# THE SUCCESS OF THE WORD: THE LITERARY CRITIC AS CONSTITUTIONAL THEORIST

DANIEL J. KORNSTEIN*

## I. INTRODUCTION

The study of literature is good preparation for the study of law. One of our most eminent legal scholars, the late Grant Gilmore, took his Ph.D in French literature, writing a dissertation on Mallarmé, before ever setting foot in a law school.[1] Perhaps this is not surprising. After all, literature, like law, deals with human nature and experience. At its best, the study of law furnishes us with insight into human nature and the human experience. Like law, literature is built on texts that must be read, studied, and interpreted. As a result of their training, sensitivity, and cast of mind, students of literature should make excellent students of law.

Despite the obvious similarities of the intellectual tasks involved, blending law and literature into a distinct discipline is only a recent development. In 1973, James Boyd White, in his seminal book *The Legal Imagination: Studies in the Nature of Legal Thought and Legal Expression*, drew heavily on readings from literature "to establish a way of looking at the law from the outside, a way of comparing it with some other forms of literary and intellectual activity, a way of defining the legal imagination by comparing it with others."[2] Since the publication of White's pathbreaking book over a decade ago, literary studies and critical techniques have increasingly become an explicit part of legal debate. Even the recondite word hermeneutics, a term used by literary critics for the study of interpretation, has started to find its way into the pages of legal periodicals.[3] Within the last few years, such journals have sponsored symposia on textual inter-

* Partner, Kornstein Veisz & Wexler, New York City. B.S., City College of New York 1968; J.D., Yale University 1973.

[1] For a brief description of Professor Gilmore's life and career, see the collection of memorial essays in 92 YALE L.J. 1, 1-11 (1982).

[2] J. WHITE, THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION xx (1973).

[3] *See, e.g.*, Abraham, *Three Fallacies of Interpretation: A Comment on Precedent and Judicial Decision*, 23 ARIZ. L. REV. 771, 783 n.22 (1981); Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair*, 32 RUTGERS L. REV. 676 (1979); Fletcher, *Two Modes of Legal Thought*, 90 YALE L.J. 970, 1002 (1981); Weisberg, *How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor with an Application to Justice Rehnquist*, 57 N.Y.U.L. REV. 1 (1982); Weisberg, *Law, Literature and Cardozo's Judicial Poet-*

pretation.[4] Law and literature, as a separate study, has come out of the closet.

Law and literature is a rapidly growing discipline. In the past year-and-a-half, three important new books have entered the field. White's latest effort, *When Words Lose Their Meaning*, presents a way of reading law as literature.[5] *Law & Letters in American Culture*, by Robert A. Ferguson, studies the role of law in early American literature.[6] The third of the recent trio of books in this genre is *The Failure of the Word: The Protagonist as Lawyer in Modern Fiction* by Richard H. Weisberg,[7] a professor at the Benjamin N. Cardozo School of Law.

*The Failure of the Word* is a superb example of the combined disciplines of law and literature. Professor Weisberg's book realizes the potential of the new field of study. Weisberg's stated aim is to expose some of modern literature's malaise in the "futile wordiness" of lawyerly protagonists.[8] Weisberg succeeds wonderfully in achieving this goal. On its own terms, *The Failure of the Word* is a *tour de force*, a subtle and provocative volume bound to spur much creative thinking about the role of lawyers in modern fiction. But Weisberg's book is much more.

In addition to its manifest content, *The Failure of the Word* has a vital, and no less important, latent content. The subtlety, fertility, and richness of the book invite us to view it not as mere literary criticism, but as a separate text that is itself open to interpretation. In referring to *Billy Budd, Sailor*, Weisberg himself says that his "analysis need only be considered one of the many responses to an incredibly evocative story."[9] By the same token, Weisberg's own book is "incredibly evocative" and suggests more than one possible response.

The latent content of *The Failure of the Word* is a theme larger than literary criticism. Like the literary lawyers he analyzes so well, Weisberg communicates, at least in part, by indirection, using the ability to "mask" true purposes behind "politic outward

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*ics*, 1 CARDOZO L. REV. 283 (1979); *Symposium, Hermeneutics and Legal Interpretation*, 58 S. CAL. L. REV. 35, 35-276 (1985).

[4] *See, e.g., Symposium: Law & Literature*, 32 RUTGERS L. REV. 603, 603-739 (1979); *Symposium: Law And Literature*, 60 TEXAS L. REV. 373, 373-586 (1982).

[5] J. WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER AND COMMUNITY (1984).

[6] R. FERGUSON, LAW & LETTERS IN AMERICAN CULTURE (1984).

[7] R. WEISBERG, THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION (1984) [hereinafter cited as WEISBERG].

[8] *Id.* at xiii.

[9] *Id.* at 134.

displays."[10] Although ostensibly about literature, Weisberg's book is really about law. *The Failure of the Word* can be understood, in its broadest sense, as an original and penetrating essay on constitutional law and legal interpretation. Only by reading Weisberg's work in this way can its vast richness be fully appreciated and put into the context of Weisberg's own intellectual development.

In view of Weisberg's magnificent achievement, one learns with interest that he has something in common with Grant Gilmore. Like Gilmore, Weisberg studied French and Comparative Literature before studying law. Like Gilmore, Weisberg earned his doctorate with his thesis on Mallarmé. Something in the poetry of Mallarmé must stimulate and inspire future law professors. In reading Weisberg's book, we should perhaps keep Mallarmé in mind as a frame of reference.

## II. The Manifest Meaning

The manifest content of *The Failure of the Word* consists of a brilliant literary analysis. Weisberg uses eight examples of modern literature as windows on various cultural phenomena. Analyzing well-known works of Dostoevsky, Flaubert, Camus, and Melville, Weisberg gives important new insight into their works. Through this analysis, Weisberg reaches certain unique conclusions about literature, law, and culture generally.

