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The View From Main Street

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THE VIEW FROM MAIN STREET

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"And do as adversaries do in law - strive mightily, but eat and drink as friends."

Shakespeare, Taming of the Shrew, Act 1, Scene 2

The above quotation was once the hallmark of the profession of lawyering. At the same time, it was one of the great enigmas about the profession that confused the population at large; our capacity to maintain respectful relationships with legal adversaries at the end of the day.[1] To a large extent, that ability to "eat and drink as friends" has been lost. My perception is that a great sense of community was destroyed somewhere along the way as lawyers ceased telling the truth to one another. Since I have only practiced in Colorado, although for more than twenty-seven years, most of my examples must, of necessity, be drawn from Colorado sources.[2] I do believe, however, that this is a national trend.[3]

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[1] *See* Brent E. Dickson & Julia Bunton Jackson, *Renewing Lawyer Civility*, 28 VAL. U. L. REV. 531 (1994) ("The capacity of lawyers to wage legal battle against each other while treating the law and each other with courtesy and respect has long intrigued the popular interest.")

[2] *See, e.g.*, Brooke L. Wunnicke, *From A Pioneer Woman Trial Lawyer, in Civil Litigation in Colorado: A Look Back and A Look Around*, 26 COLO. LAW. 115, 118 (Richard L. Gabriel ed.)(1997) (discussing the lack of civility among lawyers as a cause of the decline in the standards of the legal profession, Brooke Wunnicke states, "I have had judges tell me that counsel are not even civil to them .... [I]n my day, a lawyer's word was better than a sealed undertaking. Too often, that is no longer the case.").

[3] *See* John C. Buchanan, *The Demise of Legal Professionalism: Accepting Responsibility and Implementing Change*, 28 VAL. U. L. REV. 563, 568 (1994) (citing lawyers' "flagrant disrespect" for one another in the courtroom as one of the reasons they are to blame for the profession's general decline); *see also* Dickson & Jackson,

Main Street is the heart of all corruption, if you believe Sinclair Lewis,[4] or the heart of America, if you believe Billy Graham.[5] Whatever your belief, it is here on Main Street that the problem is most easily seen, as if through a prism. It is through the morning window of the coffee shop on Main Street that the "important people" of the town may be seen deciding the concerns of our community for that day. It is here that the attitudes of lawyers can be surveyed and gauged.

Most distressing is lawyers inability to speak the truth to each other. This inability to engage in truth-telling manifests itself in our perceptions of our world, and in how we treat the world at large. It is apparent in whether we have respect for the circumstances of other parties and their attorneys in the court room, respect for judges, for witnesses and for the public in general. The problem is visible, in part, in acrimony among attorneys in and out of the courtroom. Debates by lawyers degenerate into *ad-hominem* attacks on each other. Other symptoms run the gamut from deceptive billing practices[6] to confusing zealous representation of a client's cause with zealotry in the cause itself.[7]

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supra note 1, at 541 (stating that the nationwide decline in lawyer civility is not irreversible). Dickson and Jackson discuss the steps that many states, including Indiana, Illinois, Wisconsin, Kansas and Delaware, are taking to deal with the problem of lawyer incivility. *See id.* at 532-40.

[4] *See generally* SINCLAIR LEWIS, MAIN STREET (Harcourt, Brace & World, Inc. 1920).

[5] *See* Jim W. Jones, *Graham Still Fills Spiritual Role for Nations*, FT. WORTH STAR-TELEGRAM, Apr. 30, 1995 at 8 (citing Billy Graham's statement that the Oklahoma City bombing was a "senseless tragedy" that ripped "at the bare heart of America"); Chet Lunner, *Town Remembers Troops Killed in Scud Attack*, GANNETT NEWS SERV., Mar. 10, 1991 (discussing Billy Graham's statement that Greensburg, Pennsylvania is the "heart of America").

