court ruled that students in property-poor school districts, like more fortunate students in wealthier districts, have the constitutional right under the New Jersey Constitution to a “thorough and efficient system of [public education].”<sup>14</sup> The result of those rulings has been a significant increase in state funding for public education in the poorer districts.<sup>15</sup> Still other New Jersey cases enforce the rights of the learning impaired students and their parents to a “thorough and efficient” public education, even if that education costs the state more dollars.<sup>16</sup>

A series of New Jersey cases, known generally as the *Mt. Laurel* opinions, convey the message that municipalities may not use exclusionary zoning to exclude

9. Nat Hentoff, *The Justice Breaks His Silence*, PLAYBOY, July 1991, at 120, 158 (quoting a 1986 speech to the ABA’s Section on Individual Rights and Responsibilities), reprinted in ROGER GOLDMAN & DAVID GALEN, JUSTICE WILLIAM J. BRENNAN, JR.: FREEDOM FIRST 18, 25 (1994).

10. 411 U.S. 1 (1973).

11. See *id.* at 37.

12. 303 A.2d 273 (N.J. 1973) (Robinson I); 306 A.2d 65 (N.J. 1973) (Robinson II); 335 A.2d 6 (N.J. 1975) (Robinson III); 351 A.2d 713 (N.J. 1975) (Robinson IV); 355 A.2d 129 (N.J. 1976) (Robinson V); 358 A.2d 457 (N.J. 1976) (Robinson VI); 360 A.2d 400 (N.J. 1976) (Robinson VII).

13. 495 A.2d 376 (N.J. 1985) (Abbott I); 575 A.2d 359 (N.J. 1990) (Abbott II); 643 A.2d 575 (N.J. 1994) (per curiam) (Abbott III); 693 A.2d 417 (N.J. 1997) (Abbott IV); 710 A.2d 450 (N.J. 1998) (Abbott V).

14. *Robinson*, 303 A.2d at 294; see N.J. CONST. art. VIII, § 4, ¶ 1; N.J. STAT. ANN. § 18A:7F-2 (West 1997); see also *Abbott*, 495 A.2d at 383.

15. See Cheryl Winokur, *Court Gives Its Final Word in Abbott, Adopting State Reform Plan*, 152 N.J.L.J. 757 (1998). For a summary of New Jersey’s school funding dispute, see *Abbott v. Burke: History of the Debate*, STAR-LEDGER (Newark, N.J.), May 22, 1998, at 20.

16. See *Lascari v. Board of Education*, 560 A.2d 1180, 1191 (N.J. 1989) (holding that a board of education that fails to show that the program established for a handicapped student is appropriate may be liable for the cost of a private education).

people of low and moderate income.<sup>17</sup> In other cases the court has construed welfare legislation to grant procedural protection to the homeless who are about to be expelled, not from Pencey Prep, but from emergency housing.<sup>18</sup> You may recall also the *Karen Ann Quinlan* case, and its progeny, which recognizes the right of terminally ill patients to die with dignity.<sup>19</sup>

Then there are the myriad judicial decisions that expand on federal constitutional protections against unreasonable searches and seizures. Some of the decisions prevent police without probable cause from searching the garbage outside one's home.<sup>20</sup> Others prevent searching a passenger in a car, perhaps one's spouse, if the police should stop the car for something as trivial as changing lanes without signaling or for failing to keep the license plates clean.<sup>21</sup>

Finally, I note the tort cases in which the Court has tried to develop rules of law that protect people from the unreasonable and harmful conduct of others. Cases like *Department of Environmental Protection v. Ventron*,<sup>22</sup> which struck a blow for environmental protection by declaring that "[t]hose who poison the land must pay for its cure,"<sup>23</sup> *Pierce v. Ortho Pharmaceutical*<sup>24</sup> and *Woolley v. Hoffman-La Roche*,<sup>25</sup> which protects white collar workers from termination of employment for reasons that violate public policy;<sup>26</sup> and *Kelly v. Gwinnell*,<sup>27</sup> which provides a cause of action not only against drunken drivers but also against those who knowingly serve alcoholic beverages to obviously intoxicated drivers.<sup>28</sup> In all these cases, the New Jersey Supreme Court, perhaps without realizing it, has given meaning to Holden Caulfield's dream of standing between the vulnerable and the edge of the cliff.