Weisberg's stated theme is original. One of the hallmarks of originality is the ability to see connections between apparently unrelated phenomena. Where others have seen nothing, Weisberg discerns genuine links between several apparently unrelated pieces of modern fiction. It is no small achievement to perceive vital connecting patterns in works as diverse in time, setting, and subject matter as Dostoevsky's *Brothers Karamazov, Notes from Underground*, and *Crime and Punishment*; Flaubert's *Salammbô* and *Sentimental Education*; Camus' *The Fall* and *The Stranger*; and Melville's *Billy Budd, Sailor*. Weisberg's achievement is enhanced by the far-reaching implications he is able to draw out of those connecting patterns.

Weisberg sets out to show nothing less than the relationship between modern cultural malaise and the lawyer-like protagonists in nineteenth and twentieth-century literature. According to Weisberg, the use of lawyer-like protagonists in modern literature is the key to understanding basic aspects of modern culture.

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[10] *Id.* at 161.

In such characters are combined two fundamental cultural themes: the twin themes of *ressentiment* and legalism. These themes, in turn, combine to produce the "legalistic *ressentiment*" so central to modern fiction.

At the heart of Weisberg's literary analysis lies the concept of *ressentiment*. That concept, which Weisberg attributes to Nietzsche, means perpetual rancor. *Ressentiment* involves disguised rage taking the form of public "revenge" against imagined "insults." Ressentient individuals have a lingering sense of injury without a firm sense of values. They generally feel a discrepancy between what they consider their own worth to be and the actual worth and position accorded them by others.[11]

*Ressentiment* is, for Weisberg, "modern Western culture's own deepest malaise."[12] To understand *ressentiment* and ressentient injustice is to understand law and language today, says Weisberg.[13] *Ressentiment* is a "negative force in society and history," and plays a major role in the novels which he interprets.[14] In each literary work examined by Weisberg, *ressentiment* mars the protagonist. And in each such work of fiction, the protagonist is a lawyer or lawyer-like character.

These fictional lawyer-types, flawed by *ressentiment*, are the bridge to Weisberg's other major theme: Legalism. These literary legal figures have several other distinctive traits. Weisberg describes the lawyer-like protagonists as well-educated, hard working, insightful individuals, blessed with subtle and careful minds, endowed with superior powers of perception, and distinctively articulate at their best.[15] Weisberg sees these fictional lawyer-types, at their worst, as avoiding and distorting reality and life, as maladjusted, repressed, and violent individuals who adhere to resentful values. They are inactive, promoters of injustice, indirect with hidden motives, equivocating, and dissembling (and above all too wordy).[16] This verbosity is a primary trait, making the fictional lawyers prolix verbalizers who use words to avoid reality and action.[17] Such people do not act; they react, with words.[18] "These protagonists prefer the safety of wordiness

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[11] *Id.* at xii-xiv, 13-23, 27.
[12] *Id.* at xiii.
[13] *Id.* at 14.
[14] *Id.* at xiii, 5.
[15] *Id.* at 47, 50.
[16] *Id.* at 4, 8-9.
[17] *Id.* at 4.
[18] *Id.* at 28, 59, 95.

to the risks of spontaneous human interaction."[19]

Juxtaposed against the predominantly negative traits of lawyer figures are the primarily attractive qualities of the "just individual."[20] Such an individual, while nonverbal and less articulate,[21] is more popular, basically well adjusted, and fulfilled.[22] He has a keen intelligence and couples action with reason.[23] Unlike his verbose legal counterpart, the just individual responds quickly and effectively to evil, though nonverbally.[24] He is associated with happiness, power, beauty, goodness, and other positive forms of life.[25] He spontaneously partakes of all the fullness of reality.[26]

Tension between these two sets of character traits generates the energy for Weisberg's thesis. According to that thesis, the bitter and resentful verbosity, the sheer wordiness, of fictional lawyers has produced what Weisberg sees as the prevailing failure of modern Western culture.[27] Speech is an inadequate replacement for legitimate action.[28] Yet we have been plagued by the "futile wordiness of legalistic protagonists."[29] Hence the genesis of Weisberg's title, *The Failure of the Word*, and his subtitle, *The Protagonist as Lawyer in Modern Fiction*.

But Weisberg's thrust is not pessimistic. Like a physician, he examines the symptoms of modern cultural malaise and diagnoses the causes as legalistic *ressentiment*. Having made his diagnosis, Weisberg offers a prognosis of guarded optimism: "ressentiment can yet be altered."[30] Negative forces "yield eventually to the ebullient creativity of self-willed people with a firm sense of communal ethics. Literary art, ever the reflection of a culture's sense of itself, may again join with a positive system of law to generate admirable language."[31]

## III. The Latent Content

As Freud used the term, *manifest* dream-content is "what the

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19 *Id.* at xi.
20 *Id.* at 7.
21 *Id.* at xii, 4.
22 *Id.* at 6.
23 *Id.* at 7.
24 *Id.* at 13.
25 *Id.* at 39.
26 *Id.* at 34.
27 *Id.* at xiii.
28 *Id.*
29 *Id.*
30 *Id.* at 175.
31 *Id.* at 176.

dream actually tells us."[32] By applying Freudian terms to the interpretation of a text, we may be able to find in *The Failure of the Word* something besides its manifest content. In Freudian psychoanalysis, *latent* dream-thoughts, by contrast, are the concealed material. In Weisberg's book, latent, partially hidden, themes coexist with the manifest content.