[6] *See* Kenneth Lasson, *Lawyering Askew: Excesses in the Pursuit of Fees and Justice*, 74 B. U. L. REV. 723, 748-49 (1994) (discussing two forms of deceptive billing practices, double billing and charging costs as fees); Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 716-17 (1990) (discussing a study done by the author in which it was found that the most common deceptive billing practice among lawyers interviewed was failure to keep good records of time spent working); Douglas R. Richmond, *Professional Responsibility and the Bottom Line: The Ethics of Billing*, 20 S. ILL. U. L. J. 261, 263-64 (1996)("Fraudulent or deceptive billing is a disturbingly common problem."). *See generally* William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 RUTGERS L. REV. 1, 15 (1991) (discussing various lawyers' confessions of their deceptive billing practices).

[7] John Buchanan recounts an instance when lawyers from two large Manhattan law firms were working on a case and began to fight about a trivial document, and "suddenly three grown men in tailored suits were squirming around on the floor,

In large part this trend has come to us, not because we saw it coming, but because of the kinds of behavior we have displayed, the common responses to our methods of practice and the rules that we impose upon ourselves. Several years ago, Colorado, among other states, adopted a revised form of Rule 26 of the Rules of Civil Procedure,[8] governing the duty of disclosure one party has to another during discovery. The revision provides that certain documents must be disclosed even without a formal request and sets out the limitations and procedures of discovery.[9] This revised rule was adopted not out of a perceived defect in existing procedures, but because of "the need to eliminate gamesmanship and enhance professionalism."[10]

This change in emphasis from trust in the lawyer's professionalism to increasing technical requirements and compliance with rules of disclosure is further illustrated by an increase in Colorado in the mandatory continuing legal education requirement for ethics training from two hours to seven hours.[11] This requirement is quite a change for those who have been in the practice longer than twenty years, when the subject of legal ethics was not required at all, and was only casually addressed in the law schools. Depressingly, it seems the more ethics is being taught in schools,[12] the more lightly ethical violations are regarded.

For example, at one time on our particular Main Street, there was an attorney, whom I will call "Jimmy," whose reputation was poorly regarded. The barber-shop talk was that if anyone were in such deep difficulty that he needed a really crooked lawyer, he should immediately hire Jimmy. Although Jimmy was a bender of the rules when it came to ethics, he would respond when items were put in writing and he did comply with

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fists a flying." Buchanan, *supra* note 3, at 567 (quoting David A. Kaplan & Ginny Carroll, *How's Your Lawyer's Left Jab?*, NEWSWEEK, Feb. 26, 1990, at 70).

[8] *See* COLO. REV. STAT. ch. 4, Rule 26 (1997)

[9] *See id.*

[10] Knapp, 12 COLORADO PRACTICE, §26.2.2, at 69 (West 1996).

[11] *See* COLO. REV. STAT. ch. 20, Rule 260.2(2) (1997). This increase became effective on January 1, 1992. *See id.*

[12] *See* Barry Sullivan, *Professions of Law*, 9 GEO. J. LEGAL ETHICS 1235, 1268 (1996) (discussing the expanded ethics curriculum of many law schools today). *But see* Bruce A. Green, *Less Is More: Teaching Legal Ethics in Context*, 39 WM. & MARY L. REV. 357, 367 (1998) (stating that many law schools devote only one or two credits to ethics courses, and positing that even an increase to three or four credits would be inadequate).

court orders. The general opinion throughout the community was that he knew the truth, but it was simply his choice to disregard it. To my knowledge, he was not regarded as the norm.

Since Jimmy's passing, he has been replaced by an attorney whom I will call "Daniel." Unlike Jimmy, Daniel does not appear to recognize truth or reality. His attitude enables him to blandly ignore court orders and deny the plain meaning of letters directed to him. He is not an attorney who engages in the commonly-complained of problem of harassing the opposition with paperwork; rather, this is a lawyer who files documents without a whit of legal citation. He then insists in court on an interpretation of the facts for which he was unable to provide support.

Lack of legal citation, unfortunately, is one of the disconnections from reality from which our profession suffers. Lawyers will argue their position in pleadings utterly devoid of reliance on any proposition of law or case holding. Since the law is the framework upon which we hang our causes, these "lawless" pleadings are like dealing with mush. As a result, Daniel and his coterie appear to be free to assign whatever meaning they wish to their assertions.