The Oklahoma Supreme Court likewise has rendered decisions that temper justice with mercy, reason with compassion. It too recognizes that an employer may not discharge an employee at-will for reasons that violate public policy. For example, in *Burk v. K-Mart Corporation*,<sup>29</sup> the court declared that "[a]n employer's termination of an at-will employee in contravention of a clear mandate of public

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17. See *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713, 724 (N.J. 1975) (Mount Laurel I) (holding that municipalities cannot ban low and moderate income housing through its land use regulations); *Southern Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390, 421-59 (N.J. 1983) (Mount Laurel II) (outlining requirements for compliance with the Mount Laurel doctrine and remedies for noncompliance).

18. See *Franklin v. New Jersey Dep't of Human Servs.*, 543 A.2d 1, 10 (N.J. 1988) (upholding a five-month limit on emergency aid in housing so long as other programs to find more permanent housing are in place).

19. See *In re Quinlan*, 355 A.2d 647, 663 (N.J. 1976) (holding that a patient may decline medical treatment in certain cases).

20. See *State v. Hempele*, 576 A.2d 793, 813 (N.J. 1990) (requiring a warrant to search garbage bags left at the curb for collection).

21. See *State v. Smith*, 637 A.2d 158, 166-167 (N.J. 1994) (holding that the police must give "specific and articulable facts" to justify ordering a passenger out of a car stopped for a traffic violation).

22. 468 A.2d 150 (N.J. 1983).

23. *Id.* at 160.

24. 417 A.2d 505 (N.J. 1980).

25. 491 A.2d 1257 (N.J. 1985).

26. See *Pierce*, 417 A.2d at 512; *Woolley*, 491 A.2d at 1260-61.

27. 476 A.2d 1219 (N.J. 1984).

28. See *id.* at 1224.

29. 770 P.2d 24 (Okla. 1989).

policy is a tortious breach of contractual obligations."<sup>30</sup>

That is interesting, you may be thinking. It might even be true. But what about me? Does anyone really think of law students, law professors, and lawyers as catchers in the rye? I do. But do you? Do you think that you are a catcher in the rye?

Before you answer, pause, close your eyes, and let your mind drift back to when you first dreamt of becoming a lawyer. My guess is that you did not dream of billing 2,500 to 3,000 hours a year as the reason for going to law school.

Sure, you think of law as a means of providing for your family. Yes, you want some of the good things that life can provide: a home, a car, a nice vacation, maybe membership in a country club. These are all the things that Holden Caulfield's father wanted to provide for Holden and Phoebe. But for you, I bet there was something else. Something, for example, that may have set you apart from at least some of your friends who went to business school.

The current phrase to describe that something extra is "professionalism." Your presence here today shows that you view the law as something more than a business, as a profession, a calling. It suggests also that perhaps without realizing it, you may be a catcher in the rye.

Now, it is easier for judges than for lawyers to be catchers in the rye. Sometimes an inescapable duty forces that role on courts. For many people, however, lawyers are all that stand between them and the edge of the cliff. You know that already. But sometimes you, like I, forget.

Your families depend on you, just as you depend on them, for emotional support. Here at the University of Tulsa College of Law you may find other students who need your help. Someone may be having a tough time with a course or going through a rough patch in his or her personal life. For that person, you can be a catcher in the rye.

Law students and lawyers, even more than the general public, live lives filled with stress. Stressed-out lawyers sometimes turn to alcohol or drugs. Some people, including law students and lawyers, cannot control the use of alcohol or drugs and become addicts. Occasionally, they destroy their careers, their families, and sometimes their lives.

The problem for the practicing bar is no more serious in New Jersey than elsewhere, but it is serious enough for the New Jersey State Bar Association and the Supreme Court to have established the New Jersey Lawyer's Assistance Program to aid lawyers who suffer from alcohol or drug addiction.<sup>31</sup>

The Oklahoma Bar Association sponsors a similar program for impaired

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30. *Id.* at 28.