The relationship between the manifest content of *The Failure of the Word* and its latent meaning can be explained. On the surface, the manifest content of Weisberg's book is a matter of literary analysis, albeit literature involving lawyers and law. On a deeper level, and perhaps not even consciously perceived by the author himself, the latent content of Weisberg's book is an essay on constitutional law and legal interpretation. Seen on this level, Weisberg uses literature as a symbol of law, so that his comments about literature should properly be read as comments about law. It is possible, of course, that Weisberg never intended literature to be a substitute for law in his book. However, as Weisberg would be among the first to recognize, an author's intent is not necessarily binding on a reader's response.[33] A text, such as *The Failure of the Word*, is open to more than one interpretation.[34]

Interpreted as an essay about law, and not about literature, *The Failure of the Word* has much to tell us that is important to contemporary legal discourse. It evaluates the dichotomy between speech and action, a basic distinction in constitutional law, from a new perspective. From Weisberg's discussion of the speech-action dichotomy, we can generalize to the larger theme of judicial activism versus judicial restraint. Weisberg's book yields further insight into judicial review and constitutional interpretation. It sheds light on the role of values in interpreting law, objectivity and subjectivity in law, and the habit of lawyers to speak by indirection. A current example, Attorney General Meese's proposed "Jurisprudence of Original Intention,"[35] provides a controversial yet enlightening way to illustrate these aspects of Weisberg's theory.

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[32] S. FREUD, INTRODUCTORY LECTURES ON PSYCHOANALYSIS 120 (J. Strachey ed. 1966).

[33] *See generally* S. FISH, IS THERE A TEXT IN THIS CLASS? (1980); G. GADAMER, TRUTH AND METHOD (1960); G. GRAAF, LITERATURE AGAINST ITSELF (1979); G. HARTMAN, CRITICISM IN THE WILDERNESS (1980); R. PALMER, HERMENEUTICS (1969).

[34] *See supra* note 33.

[35] *See infra* notes 137-46 and accompanying text.

### A. *The Speech-Action Dichotomy*

Running through Weisberg's book is a crucial theme that has a clear parallel in constitutional law. Weisberg sees an important distinction between speech and action in the works of literature he examines. Weisberg's distinction between speech and action in modern literature resembles a similar distinction used by the Supreme Court in first amendment cases. Ultimately Weisberg rejects the distinction as empty and pernicious. In rejecting the distinction between speech and action in literature, Weisberg reaches the same conclusion as do some of our most eminent constitutional scholars.[36]

A major link between the eight literary works studied by Weisberg is their distinction between speech and action. In each of the works, "inactive, wordy characters" try to rule others who are both active and nonverbal.[37] Such characters lead mere half lives, as they verbalize and narrate rather than live.[38] In *Salammbô*, for instance, Flaubert pits a castrated priest, a lawyer-like protagonist and a "wordy adversary," against his opposite, a "virile rival."[39] Similarly, in both *The Stranger*, by Camus, and *Billy Budd, Sailor*, by Melville, the nonverbal innocent heroes must suffer formal legal trials at the hands of lawyerly adversaries who manipulate justice through their verbal skills.[40] As Weisberg explains, the protagonists in these works embody the speech-action dichotomy.

In practice, the Supreme Court has frequently cited the distinction between speech and action in deciding first amendment cases.[41] Under the stated rationale of these cases, where the conduct in question is "pure speech," it is entitled to full first

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[36] *See infra* notes 41-63 and accompanying text.

[37] WEISBERG, *supra* note 7, at xi.

[38] *Id.* at 75, 78. Weisberg criticizes those who avoid life by living through art, literature, or law. He notes Flaubert's "general unwillingness to participate in the significant political and social battles of his era." *Id.* at 89. He thinks ressentiment "can be overcome only through an extreme commitment to experience and passionate human action," and "complete action and immersion in human intercourse . . . ." *Id.* at 75. In the same connection, it is worthwhile to compare Justice Holmes' comment: "as life is action and passion, it is required of a man that he should share the passion and action of his time at peril of being judged not to have lived." O. HOLMES, JR., SPEECHES 11-12 (1913).

[39] WEISBERG, *supra* note 7, at 102.

[40] *Id.* at 114-59.

[41] *See, e.g.*, Spence v. Washington, 418 U.S. 405 (1974); United States v. O'Brien, 391 U.S. 367 (1968); Brown v. Louisiana, 383 U.S. 131 (1966); Adderley v. Florida, 385 U.S. 39 (1966); Cox v. Louisiana, 379 U.S. 559 (1965); Street v. New York, 394 U.S. 576 (1969); Teamsters Local 695 v. Vogt, 354 U.S. 284 (1957); Giboney v. Empire Storage and Ice Co., 336 U.S. 490, 498 (1949).

amendment protection.[42] If the conduct is "speech plus" (for example, labor picketing for illegal purposes), it is entitled to lesser protection.[43] If the Court views the subject as conduct, and not as speech (such as a demonstration on the premises of a county jail), the first amendment does not apply.[44] In all of these cases, the crucial question is deciding which category, speech or action, is appropriate.[45]

That question has never been an easy one for constitutional scholars to answer. The cases are hard to reconcile, and the Supreme Court has never spelled out a basis for its distinction.[46] When the Supreme Court differentiates between speech and conduct, it is more often than not announcing its conclusion, rather than setting forth an analytic process, as the dissenting justices frequently point out.[47] Professor Laurence Tribe writes that "[t]he distinction between 'expression' and 'action' or 'speech' and 'conduct' is essentially unhelpful because it asks a question which is answerable only if one has already decided, on independent grounds, whether the act is protected by the first amendment."[48]

Based on this kind of analysis, more and more constitutional theorists have recently begun to reject the speech-action dichotomy in constitutional law. They believe that the dichotomy is "empty" and "has no real content."[49] All communication involves conduct, and much conduct, such as "symbolic speech" is expressive. "Expression and conduct, message and medium, are thus inextricably tied together in all communicative behavior . . . ."[50] This development in constitutional law is analogous to Weisberg's own thinking.

In the last analysis, Weisberg also rejects the speech-action dichotomy. At the end of his book, Weisberg makes clear that he thinks speech and action should be inseparable. To illustrate his point, Weisberg quotes from Melville's *Billy Budd, Sailor*: "the poet but embodies in verse those exaltations of sentiment that a nature like Nelson, the opportunity being given, vitalizes into

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42 *See, e.g.*, Cox v. Louisiana, 379 U.S. 559, 563 (1965).

43 *See, e.g.*, Teamsters Local 695 v. Vogt, 354 U.S. 284 (1957).

44 *See, e.g.*, Adderley v. Florida, 385 U.S. 39 (1966).