To be sure, lawyers have for centuries pressed home the points that they wish to stress, but there was always an assertion that the framework of the rules of the law led to the truth,[13] even where direct case support could not be provided. The general population seems to believe, however, that this presentation of the most favorable aspect of a lawyer's case is somehow a concealment of fact.[14] Some of this perception is due to confusion because of the function of the rules of evidence to ensure reliability; at times, what would be regarded by the layperson as reliable enough to be heard, albeit with a grain of salt, is regarded by the courts as too prejudicial or otherwise too unfair or unreliable to be considered. As the Colorado evidence rule notes, "[t]hese rules shall be construed to secure fairness in admini-

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[13] *See* FED. R. EVID. 102 (stating that the purpose of the Federal Rules is to ascertain the truth); 1 MCCORMICK ON EVIDENCE § 72, at 268-69 (John William Strong et al. eds., 4th ed. 1992) (noting that the majority of the rules of evidence are justified by their tendency to promote the truth).

[14] *See* Bruce A. Green, *"The Whole Truth?": How Rules of Evidence Make Lawyers Deceitful*, 25 LOY. L.A. L. REV. 699, 699 (1992)("The evidentiary rules promote the appearance of deceit by restricting the introduction of evidence that jurors expect to receive; they promote actual deceit by legitimizing prevailing methods of witness preparation that make testimony less truthful, rather than more truthful.").

stration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."[15]

The public does not always understand the importance of the insistence on heightened rules of reliability, and the refusal to accept as evidence in a court of law what is "common knowledge" without some foundation in fact. Daniel and other lawyers like him seem to thrive on this disregard of the foundation of fact. What they do not realize is that when arguments are put forward without a sufficient basis in evidentially reliable facts, they are essentially untruthful.

Acrimony is stirred up by reliance on inadequately supported facts. Daniel and his contemporaries have either forgotten or never learned the axiom taught by Professor Karl Llewellyn's *The Bramble Bush*.[16] That adage is, that disputes are what the law is about, "[a]nd the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. *What these officials do about disputes is, to my mind, the law itself.*"[17]

Daniel does not seem to regard himself as an official of the law. He does not deal with the law as if it concerned actual disputes with real consequences to real people. Unfortunately, Daniel is not an isolated case. There are too many lawyers who could fit the following anecdote.

One of the most agonizing moments I have ever experienced as a lawyer was when, by happenstance, I found myself in the company of Daniel and several laypeople for a period of about an hour during an automobile trip. Daniel was expounding on what grand fun he was having practicing law. I held my peace as my one contact with Daniel, at that point, had been a custody dispute in which his actions had reduced my client to tears and surrender, due to the virulence of his attacks. Apparently recalling our encounter, Daniel turned to me, slapped me on the leg, and said, "We've had some fun, haven't we?" One of the other passengers saw my expression and, earning my gratitude, responded for me by saying, "No, he apparently just regarded it as

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[15] COLO. REV. STAT. ch. 33, Rule 102 (1997).

[16] KARL N. LLEWELLYN, THE BRAMBLE BUSH, ON OUR LAW AND ITS STUDY (3rd ed. 1960).

[17] *Id.* at 3 (emphasis in the original).

work."

A similar shudder was induced in me years ago by a young police officer who commented, quite sincerely, that he believed lawyers huddled with their clients to concoct their defense. It has been my experience that the versions told by police witnesses and defendants do not often vary by much; they do, however, vary in emphasis. It is these differing emphases that are the heart of most disputes, not only in criminal cases but also in civil cases. When lawyers forget that there are two sides to a story and deal with their side as the exclusive truth, professionalism becomes lost and the dispute between the lawyers becomes unduly personalized. Lawyers seem to have forgotten that we are advocates and not acolytes.