31. See Editorial, *A Safety Net that Works*, N.J.LAW. (Weekly Newspaper) March 9, 1998, at 502; William John Kane & Cheryl Baisden, *Use and Abuse: Are You Controlling the Substance or Is the Substance Controlling You?*, N.J.LAW. (Periodical), Dec. 1996, at 12.

lawyers.<sup>32</sup> This year it increased its funding of the program and hired a part-time director who will be available to respond to calls for assistance twenty-four hours a day, seven days a week.<sup>33</sup> If anyone needs a catcher in the rye, it is a lawyer who is an addict. Look around. Maybe you have a classmate who is on the road to addiction. If so, a friendly word may save his or her career or life.

When you are admitted to the bar, you will find that all kinds of people depend on you. First and foremost, your clients will depend on you. The people with whom you work will depend on you, not just for a paycheck, but for kind words and an occasional thanks. The judicial system also will need you. Courts constantly need lawyers to serve on all kinds of committees and to perform pro bono work in the public interest. Some lawyers, those who practice public interest law, become professional catchers in the rye.

Everyone in Oklahoma can take pride in the response of the bar to the legal needs of victims of the Alfred Murrah Federal Building on April 19, 1995. Responding to those needs, 145 lawyers were assigned to 153 cases.<sup>34</sup> Shortly, after the bombing, two hundred attorneys attended an unadvertised meeting to sign volunteer lawyer agreements offering their services to victims.<sup>35</sup> Based on a survey conducted by the Oklahoma Bar Association, attorneys donated 3,248 hours of pro bono legal services as a result of the Oklahoma City bombing.<sup>36</sup>

The history of American law is replete with examples of lawyers who have served as catchers in the rye. I do not know of another profession that has given so generously of itself, yet remains the object of so much skepticism. If you pause to reflect, you will produce your own list of lawyers who are catchers in the rye. To start, I shall mention three. One you certainly know, another you may know, and the third, you will not know.

The first is Thurgood Marshall, the first African American to serve on the United States Supreme Court.<sup>37</sup> It is not, however, because of his role on the United States Supreme Court, the Second Circuit Court of Appeals, or as Solicitor General of the United States that I mention him.<sup>38</sup> In 1933, long before he became an American icon, Thurgood Marshall went to work for the NAACP.<sup>39</sup> The great-grandson of a freed slave, he had been denied admission to Maryland Law School because of his race.<sup>40</sup> Undaunted, he graduated magna cum laude from Howard University Law School.<sup>41</sup> For twenty-three years, he traveled throughout the United

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32. See Helen Epstein, *Lawyers Helping Lawyers Committee Branches Out*, 69 OKLA. BAR J. 701, 701 (1998); Leigh Jones, *Group Gives Aid to Troubled Attorneys*, J. REC. (Okla. City), Aug. 19, 1996, at \_\_\_, available in 1996 WL 11096857.

33. See Epstein, *supra* note 32, at 701, 703.

34. See Dan Murdock, *A Tragic Anniversary Remembered*, 67 OKLA. BAR J. 1237, 1238 (1996).

35. See *id.* at 1237.

36. See *id.* at 1238; see also Mike Morkes, *Lawyers Assisted Victims of OC Bombing*, TULSA TRIB. & TULSA WORLD, Apr. 29, 1996, at A11.

37. See MICHAEL D. DAVIS & HUNTER R. CLARK, *THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH* 3 (1992).

38. See *id.* at 6, 12.

39. See *id.* at 11.

40. See *id.* at 11, 30, 47.

41. See *id.* at 61.



States, primarily in the South, attacking segregation. Ironically, in one case he forced the University of Maryland to integrate.<sup>42</sup> His most famous case, however, was the 1954 landmark decision *Brown v. Board of Education of Topeka*,<sup>43</sup> in which the United States Supreme Court declared racial segregation in public schools unconstitutional.<sup>44</sup> For his commitment to civil rights, even if he had not enjoyed so distinguished a career in public office, Thurgood Marshall was a paradigm of a catcher in the rye.