45 *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970).

46 L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-7, at 600 (1978).

47 *Id.*

48 *Id.* at 601.

49 *Id.* at 599-600; Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1495-96 (1975).

50 L. TRIBE, *supra* note 46, at 599.

acts."[51] This passage is crucial to understanding Weisberg's point. With the passage from *Billy Budd, Sailor*, says Weisberg, "[w]e have truly entered the holy of holies. The mystery of this paragraph remains with us . . . ."[52] What "mystery"? Why is it "the holy of holies"?

The excerpt from Melville fascinates Weisberg because it collapses the distinction drawn by Dostoevsky, Flaubert, and Camus—not to mention the Supreme Court—between speech and action. "Ethical action and writing, we learn here," says Weisberg, "have not always been dissociated phenomena; Nelson symbolized the symmetry of art and heroism."[53] According to Weisberg, Melville seems to be calling "for a renewal of the old alliance of artistry with just action,"[54] and the "classical unity of literature and action,"[55] when "heroic action and narrative act were inextricably linked."[56] "One arm acted, the other wrote," adds Weisberg.[57] "The match of outer form with inner man achieved artistic harmony in such figures."[58]

Breaking the link, that is, distinguishing between speech and action, has led to serious problems. Weisberg sees the distinction as symptomatic of everything wrong with modern literature, as a reflection of *ressentiment* in our culture. "Only ressentient modern-day verbalizers," writes Weisberg, "see alienation from heroic activity as a sine qua non for the verbally expressive life."[59] One could produce a fascinating analysis of certain Supreme Court justices as "ressentient modern day verbalizers."

In some ways, by breaking down the distinction between speech and action, Weisberg is only recognizing the obvious. But, as Justice Holmes once advised, "[w]e need education in the obvious."[60] Perhaps Weisberg had Winston Churchill in mind when writing: "in other ages political leaders combined strong willed ethics with verbal force."[61] President Kennedy, for example, said that Churchill "mobilized the English language and sent

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51 WEISBERG, *supra* note 7, at 171 (quoting H. MELVILLE, BILLY BUDD, SAILOR (H. Hayford & M. Sealts eds. 1962)).

52 *Id.*

53 *Id.*

54 *Id.* at 175.

55 *Id.* at 172.

56 *Id.*

57 *Id.*

58 *Id.*

59 *Id.* at 171.

60 *Id.* at 157 (quoting F.B. WIENER, A PRACTICAL MANUAL OF MARTIAL LAW 16 (1940), *quoting* O. HOLMES, JR., COLLECTED LEGAL PAPERS 292 (1920)).

61 *Id.* at 179.

it into battle."[62] The core of Weisberg's critical view of the speech-action dichotomy is: "use of words in the service of positive values remains . . . a magnificent possibility."[63]

### B. *Judicial Activism v. Judicial Restraint*

Weisberg's affirmative view of the link between speech and action, the "magnificent possibility" of using "words in the service of positive values," suggests a certain view of the role of courts in a democratic society. In America, courts have extraordinary power. In performing their duty to interpret laws, courts in this country can take either an active or passive view of their role. As Alexander Bickel wrote, judicial review is a "counter-majoritarian force in our system" because it allows unelected judges to thwart the will of the people's elected representatives.[64] The unusual aspects of judicial review have made it a perennial subject for legal debate.

The debate continues. Today, as in the past, participants in the debate over the proper role of courts use the terms judicial activism and judicial restraint. Despite their imprecision and frequent inappropriateness, these terms convey the primary thrust of the two opposing viewpoints. As the daily newspapers attest, politicians and journalists assume most Americans understand the difference between judicial activism and judicial restraint. When President Nixon spoke of favoring "strict constructionists" as judges, and when the current President seeks judicial nominees who supposedly will not impose their own personal values if put on the bench, the American people understand the meaning behind these phrases.

It is hard to read Weisberg's book without interpreting it, at least in part, as a psychological critique of judicial restraint. Weisberg favors action over inaction. He associates inaction, "fatal hesitancy," with verbosity.[65] Rather than act, the legal protagonist in fiction, like Hamlet ("that first great literary lawyer"), talks at length.[66]

The result of such wordy inaction is, for Weisberg, continued wrongdoing. "Injustice has endured," Weisberg says, "and

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[62] Address by President Kennedy on April 9, 1963 granting Churchill Honorary American Citizenship, *reprinted in* CHURCHILL 162-63 (M. Gilbert ed. 1967). Kennedy went on to say that "[t]he incandescent quality of his words illuminated the courage of his countrymen."

[63] WEISBERG, *supra* note 7, at 178.

[64] A. BICKEL, THE LEAST DANGEROUS BRANCH 16-17 (1962).

[65] WEISBERG, *supra* note 7, at 35.

[66] *Id.* at 8.

even expanded through the verbal predilection of the protagonist as lawyer."[67] "Passivity," he continues, "has often allowed, and sometimes encouraged, the dominance of injustice on earth . . . ."[68] Weisberg criticizes those who always find reasons not to act. "The noble strength of his sensitivity," Weisberg writes about a legal protagonist, "wars with the ignoble effects of his wordy investigations."[69]

Weisberg's activist tone sharply contrasts with some of the precepts of judicial self-restraint. One cannot imagine Weisberg saying, as Justice Brandeis said, that, "[t]he most important thing we do is not doing."[70] Nor would Weisberg be likely to find totally congenial the self-restraining principles announced by Brandeis in *Ashwander v. Tennessee Valley Authority*.[71] As a matter of temperament, if nothing else, Weisberg would probably disapprove of the way Justice Frankfurter was "forever disposing of issues by assigning their disposition to some other sphere of competence."[72] The "passive virtues" exemplified by Frankfurter, and written about by Bickel, would hold no attraction for Weisberg.