Returning to public perception, our impact on the community at large is, unfortunately, expressed by Carl Sandburg's poem, *The Lawyers Know Too Much*[18]:

The lawyers, Bob, know too much.
They are chums of the books of old John Marshall.
They know it all, what a dead hand wrote,
A stiff dead hand and its knuckles crumbling,
The bones of the fingers a thin white ash.
The lawyers know a dead man's thoughts too well.

In the heels of the higgling lawyers, Bob,
Too many slippery ifs and buts and howevers,
Too much hereinbefore provided whereas,
Too many doors to go in and out of.

When the lawyers are through
What is there left, Bob?
Can a mouse nibble at it
And find enough to fasten a tooth in?

[18] CARL SANDBURG, *The Lawyers Know Too Much*, *in* THE COMPLETE POEMS OF CARL SANDBURG 189 (1970).

Why is there always a secret singing
When a lawyer cashes in?
Why does a hearse horse snicker
Hauling a lawyer away?

The work of a bricklayer goes to the blue.
The knack of a mason outlasts a moon.
The hands of a plasterer hold a room together.
The land of a farmer wishes him back again.
Singers of songs and dreamers of plays
Build a house no wind blows over.
The lawyers—tell me why a hearse horse snickers hauling a lawyer's bones.[19]

Rather than being an influence for good, lawyers have become an emblem of grasping and petty bickering. However, as officials of the law, we are to shape a dispute, not become part of it.

Lawyers have come to be regarded as epitomized by "lawyerspeak." Lawyerspeak is that peculiar language in which only we lawyers converse.[20] An illustration from the 1992 presidential campaign provides a classic example. When Mr. Clinton was asked if he had ever smoked marijuana, his first response was to dissemble and defer.[21] After some pushing and prodding, he responded, "I have never broken the laws of my country."[22] When someone realized that Mr. Clinton had been a student in England during part of his college career, Mr. Clinton provided his famous (or infamous, depending on your politics) response, "I didn't inhale."[23] A newspaper article some time later described an MTV interview during which Clinton implied that he couldn't

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[19] *Id.*

[20] *See* Mortimer Sellers, *Think of Your Latin When Hurling Accusations*, NAT'L L. J., Feb. 9, 1998, at A1g ("Lawyers have earned a bad name for sophistry and manipulating language to mislead to unwary.").

[21] *See* Thomas B. Edsall, *Clinton Admits '60s Marijuana Use*, WASH. POST, Mar. 30, 1992, at A1(noting that "until today, Clinton essentially evaded the question").

[22] *Id.* (quoting a statement made by Clinton the previous week).

[23] *Id.* at A8

have inhaled, even if he had wanted to.[24] By that time, political figures who had smoked marijuana in their youth were coming out of the proverbial weed patch.[25] Of course, put the whole controversy in perspective by pointing out that anyone who had been in college or graduate school during the late 60's or early 70's had, in all probability, at least sampled marijuana.[26] How much better it would have been for our profession had Mr. Clinton's first response been something like, "yes, I tried it, but I gagged," and he had simply put the situation behind him.

This kind of dissembling is, I believe, a feature inherent in the personality of, and considered an asset and a skill in, one who becomes an active practicing lawyer. As lawyers, we seek to inflate our status or downplay a fault. This trait is simply human. It was well defined by David Nyberg in his book, *The Varnished Truth*:[27]

> Any adequate explanation of deception must embody the one law of human nature we can infer from the last century of psychological theory; namely, that people need to think well of themselves, and to do so they need to be thought well of by somebody else. Our common ground is a need to appear to be better than we think we really are.[28]

Lamentably, this predisposition is magnified and fostered by our profession. I believe that Daniel and other lawyers like him take this beyond what was ever contemplated. This continual evolution of "hide and seek" tactics in the day-to-day practice of the law prompted an editorial by Richard S. Hennessey, a former chair of the Colorado Supreme Court Grievance Committee and member and former chair of the Colorado Bar Association Ethics Committee. In his commentary, Hennessey wrote about the new disclosure Rules as adopted, and in his editorial states:

> I submit that these new disclosure rules were intended to force

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[24] *See* Maralee Schwartz & Howard Kurtz, *Clinton Gets His MTV, Wants Its Viewer' Votes: Network Invites Bush and Perot to Appear Too*, WASH. POST, June 17, 1992, at A16 (quoting Clinton's response when asked if he could do it all over would he inhale: "Sure, if I could.").