Not quite so famous is Archibald Cox. Twenty-four years ago, however, he symbolized the rule of law in a country torn apart by the Watergate crisis, specifically by the question whether to prosecute the President of the United States, Richard Nixon.<sup>45</sup> Long before Watergate, however, Archibald Cox was a distinguished Harvard Law School professor who had served four administrations in various capacities, most notably as solicitor general in the Kennedy Administration.<sup>46</sup> Professor Cox descended from a lineage of wealth and privilege.<sup>47</sup>

Attorney General Elliot Richardson appointed Cox to investigate all Watergate-related crimes.<sup>48</sup> In the course of his investigation, Cox learned that President Nixon had tape recorded his conversations in the Oval Office.<sup>49</sup> Cox requested a copy of the tapes.<sup>50</sup> President Nixon refused.<sup>51</sup> Maintaining that the President was not above the law, Cox obtained a court order directing the President to deliver the tapes for an in camera inspection by the court.<sup>52</sup>

Instead of delivering the tapes as ordered, President Nixon proposed a compromise, which Cox rejected.<sup>53</sup> President Nixon then directed Attorney General Richardson to fire Cox.<sup>54</sup> Richardson refused and resigned on principle.<sup>55</sup> Ultimately, Nixon appointed Robert Bork as acting attorney general.<sup>56</sup> Bork fired Cox.<sup>57</sup>

After being fired, Cox said, "[w]hether ours shall continue to be a government of laws and not of men is now for Congress [to decide] and ultimately the American

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42. See *Pearson v. Murray*, 182 A. 590, 594 (Md. Ct. App. 1936).

43. 347 U.S. 483 (1954).

44. See *id.* at 495.

45. During the Roosevelt administration, Cox served on the National Defense Mediation Board, the Solicitor General's Office, the State Department and the Labor Department. See KENGORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION 50-51, 53, 56 (1997). Cox was chairman of the Wage Stabilization Board during the Truman administration, but resigned when the President overturned Cox's cap on coal miner salary increases. See *id.* at 66, 75. After his election, President Kennedy appointed Cox to the position of Solicitor General, in which he served until the end of President Johnson's first term. See *id.* at 143, 194.

46. See *id.* at 50-51, 53, 56.

47. See *id.* at 3-5.

48. See *id.* at 240-41.

49. See *id.* at 284.

50. See GORMLEY, *supra* note 45 at 286.

51. See *id.* at 287.

52. See *id.* at 305.

53. See *id.* at 323-24, 343.

54. See *id.* at 355.

55. See GORMLEY, *supra* note 45, at 356.

56. See *id.* at 357.

57. See *id.* at 357-358.

people.”<sup>58</sup> By attempting to prevent the country from falling over the precipice of lawlessness, Archibald Cox and, I might add, Elliot Richardson, were constitutional catchers in the rye.

Marilyn Moreheuser is not a household name. Not in New Jersey, where she lived and practiced law, and certainly not in Oklahoma. I never met her personally, but she appeared several times in our court. A former Roman Catholic nun, she became a lawyer and served as executive director of the Education Law Center in Newark.<sup>59</sup> As you may know, Newark is plagued by many of the problems confronting inner-cities in the Northeast, which include high rates of crime, poverty, and unemployment. For fourteen years she led the fight, in the words of the New Jersey Constitution, for “a thorough and efficient system of free public schools.”<sup>60</sup> Speaking for the students in the inner-cities, she tried to close the financial gap between property-rich and property-poor districts.<sup>61</sup> Her argument was that for inner-city students the formula used to fund education was unconstitutional.<sup>62</sup> As I mentioned earlier, our court agreed. The Legislature devised a new formula.<sup>63</sup> Again, Ms. Moreheuser challenged the formula as unconstitutional.<sup>64</sup> Before the case could be heard, however, she died a tragic death from cancer.<sup>65</sup> Her efforts nonetheless were not in vain. The court again struck down the funding formula and forced the state to devise an acceptable plan.<sup>66</sup> No matter what one thinks of school-finance litigation, all would agree that Marilyn Moreheuser was a tireless catcher in the rye for countless inner-city children.

My point in mentioning these three lawyers is simply to point out the opportunities for lawyers to act as catchers in the rye. Whether you descend from slavery or from a privileged background, or whether you labor in public view or in anonymity, you may find, as Thurgood Marshall, Archibald Cox, and Marilyn Moreheuser found, that you are all that stands between countless others and the edge of the cliff.