The conclusion that Weisberg views the self-denying ordinances of judicial restraint with great skepticism is inescapable. Undoubtedly, Weisberg sees such principles as excuses for not acting. Lack of justiciability, mootness, ripeness, and political questions would strike Weisberg as reasons sought out by judges to justify a psychological reluctance to act. Of great relevance is Weisberg's description of the inactive, verbalizing legal protagonist:

> he creates so many doubts for himself . . . that he does not ever make a move toward reaching a deeply felt insult. Primary causes (the justice of the charge against the oppressor, no matter what the odds of success) are replaced by endless second-guessing (Should I act? Will there be a better time to act? Was my enemy really wrong? Don't I admire him deep down? Will I look ridiculous? etc.).[73]

The leading modern exemplar of judicial self-restraint, Felix Frankfurter, would surely strike Weisberg as having many of the

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67 *Id.* at 9.
68 *Id.* at 66.
69 *Id.* at 9.
70 A. BICKEL, *supra* note 64, at 71 (quoting Justice Brandeis).
71 297 U.S. 288, 341-56 (1936) (Brandeis, J., concurring).
72 Jaffe, *The Judicial Universe of Mr. Justice Frankfurter*, 62 HARV. L. REV. 357, 359 (1949).
73 WEISBERG, *supra* note 7, at 32.

qualities found in the fictional lawyers in modern literature. Frankfurter was a brilliant and learned lawyer, superbly educated, capable of great insight, blessed with a complex, subtle, and extraordinarily articulate intellect. At the same time, Frankfurter was verbose, passive, hypertechnical, long-winded, persnickety, and more concerned with process than with substance. His advocacy of judicial restraint was maddening to those who admired his civil libertarian crusades before he joined the Supreme Court.[74] In a recent, trenchant, psychobiography, *The Enigma of Felix Frankfurter*, H.N. Hirsch goes so far as to describe Frankfurter as "a textbook case of a neurotic personality,"[75] what Weisberg would identify as a "disjointed inner state."[76]

In the view of Hirsch and others,[77] Frankfurter's life is filled with what is the grist for Weisberg's mill. Throughout his life, Frankfurter hid his true motives, using flattery and other means to manipulate people.[78] On the Court he was capable of great insight and felicitous expression. Yet he repeatedly avoided substantive issues, and perpetuated what others considered to be social wrongs by relying on the "passive virtues," that is, by "creat[ing] . . . many doubts for himself" and by "endless second-guessing."[79] Fed up with Frankfurter's wordiness, Justice Frank Murphy dismissed Frankfurter's scholarly opinions as "elegant bunk."[80]

In many ways, Frankfurter personifies the ressentient legal figure. Like the classical ressentient type, Frankfurter, according to Hirsch, lacked a firm sense of personal values due to a fundamental ambiguity in his choice of an identity.[81] Frankfurter, writes Hirsch, was "someone whose self-image is overblown and yet, at the same time, essential to his sense of well being."[82] Frankfurter's early years on the Court represented his first confrontation with a sustained challenge to his exaggerated self-image in a field which he considered his own.[83]

The turning point for Frankfurter came in the flag salute cases.[84] After the second flag salute case, in which the Court over-

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74 *See, e.g.*, J. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 73 (1975).
75 H. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 5 (1981).
76 WEISBERG, *supra* note 7, at 125.
77 *See, e.g.*, F. RODELL, NINE MEN 269-73 (1955).
78 J. LASH, *supra* note 74, at 45, 49.
79 WEISBERG, *supra* note 7, at 32.
80 J. HOWARD, MR. JUSTICE MURPHY 269 (1968).
81 H. HIRSCH, *supra* note 75, at 11-64.
82 *Id.* at 5.
83 *Id.* at 5-6.
84 *Id.* at 147-55, 171-76. *Compare* Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940) *with* West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

ruled his earlier majority opinion, the remainder of Frankfurter's tenure was, in a sense, devoted to refighting a recurring battle.[85] Frankfurter's stance cast him in opposition to the rest of the Court; his leadership had been rejected.[86] From Frankfurter's psychological viewpoint, he felt perpetual rancor, as if he were under siege and had no choice but to remain where he was and fight it out.[87] He reacted to his opponents with vindictive hostility.[88] Such opposition pushed Frankfurter "into jurisprudential corners from which he never extricated himself."[89] Frankfurter became so intent on beating his adversaries, on seeking revenge for the insult to his pride, that he became obsessed by an austere doctrine of judicial self-restraint.[90]

Frankfurter's career vividly illustrates Weisberg's views. With Frankfurter, as with other ressentient individuals, "vengeance takes the form of a Hamlet-like torrent of words directed against an irrelevant object;"[91] in his case, many long opinions rationalizing his inaction. Surely Frankfurter's critics would say he "saturates the page with vindictive verbosity,"[92] that he "retreats into language" with "wordy cowardice."[93] What Weisberg says about one of Camus' characters applies with equal force to Frankfurter: he was afflicted with the "massive evil which intellectuals endure when they allow formal structures to replace their native sense of justice."[94] Wordiness leads "to passivity in the face of clear injustice or, worse still, to the creation of injustice itself."[95]

Many of Frankfurter's critics say that he lost an "opportunity for truly creative jurisprudence" because his judicial self-restraint got in the way.[96] Such criticism calls to mind Weisberg's comment that, "highly formalized language mediates between [ressentient legalists] and the exigencies of life, protecting but also gradually dis-

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85 H. HIRSCH, *supra* note 75, at 176; *see also* J. LASH, *supra* note 74, at 68-75.

86 H. HIRSCH, *supra* note 75, at 68-75.

87 *Id.*

88 *Id.* at 6.

89 *Id.* at 191.

90 *Id.* Justice Frank Murphy said Frankfurter's campaign for judicial self-restraint masked personal drives that Frankfurter condemned in others. J. HOWARD, *supra* note 80, at 269.

91 WEISBERG, *supra* note 7, at 40.

92 *Id.* at 95.

93 *Id.* at 95, 112. Even Learned Hand, a friend of Frankfurter, said in 1957, in explaining why Frankfurter was not one of the giants of the Court: "He's too discursive." L. LASH, *supra* note 74, at 76.