[25] *See id.* (listing Supreme Court Justice Clarence Thomas, then Senator Al Gore, Jr., and former Governor of Arizona, Bruce Babbitt).

[26] See Bob Greene, *This Is Surrogate Parenthood*, SAN DIEGO UNION-TRIB., Apr. 7, 1987 at B6 ("The prevalence of alcohol and drugs on campuses, which was winked at by many university administrations in the '60's and '70's .... ").'

[27] DAVID NYBERG, THE VARNISHED TRUTH, TRUTH TELLING AND DECEIVING IN ORDINARY LIFE (1996).

[28] *Id.* at 86.

> a shift from the prior order, which favored the advisory ethic, to a new order, which emphasizes the lawyer's responsibilities, *in litigation*, as an officer of the Court, *in the Law Office*, as a private administrator of the law with public responsibility. This shift expands the scopes of the lawyer's individual ethical responsibilities well beyond rationalizing lawyer conduct principally as agent or representative.[29]

Supreme Court Justice Antonin Scalia commented in a dissent to the changes to Rule 26 of the Federal Rules of Civil Procedure, addressing disclosure, that the rule changes, which were made without adequate study and testing, would encourage frivolous litigation, and were more about attitudes than anything else.[30] Writing in his editorial, Mr. Hennessey agrees, stating that "[t]he clear direction has been away from basic principles to be implemented in practice toward detailed proscriptive and prescriptive rules. However, I believe, that in promoting more and more rules, focus on our prime purpose of incorporating the moral principle of justice has been lost."[31] While agreeing with the above, I further submit that what has been lost is the internalized sense of values that members of our profession once held dear. Whether the loss has occurred within society as a whole, or solely within the profession, these values must somehow be regained. Mr. Hennessey correctly emphasized the attitudes of lawyers. Professor Nyberg affirms:

> Attorneys live in several societies: a small one with their clients which is private and bounded by an ethic of confidentiality; a larger one with their fellow attorneys and judges which includes an ethic enjoining the 'knowing' use of perjury: and the largest one with the rest of us which, as we have seen, includes many contradictory ethical positions on truth telling.[32]

Exactly how we navigate the fine line between truth and untruth can create problems in courtroom behavior. Professor Monroe H. Freedman, in an article dealing with professional responsibility and the possibility of perjury, sets forth three ques-

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[29] Richard F. Hennessey, *Emphasizing Rules Instead of Principles Risks Losing Our Sense of Purpose*, 27 COLORADO LAWYER 2, 19 (Feb. 1998).

[30] *See* 61 U.S.L.W. 4365, 4393-94 (U.S. Apr. 27, 1993) (Scalia, J., dissenting) ("a measure which eliminates rather than strengthens a deterrent to frivolous litigation is not what the times demand").

[31] Hennessey, *supra* note 29, at 20.

[32] NYBERG, *supra* note 27, at 180.

tions regarding possible perjury by a client or an impeachment of a witness the attorney knows to be truthful.[33] The second question of Professor Freedman's article is the one that I find most common. He asks, "[i]s it proper to put a witness on the stand when you know he will commit perjury?"[34]

A complainant in a workman's compensation case proves the wrong date of the accident. The defendant insurance company's counsel remains silent and moves to dismiss at the close of the evidence. Although the crime was committed at 8:00 at night, the District Attorney mistakenly proves it was committed at 9:00 p.m. The defendant's attorney knows his client has an alibi for 8:00 p.m. (although not for 9:00 p.m.), and presents his client's testimony. Neither is perceived as lying. But these court room strategies are regarded as just that. Each side of any controversy has the task of presenting his most favorable case; many quite reasonably take advantage of the flaws in the other side's presentation, in hopes of securing a favorable outcome.