Of course, a lawyer need not hold public office or participate in public interest law to be a catcher in the rye. Many lawyers serve the public while remaining in private practice. The history of the bar is replete with examples of private practitioners who have contributed their time and money to the common weal.

According to some observers, the legal profession itself is headed for the edge of a cliff. In recent years, bar associations, lawyers, judges, and legal scholars have voiced concerns about the lack of “professionalism” among practicing lawyers. The most flagrant violations concern “Rambo litigation,” a term that covers a multitude

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58. *Id.* at 358.

59. See John Mooney, *Marilyn Morheuser; Led School Funds Fight*, THE RECORD (New Jersey), Oct. 24, 1995, at A21.

60. N.J. CONST. art. 8, § 4, ¶ 1; see also Lisa Brennan, *School Funding Advocates Say Fight to Go On After Morheuser*, N.J.L.J., Oct 30, 1995 at 1.

61. See Mooney, *supra* note 59.

62. See *id.*

63. See *id.*

64. See *id.*

65. See *id.*

66. See *Abbott v. Burke*, 710 A.2d 450, 474 (N.J. 1998).

of sins stretching from abusive discovery tactics to humiliating cross-examination, and even to justifying misrepresentations out of "loyalty" to one's client.<sup>67</sup> So concerned is the American Bar Association that it conducted a symposium of learned commentators on "Teaching and Learning Professionalism."

In the keynote address at that symposium, Professor Roger Cramton of Cornell Law School urged the thesis:

that the central moral tradition of lawyering has been that a lawyer's primary obligation is to the procedures and institutions of the law. In recent decades the earlier consensus has been largely, but not totally, replaced by ideology and behavior characterized by total commitment to client and a rejection of lawyers' public responsibilities. The need today is to regenerate the ideal of the law as a public profession with large public responsibilities and to give meaning to those responsibilities by the development of principles and narratives that give life to them.<sup>68</sup>

Another distinguished academician makes a suggestion that some here tonight may find even more discomfiting. Professor James Boyd White of the University of Michigan Law School has said:

In the law the process of deprofessionalization I describe is also fed, I think, by the modern law school, when it focusses so exclusively upon the law as a set of policy choices, themselves frequently cast in economic terms. What I have characterized as the central feature of the lawyer's life, the claiming of meaning through the reading of authoritative texts, was once the center of legal education; but it is no longer; and one consequence of the shift is that we are no longer training our students to see and realize the possibilities for meaningful action and life that are present at the center of the profession they have chosen.<sup>69</sup>

In New Jersey, the state's three law schools, the State Bar Association, and the Supreme Court have formed the New Jersey Commission on Professionalism, which recently published sixteen principles that exceed the requirements of the Disciplinary Rules that govern legal ethics.<sup>70</sup> The principles speak to lawyers' relations with clients, other counsel, and courts, as well as judges' relations with lawyers and others.<sup>71</sup> The point is that sometimes the people headed for the edge of the cliff of professionalism are those who should be catching others. At times, then, lawyers may have to catch the catcher in the rye.

I do not know what you do on the weekends, but my wife and I usually start the

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67. See, e.g., Sandra Torrey, *Rambo Litigation and a Rash of Rudeness*, WASH. POST, July 20, 1992, at F5.

68. Roger C. Cramton, On Giving Meaning to "Professionalism," 1996 A.B.A. TEACHING AND LEARNING PROFESSIONALISM: SYMP. PROC. 24.

69. James Boyd White, *Meaning in the Life of the Lawyer*, 26 CUMB. L. REV. 763, 766 (1996).

70. See *Principles of Professionalism for Lawyers and Judges*, 149 N.J. L.J. 251 (1997).

71. See *id.*

weekend by watching a video on Friday night. It is a sign of advancing years. About a year ago, we watched *Jerry Maguire*. It is not a great movie. The plot is predictable. But it has a great message.

As you may know, Jerry Maguire is a sports agent who becomes disillusioned by the cynicism and materialism of his work.<sup>72</sup> He experiences an epiphany in a hotel room in Miami and writes a mission statement for his firm, the burden of which is "Fewer clients. Less money."<sup>73</sup> For this, he is fired. He not only loses his job, he loses his fiancé, and almost his sanity.<sup>74</sup> Ultimately, however, he triumphs. The movie struck a responsive chord with the American public and the Academy Award judges. It was nominated for five Academy Awards and received one.