94 WEISBERG, *supra* note 7, at 115. *See* L. LASH, *supra* note 74, at 87 (1975) ("The tool of judicial restraint . . . became on the Bench a brake on his [*i.e.*, Frankfurter's] larger sympathies.").

95 WEISBERG, *supra* note 7, at 178.

96 H. HIRSCH, *supra* note 75, at 191.

tancing them from the sources of positive and creative action."[97] Just the juxtaposition of the comments underscores the power of Weisberg's analysis and its tremendous utility. It would be a great surprise if Weisberg turned out to be a Frankfurter fan. Much closer to Weisberg's world view is the remark of Justice Douglas, who once wrote: "[i]t makes a mockery of judges who insist that if they were not imprisoned by the law they could do justice."[98]

### C. *Legal Interpretation*

Judicial activism and judicial restraint are aspects of legal interpretation. Just as Weisberg's book gives insight into the activist-restraint conundrum, it also illustrates various facets of endemic problems in legal interpretation. Weisberg's analysis of fictional works evidences his views on basic interpretive problems. Those views, when drawn out, are interesting in their own right, and suggest new devices for discussing old problems.

#### 1. Law and Values

If Weisberg's book is a symbolic essay about law, its implications are broad and relate to the most current debates in constitutional law. Weisberg bemoans literature without values. According to Weisberg, the "absence of deep-rooted values" causes severe problems for literary characters.[99] Clamence, one of Camus' existentialist heroes, has learned nothing because he has failed to "conceive the positive, ethical value system which must replace the rotten present code . . . ."[100] On the very last page of his text, Weisberg welcomes the "seeds of a revivified genre" that includes "reintegration of language and values."[101] Our generation, he says, should be especially "wary of language systems bereft of ethical referents."[102]

Weisberg's discussion of values in literature sounds much like a similar discussion in law. Indeed, Weisberg may actually be discussing law obliquely. At one point, for example, he directly states that "European religion, law, scholarship, and literature . . . may have rationalized their own values out of existence."[103]

The role of values is crucial to the controversy over the legit-

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97 WEISBERG, *supra* note 7, at xi.

98 W. MENDELSON, THE SUPREME COURT: LAW AND DISCRETION 39 (1967) (quoting Justice Douglas).

99 WEISBERG, *supra* note 7, at 128.

100 *Id.*

101 *Id.* at 179.

102 *Id.*

103 *Id.* at 129.

imacy of judicial review in a democracy. That controversy has focused on what values, if any, courts should implement in interpreting the Constitution. Several scholars think courts should use such values, whether they be conventional morality, fundamental rights, the judges' own values, neutral principles, natural law, consensus, or tradition.[104] In 1980, John Hart Ely, now Dean of Stanford Law School, published an important book that takes a different approach.[105] In *Democracy and Distrust*, Ely proposed what he called a value-free mode of judicial review based on reinforcing participation and representation in a democracy. Ely argued that all the value-filled approaches were defective and noninterpretive in the sense that they were not found either explicitly or implicitly in the Constitution.

In time, however, Ely had to bear the brunt of his own criticism. His "process-oriented" strategy struck an astute observer as itself "covertly value-laden."[106] Paul Brest argued that electoral participation, so stressed by Ely, was as much a value as any of the values that Ely had exposed.[107] In the end, Brest called Ely's effort a "detour" and concluded that no system of judicial review can be value-free.[108]

Against the background of the debate over values in judicial review, Weisberg's book takes on more meaning. Presumably Weisberg would eschew a value-neutral form of judicial review, "bereft of ethical referents."[109] Presumably Weisberg would strongly favor a form of judicial review based on "deep-rooted values,"[110] that "conceive the positive, ethical value system."[111] Precisely what values Weisberg would enforce through judicial review is more difficult to tell. The "salutary traits" referred to by Weisberg—vitality, sincerity, passionate involvement with others, ethical leadership, refusal to let clear wrongdoing survive[112]—differ from the sort of values usually associated with constitutional law.

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104 For a critique of the views of such scholars, see J. ELY, DEMOCRACY AND DISTRUST 43-72 (1980).

105 *Id.*

106 Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Law Scholarship*, 90 YALE L.J. 1063, 1065 (1981).

107 *Id.* at 1093.

108 *Id.* at 1064-65.

109 WEISBERG, *supra* note 7, at 179.

110 *Id.* at 128.

111 *Id.*

112 *Id.* at 178.

### 2. Objectivity and Subjectivity

Weisberg draws a central distinction between objective and subjective interpretation. The thrust of his analysis in this regard is that law is riddled with subjectivity. He does not necessarily use "subjective" in a pejorative sense. In describing incidents in Dostoevsky's novels, he points out the artistry and imagination involved in legal investigation of the facts, which leads to a "personalized vision of reality."[113] Such "artistic legality" and "idiosyncratic vision" can be brilliant accomplishments, even if subjective.[114] But, Weisberg says, they explode the myth of legal "objectivity."[115]

Exploding the myth of objectivity in law, as well as elsewhere,[116] has been a recurring and controversial modern theme. During the late nineteenth-century, for instance, the dominant view in America was that judges were oracles of the law, that they "found" the law as it had always existed, and mechanically applied such law to the facts in particular cases.[117] In theory, such Legal Formalism, based as it was on deductive logic, made law seem objective by reducing the subjective element in limiting the scope of a judge's discretion and creativity.[118] This formalistic view lulled people into thinking that they were living under a "government not of men but of laws."[119]

With the publication of Justice Holmes' *Common Law*, in 1881, Legal Formalism started to come under attack. Judicial decisions, which had hitherto been cloaked in the guise of logic, began to be seen as choices between competing public policies.[120] Inspired by Holmes and later by Justice Benjamin N. Cardozo, the Legal Realists showed that judges do in fact make and change law.[121] The Realists advocated the use of sociological facts and empirical research to justify the social policies, or

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113 *Id.* at 54, 58. Weisberg is particularly perceptive on this point: " [L]egal recreation of events sometimes serves more to fulfill the psychological and artistic goals of the lawyer than to achieve justice in the individual case . . . . [T]he process of legal investigation contains the potential for imaginative artistry." *Id.* at 54. Weisberg then refers to the "crucial significance of imaginative legal investigation." *Id.*

114 *Id.* at 60.