While attorneys have long engaged in the practice of selective truth telling, the practice has been balanced to some extent, and therefore tolerated, by the fundamental idea of collegiality outside the court room. The absence of collegiality has led to the absence of truth-telling in relationships between attorneys. Although collegiality can make life more pleasant, it sometimes requires some uncomfortable truth-telling.

When I was a neophyte, I treasured advice from "older and wiser heads." One such instance involved an experienced attorney who brought to my attention an important legal issue I had missed, even though he was my adversary in a dissolution of marriage action. Together, we achieved a fair result and settled.

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[33] Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1996). According to Freedman, the three hardest questions are:

> 1. Is it proper to cross examine for the purpose of discrediting the reliability or creditability of an adverse witness whom you know to be telling the truth?
> 2. Is it proper to put a witness on the stand when you know he will commit perjury?
> 3. It is proper to give your client legal advice when you have reason to believe that the knowledge you give him will tempt his to commit perjury?

Id.

Several judges, upon hearing of Professor Freedman's answers to the questions, moved to have him disbarred.

[34] *Id.*

We spoke after final orders, and I thanked him for his courtesy. He reminded me that he could have let me fall, but at some point, after I became more experienced, he might overlook an essential element, and he hoped for the same civility from me.

I do not believe Daniel has that same regard for his fellow attorneys before the bar. Similarly, I am quite sure that other attorneys find that he has little regard for truth-telling. Were he an isolated case, he could be disregarded as an aberration. Unfortunately, too many lawyers, particularly those more newly admitted to the profession, consider Daniel's methods to be proper. It is not so much that Daniel cannot place the same value on collegiality as do others. He apparently does not even know that it exists as a characteristic for which to strive.

Daniel's failure to recognize the usefulness of collegiality harms not only him but also his clients. Whether his motivation is zealotry, or merely accumulation of wealth, his inability to recognize the benefit of collegiality damages the profession as a whole. Perhaps the increase in the number of lawyer jokes[35] is a reaction to this world constructed by Daniel and his colleagues, since we most often make jokes about that which we fear.

Professor Llewellyn, in a chapter entitled "Before Sunrise"[36] praises the inventions of lawyers, in order to offset Carl Sandburg's grim assessment. He praises the lawyers who devised everything from "the long term lease for real estate improvement, and the collateral trust for real estate financing,"[37] to the lawyers who changed opposition to the Government from treason to merely losing an election.[38] Earlier in the book, in a chapter entitled "Law in Civilization,"[39] Professor Llewellyn speaks approvingly of our American society:

> [b]ut we know that for one reason or another, this learning process is imperfect in some individuals; in some individuals, various native desires, whether or not stirred by particular chance contacts that we can trace, break through the accepted

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[35] *See* Michael A. Cardoza, *In Our Own Image: A Chance to Improve the Profession*, N.Y.L.J., Dec. 29, 1997, at 2 (describing how various rules regarding lawyer civility can save the reputation the profession which "ranks among the bottom of respected occupations." Now that "[l]awyers jokes are the staple of any comedic repertoire").

[36] LLEWELLYN, *supra* note 16, at 169.

[37] *Id.* at 176.

[38] *See id.*

[39] *Id.* at 125.

> mold. While the child is in the home, this goes by the name of naughtiness. When he gets out of the home it goes by the name of badness, or queerness, and in due course delinquency—or brilliance. When he becomes an adult we call it criminality on the one hand and greatness on the other.[40]

On an initial reading, this assertion might strike one as peculiar. Upon reflection, however, it seems that Professor Llewellyn has put his finger on the genius of our legal system, so different from European civil law or the British class system. Unfortunately, without the internalization of important values and recognition of his obligation to society, Daniel perverts the genius of our legal system. The general public believes that, without advocates of the law working within the law, society will be governed without a necessary level of guidance. If this trend continues, there will be little to call the potential delinquent back from the edge of criminality and instead channel his nonconformity into brilliance.

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[40] *Id.* at 129-30.