You might want to think about the implications, both positive and negative, of "Fewer clients. Less money." If you are going to have an epiphany, Tulsa is as good a place as Miami.

In case you are wondering, yes, I have some more respectable authority than a Hollywood production. Last year, at the annual meeting of the American Law Institute, Chief Judge Harry T. Edwards of the District of Columbia Circuit Court of Appeals delivered a speech entitled "A New Vision For The Legal Profession." He criticized the legal profession for its preoccupation with making money and for its tendency to transform lawyers into mere technicians<sup>75</sup>—just the failings that Jerry Maguire saw in the work of sports agents.

Informed observers have identified metastasizing materialism as an illness that threatens the profession. So that I will not be misunderstood, I have no quarrel with those, like Holden Caulfield's father, who look to the law as a means of providing a good life.<sup>76</sup> Truth be known, I also like many of the things that money can buy. Often, however, an overemphasis on material success leads to a willingness to sacrifice the inherent dignity of others, such as adverse parties, witnesses, other lawyers, judges, and the legal profession.

One unending source of happiness in my work is my relationship with my law clerks, who become members of my extended family. Even after their clerkships end, former clerks keep in touch with me. Just about every day I receive a call about a possible career opportunity, a new "significant other," or, I regret to say, disillusionment with practice in a large firm. Often the disillusionment springs from a dehumanizing experience at the hands of a senior partner or an overbearing adversary. An example may help.

I think of a former clerk, a graduate of a prestigious law school where he was an editor of the law review and a member of the Order of the Coif. He is blessed with a brilliant mind, an admirable work ethic, and a delightful sense of humor. After finishing his clerkship, he became an associate in a large, successful law firm, one in which he is now a partner.

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72. See *JERRY MAGUIRE* (TriStar Pictures 1996).

73. See *id.*

74. See *id.*

75. See Harry T. Edwards, *A New Vision for the Legal Profession*, 72 N.Y.U.L. REV. 567, 568 (1997).

76. See SALINGER, *supra* note 1, at 223.

Early in his career with the firm, he was billing hundreds of hours a month. After one particularly grueling spell, the partner to whom he was assigned berated him for a minor error made in the course of an all-night session. "You are the dumbest person in the firm!" the partner blared. Fortunately my former clerk retained his sense of humor, as well as his dignity, and replied, "Gee, thanks, I'd forgotten that I was a person." Sure it's funny. But it's also tragic.

My former clerk's experience is symptomatic of an illness in the legal profession. All too often, the introduction to private practice cripples the spirit of young attorneys, turning them into "one-dimensional billing machines."<sup>77</sup>

So what is the solution? Chief Judge Edwards postulated a new vision for the legal profession, a vision predicated on two propositions: first, that through a variety of programs "law firms must commit a meaningful percentage of their profits to public service," and second, "that law firms should make public service activity a criterion for partnership."<sup>78</sup> In the course of his remarks, Chief Judge Edwards mentioned that fifty-four of the major firms in the District of Columbia recently agreed to increase their pro bono activities.<sup>79</sup>

Long before Chief Judge Edwards spoke to the ALI, two major law firms in my home state anticipated his comments. For years, these firms have conducted programs to bridge the gap between the demands of big firm practices and the needs of public interest law.

One firm places associates at full pay in Newark Legal Services for six-month terms. Another firm sponsors a program in which it hires full-time associates at full pay for two years. The associates dedicate all their time to public interest work. At the end of the two years, they may continue with the firm on a partnership tract with credit for the two years of public-interest work. Even large law firms can be catchers in the rye.

Bar associations also have a role to play. Even in New York, the home of the megafirm, the organized bar has reached out to those who do not participate in the bounty of American life, people who are heading for the edge of the cliff. For example, the Bar Association of the City of New York sponsors a variety of activities such as the Robert B. McKay Community Outreach Law Program, which tries to meet the needs of the elderly, new immigrants, battered women and the children, the homeless, and students in public schools.<sup>80</sup> At the Homeless Clinic in New York, lawyers and staff from a single law firm meet once a week at the homeless shelter.<sup>81</sup> Still another example appears in the educational materials and videos that the City Bar has prepared to help the unrepresented public.<sup>82</sup>

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77. See Paula A. Franzese, *To Be the Change: Finding Higher Ground in the Law*, 50 ME. L. REV. 11, 18-20 (1997).