115 *Id.* at 58, 119.

116 Christie, *Objectivity in the Law*, 78 YALE L.J. 1311 (1969); Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 37 U. CHI. L. REV. 661 (1960); *see also* C. FRANKEL, THE CASE FOR MODERN MAN 136-43 (1956).

117 *See, e.g.*, G. GILMORE, THE AGES OF AMERICAN LAW 62 (1977).

118 *Id.* at 62-63.

119 *Id.* at 41.

120 *See, e.g.*, White, *The Integrity of Holmes' Jurisprudence*, 10 HOFSTRA L. REV. 633 (1982).

121 *See, e.g.*, G. GILMORE, *supra* note 117, at 77-81.

sets of values or goals, on which judicial decisions rested.[122] Recognizing the subjectivity of judicial decision-making, the Legal Realists called for bringing the relevant factors out into the open.[123]

Even the Legal Realists, however, failed to resolve the tension between objective and subjective legal interpretation.[124] Such tension figures prominently in all discussions of the judicial function. Should a judge impose his own value preferences as law? No one publicly supports such arrant subjectivism. But if the legal text to be interpreted is vague or ambiguous, where is the judge to find guidance, especially when the draftsman's intent is unclear or when times have changed? Such tension creates the crucial problems of legal interpretation.

Weisberg's book reveals him to be a modern Legal Realist. Like the Legal Realists of the past, Weisberg recognizes the subjectivity that is inherent in the legal process. Captain Vere in *Billy Budd, Sailor* is "the apparent voice of disinterest, reason and formality."[125] But Vere is disingenuous in describing the choice he says the law compels him to make.[126] Weisberg sees "the articulate figure's [*i.e.*, the lawyer's] fundamental subjectivity" as part of a process where "law disguises with seeming rationality an arbitrary value system."[127]

Legalistic characters in fiction "disguise a ferociously negative subjective tendency with a coolly rational outer form."[128] Vere, like other lawyer-types, "deliberately distorts the operative law" to arrive at a conclusion "harmonious with his deepest *private* urges."[129] *Billy Budd, Sailor*, Weisberg says, is an "inquiry into the uses of external forms to justify intense subjective urges."[130] Thus, "we begin to see how quickly an intelligent individual can muster 'cool, outer forms' to serve formless, subjective ends."[131]

Weisberg's literary investigations may suggest a tentative and partial solution to the riddle of subjectivity and objectivity in

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122 *Id.*

123 *See generally id.; see also* J. FRANK, LAW AND THE MODERN MIND (1930); J. FRANK, COURTS ON TRIAL (1949); W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973).

124 Christie, *supra* note 116, at 1311 (1969).

125 WEISBERG, *supra* note 7, at 135.

126 *Id.* at 141.

127 *Id.* at 119.

128 *Id.* at 63.

129 *Id.* at 146.

130 *Id.*

131 *Id.* at 153-54.

law. First, he says, we "need to examine the premises upon which lofty articulations are based."[132] At least then we can know the actual dynamics of decision. Having examined those premises, we can consciously seek the "possibility for creative craftsmanship divorced from underlying subjective motivations."[133] How this "possibility" is achieved is not exactly clear, but, at a minimum, it is a step in the right direction.

### 3. Hidden Motives: A Current Example

Weisberg's comments about objectivity and subjectivity have great immediacy. To Weisberg's mind, literary lawyers tend to speak covertly and by indirection, often with "organic mendacity."[134] As Weisberg writes, the "seemingly cool outward forms of legal procedures often mask the bitter subjective aims of those who employ them—aims which are, in Melville's words, 'never declared,' and which can only be discovered through careful analysis."[135] Further along these lines, "one who calls loudest for a purely formal analysis of a phenomenon may be one who most subtly conceals some private animus."[136]

Although Weisberg is purportedly writing about fictional lawyers, what he says has striking relevance to a current debate among real lawyers. In July 1985, Attorney General Edwin Meese made an important and controversial speech to the American Bar Association, in which he urged the Supreme Court to take a new approach. "Far too many of the Court's opinions, on the whole," he said, "have been more policy choices than articulations of long-term constitutional principle [sic]."[137] Instead of reading their policy preferences into the Constitution, Attorney General Meese believes that the Justices should follow "a jurisprudence of original intention."[138] Such a jurisprudence, he said, would "go back to the original intent of the framers" and "resurrect the original meaning of the constitutional provisions."[139]

One gets a sense of *déjà vu* on reading about the speech. Meese's talk closely resembles a speech by his predecessor more

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[132] *Id.* at 40.
[133] *Id.* at 87.
[134] *Id.* at 81. In Weisberg's eyes, lawyer-types are "covert" rather than "overt." *See id.* at 138, 147, 154, 158-59, 163, 166-67, 171, 173.
[135] *Id.* at 5.
[136] *Id.* at 159.
[137] N.Y. Times, July 10, 1985, at A13, col. 1.
[138] *Id.*
[139] *Id.*

than four years ago. In October, 1981, Attorney General William French Smith pledged that he would "combat" what he called "transgression[s] . . . on the part of the judiciary."[140] Smith, like Meese, condemned "a process of subjective judicial policy making as opposed to reasoned interpretation."[141] Smith, like Meese, promised to "urge upon the courts more principled bases" for decision.[142]

Taken together, and at face value, these similar comments, made years apart by the two different Attorneys General in the same Administration, show uneasiness about the vagaries of constitutional interpretation. To Meese and Smith, and many others, the uncertainty and subjectivity of judicial policy-making can be cured only by resort to more objective principles. Lack of standards and guidelines creates unpredictability. Thus, the need for a jurisprudence of original intention.