78. See Edwards, *supra* note 75, at 574, 575.

79. See *id.* at 575.

80. See Robert L. Haig & Anthony P. Cassino, *Pro Bono: A Proud Tradition*, N.Y. ST. B.J. May/June 1997, at 38, 40.

81. See Sheryl Nance, *Legal Services for Homeless: A Team Effort*, N.Y. L.J., Apr. 13, 1990, at 1.

82. See, e.g., Martin Fox, *Video Shows the Ropes at Housing Court*, N.Y. L.J., Jan. 23, 1992, at 2; Judith S. Kaye, *School Programs Acquaint Students with Role of Law*, N.Y. L.J., May 1, 1998, at S1.

My guess is that in Oklahoma, as in other states, some law firms, large or small, as well as the organized bar, are catchers in the rye. When interviewing with a firm, you might ask about the firm's commitment to the public interest. Some firms may tell you that they are interested in serving only their clients. Others may take a broader view. You might, for example, ask whether the firm includes time spent on pro bono activities in computing your total billable hours. Or, you could ask whether the firm sponsors programs in which it places associates at full pay in public interest organizations.

If you will permit a personal note, the firm in which I practiced for many years expected its members to contribute to the community. For whatever it is worth, the most satisfying moments I enjoyed as a lawyer occurred not when I was trying a case, arguing an appeal, or working on a corporate merger.

Instead, I think of the indigent, emotionally disturbed young mother who was charged with setting a fire that caused the death of her only child. When the case was over, instead of spending her life in prison, she received psychiatric counselling and went on to live a productive life. My only compensation for hundreds of hours of work on her behalf was a basket of apples. On a cost basis, the time I spent on her behalf was totally unjustified, but I never tasted sweeter apples.

My purpose is not to disparage the economic incentives that are so critical to rational decision making in the practice of law. Still, it is gratifying to note that the University of Tulsa sponsors numerous public interest programs and awards a public interest law certificate. Many students participate in the clinics for the elderly and for health law. Dean Belsky has proposed a pro bono requirement for graduation. His suggestion of a specified number of hours of public interest work during law school merits thoughtful consideration.

Some law students become so encumbered with debt that they must adapt their career choices to their economic needs. Those students can earn far more in the private sector than they can in the public sector or in public interest positions. Loan repayment programs could help offset law school debt and encourage students to enter public interest careers. Professors Richard Revesz and Lewis Kornhauser at New York University suggest that public interest scholarships, with a commitment to repay if the recipient does not enter public interest work, are a better alternative.<sup>83</sup> Is it asking too much of law schools to compensate for the difference in pay between the public and private sectors to construct financial aid programs that encourage students to accept lower paying public interest positions? Through appropriately constructed financial aid incentives, law schools could continue to exercise a salutary influence on the careers of their students after graduation.

Law graduates, moreover, could develop a plan for their life in the law. Such a plan might lead to entering the private sector on graduation, thereby postponing public service for a later time. Law firms can assume some of the cost of serving the public interest by permitting a number of lawyers, while still paying their salaries, to

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83. See Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 N.Y.U. L. REV. 829, 949-52, (1995).

accept public interest positions. Other options are available to the entire profession—law students, lawyers, law professors, and judges—to return dignity to each other and to the profession. Those options include recognizing the inherent dignity of the people with whom you work, not making excessive discovery demands, or not trying to take undue advantage of an adversary under the guise of zealously protecting your client's interests.

To conclude, I invite you to join me and Holden Caulfield in the rye "on the edge of the cliff."<sup>84</sup> It may be, as Holden said, "crazy," but what better way to spend your life than "to catch everybody if they start to go over the cliff . . ."—to be a catcher in the rye.<sup>85</sup>

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84. SALINGER, *supra* note 1, at 224.

85. *Id.* at 224-25.