However, we have to be careful, especially in constitutional law, to search for certainty and objectivity in original intent beyond the language actually used in the Constitution.[143] Original intent may appear to be objective, when in fact such supposed objectivity is mere illusion and a mask for equally subjective policy-making.

It is unclear whether Meese was proposing a new constitutional approach or merely expressing substantive disagreement with certain recent Supreme Court decisions. His "jurisprudence of original intention" is meant to replace "subjective judicial policy-making." But given the vast difficulties of determining original intent, the supposed objectivity of the original intent may be a delusion. If such objectivity is illusory, may not Meese's new jurisprudence be a disguise for equally subjective policy choices by Supreme Court justices?

Meese's speech has provoked great debate, much of which has revolved around Meese's possible hidden motives. In a rare public defense, Justice Brennan said, "[w]hile proponents of this facile historicism justify it as a depoliticization of the judiciary, . . . the political underpinnings of such a choice should not escape notice."[144] Although Meese's approach "feigns self-effacing deference to the specific judgments of those who forged our

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140 N.Y. Times, Oct. 30, 1981, at A22, col. 1.

141 *Id.*

142 *Id.*

143 J. ELY, DEMOCRACY AND DISTRUST 16-17 (1980).

144 N.Y. Times, Oct. 13, 1985, at A1, col. 1. Justice Stevens also disputed Meese. N.Y. Times, Oct. 26, 1985, at A1, col. 1.

original social compact," Brennan added, "in truth it is little more than arrogance cloaked as humility."[145] Likewise, one eminent journalist said "a jurisprudence of original intention . . . is not what Mr. Meese has in mind. No, what really interests the present Attorney General is not judicial philosophy but particular political results."[146]

Regardless of which side one finds oneself on in this debate, the debate itself demonstrates the utility of Weisberg's analysis. Indeed, insofar as it turns on Meese's candor, the debate is being carried out on Weisberg's terms. The debate over Meese's proposal has called into question his subjective aims. The debate fits nicely into Weisberg's analysis. That analysis puts Meese's proposal into a larger perspective.

## IV. SYMBOLISM

To understand fully *The Failure of the Word*, we must keep three things in mind. First, we must remember that Weisberg is a lawyer. Second, we must recall that lawyers, according to Weisberg himself, speak by indirection. Finally, we must recollect that Weisberg has written on Mallarmé. These three points help us to interpret Weisberg's book properly in all its many-layered richness. Of the three points, the only one now left to explore is the influence of Mallarmé. Mallarmé is the key that unlocks the deep secrets of *The Failure of the Word*.

Mallarmé was a poet of the Symbolist school in France in the late nineteenth century.[147] One of the primary aims of the Symbolists was to intimate things rather than to state them plainly.[148] Language must make use of symbols. Direct statement or description gave way to a succession of words and of images, which suggest the idea.[149] Some poets, wrote Mallarmé:

> take the thing just as it is and put it before us—and consequently they are deficient in mystery: they deprive the mind of the delicious joy of believing that it is creating. To name an object is to do away with the three-quarters of the enjoyment of the poem which is derived from the satisfaction of guessing little by little: to suggest it, to evoke it—that is what claims the imagination.[150]

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145 N.Y. Times, Oct. 13, 1985, at A1, col. 1.
146 Lewis, *Mr. Meese's Petard*, N.Y. Times, Nov. 4, 1985, at A19, col. 6.
147 M. BISHOP, A SURVEY OF FRENCH LITERATURE 286-88 (1955).
148 E. WILSON, AXEL'S CASTLE 20-21 (1959).
149 *Id.* at 21.
150 *Id.* at 20 (quoting S. Mallarmé). Symbolism is no stranger to American jurispru-

Mallarmé chose symbols as a sort of disguise for his ideas.

Weisberg writes in the Symbolist tradition, and like Mallarmé, the subject of his thesis, Weisberg suggests by way of symbols. In *The Failure of the Word*, Weisberg uses literature as a symbol for the law, and fictional lawyers as symbols of real lawyers. By writing about literature and literary lawyers, Weisberg suggests ideas to the reader so that he or she can create the connections that are not explicitly spelled out. In this sense, *The Failure of the Word* is itself a work of art.

As a result of Mallarmé's influence, Weisberg's book is richly textured and can be read on many levels. On its face, it is a first-rate book of literary criticism and analysis, filled with original insight. This is the manifest content of *The Failure of the Word*.

But the true success of Weisberg's book is gauged by its latent content. Underneath the literary analysis lies a subtle and suggestive essay on law. The full value and complete achievement of *The Failure of the Word* emerges only when it is viewed on both levels. On the deeper level, the book evokes ideas, concepts, and insights which add further meaning to the understanding of law.

## V. Conclusion

Weisberg offers us a new way of looking at law: with the sensitive and discriminating eye of the thinking artist. Throughout history artists have given us useful and penetrating insight. If they would train their sights on law, we might all gain further understanding. Weisberg's technique is extraordinarily fruitful, his concept of "ressentient legalism" is highly creative and useful. Weisberg's book may be the first step on the road to a new jurisprudence.

Weisberg is a brilliant law professor with a fertile and provocative imagination. With *The Failure of the Word*, his first book, he has shown himself to be in the forefront of the creative blending of law and literature. It is no accident that he is president of The Law and Humanities Institute. We look forward with great anticipation to reading more by Richard Weisberg, and to the

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dence. Frankfurter was fond of quoting Holmes' comment that, "[w]e live by symbols." H. Hirsch, *supra* note 75, at 148. Holmes went further: "what shall be symbolized by any image of the sight depends upon the mind of him who sees it." O. Holmes, Jr., *supra* note 38, at 87-91 (1913). Justice Robert H. Jackson, in the second flag salute case, echoed the same theme. "Symbolism is a primitive but effective way of communicating ideas. The use of [a symbol] is a short cut from mind to mind . . . . A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632-33 (1943).

"delicious joy" of trying to unlock more of his mysteries. His extraordinary performance belies the title of his book. His writing proves, not the failure, but the success of the word.