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Book Review

From Billy Budd to Buchenwald


Richard A. Posner†

The Failure of the Word is an elegant, learned, and highly provocative contribution to "law and literature," the budding field that seeks, by using the methods of law on literature and the methods of literary criticism on law, to explore the relationship between two ancient fields of learning. Bold in its theses but modest in its claims, lucid and compact in argumentation, unobtrusively but thoroughly scholarly, generous to predecessors and courteous to adversaries, The Failure of the Word is a civilized and attractive book by a former professor of comparative literature who is now a law professor and a leading figure in the law and literature movement.

On matters of form I have only two faults to find. The style is in some places too ornate and allusive to be easily digested. And the author of a book about books who wants to appeal to a general audience had better summarize the plots of the books he is discussing, which Professor Weisberg does not do. Weisberg assumes familiarity with the works he discusses. The unfamiliar reader is more likely to cast aside The Failure of

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the Word than to take the time necessary to repair the deficiencies of his education.


The Failure of the Word is about “ressentiment,” a word whose currency is due to Nietzsche. Ressentiment is the rancorous envy of the naturally weak toward the naturally strong. In Nietzsche’s thought as elaborated by Weisberg, weak men (“Untermenschen”) overcome strong men (“Übermenschen”) by spinning complex verbal and conceptual webs—the strong man being highly vulnerable to certain forms of attack because he is open, trusting, nonverbal, unsubtle. The three most important webs (the second and third being Weisberg’s variations on Nietzsche’s theme) are Christianity, legalism, and the translation of experience into words, which falsifies the experience. Professor Weisberg considers ressentiment a dominant theme of nineteenth and twentieth century literature, though holding that it originated much earlier; for example, he believes Hamlet personifies ressentiment. Weisberg also asserts that ressentiment is a principal cause of the extermination of European Jewry by the Nazis. Thus, he thinks that the legal profession, along with Christianity and intellectualism, bears an important share of the guilt for the Nazis’ crimes against the Jews.

The first quarter of the book explains the nature and history of ressentiment; the principal focus is on Nietzsche. The middle half consists of compendious discussions of six novels or novellas, by Dostoevsky (Crime and Punishment and The Brothers Karamazov), Flaubert (Salammbô and Sentimental Education), and Camus (The Stranger and The Fall). The last quarter is devoted to Melville’s novella Billy Budd, Sailor. Each of the seven works depicts characters consumed by ressentiment; in several, such characters overcome naturally strong men. Weisberg ties ressentiment to the Nazis principally through a two-page case note, written by a French lawyer in 1943, which considers the circumstances in which a person of mixed Jewish and non-Jewish “blood” should be classified as a gentile. Weisberg regards the note as the natural culmination of the ressentiment displayed by such fictional characters as Captain Vere in Billy Budd.

3. “Word” in Weisberg’s title may be an ironic echo of the Christian “Word” in the gospel according to St. John. On Weisberg’s equation of law and religion, see R. Weisberg, The Failure of the Word 116 n.7 (1984) [hereinafter by page number only].
4. Pp. 8–9, 27.
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II. THE TREATMENT OF LAW IN THE BOOK

The two novels by Dostoevsky that Weisberg discusses, plus *Billy Budd* and *The Stranger*, prominently feature legal proceedings; the central characters in both *Sentimental Education* and *The Fall* are lawyers; and both Dostoevsky and Flaubert had legal training. *Salammbô*—a novel about a slave revolt in ancient Carthage—has nothing to do with law but is included to illustrate Flaubert’s well-developed sense of ressentiment, everywhere displayed in that strange novel. Yet despite the multiple links between law and the books that Weisberg discusses, the subtitle of his book, the prominence given the French lawyer's note, and Weisberg's current profession of academic lawyer, he has relatively little to say about legal concepts and institutions, as distinct from the “legalistic” outlook that he ties to ressentiment.

He does, however, usefully emphasize certain traditional differences between Anglo-American and Continental criminal procedure that are important to an American reader’s understanding of works like *Crime and Punishment* and *The Stranger*. Of particular relevance, the examining or investigating magistrate in Continental law (the *juge d'instruction* in France, the Austrian *Untersuchungsrichter*, who figures in Kafka's *The Trial*, and their counterparts in other Continental legal systems) plays a role, which may not inaptly be described as “inquisitorial,” that places him in a different relationship to a suspect or accused from that of any official in Anglo-American criminal justice systems. It is a relationship more intimate, more paternalistic, more invasive of privacy, less structured. As Weisberg explains, this relationship provides a convenient vehicle for the exploration of character. But he does not pursue the implications of this insight—in particular, he does not consider the possibility that the criminal investigation in a Continental novel may be intended to serve a purely literary end rather than to comment on the legal system. He may be confounding metaphor with message.

The other emphatic intervention of Weisberg the legal professional comes in the discussion of *Billy Budd*. He asserts that serious procedural and substantive errors mar the drumhead court-martial and execution of Billy Budd. He says they could not be Melville’s errors, because Melville, though not himself a lawyer, was well versed in the law of the sea.

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Yet if there are legal errors in *Billy Budd* (a question I take up later), it is not at all certain that Melville would have been aware of them. He had served on an American warship for fourteen months beginning in 1842 and had a long-standing interest in naval discipline, but he may have known little about eighteenth century British law; and *Billy Budd*, though written between 1888 and 1891, is set in the British navy of 1797. Professor Weisberg also neglects the possibility that since Melville was writing a novella rather than a law review article he may have altered the law to suit his literary purposes. Nothing in the text of *Billy Budd* would alert a lay reader to the possibility of legal errors, and not even a lawyer reading it (and it was not written only or mainly for lawyers) would find any such clues unless he happened to be a specialist in eighteenth century British naval law. In order to make a point about the novella (a startling one, too, as we shall see), Professor Weisberg has gone outside the novella's frame of reference. What he has done is comparable to arguing that Macbeth would be a Shakespearean hero rather than villain if modern historical research showed that Duncan had stolen the throne of Scotland from Macbeth's father or had raped Lady Macbeth.

Other than in respects I have mentioned, Professor Weisberg's book is about law and lawyers only in the sense in which a certain conception of law might be thought to signify ressentiment and hence injustice. It is the sense familiar from *The Merchant of Venice*, where Shylock's invocation of legal technicalities is opposed to Christian love symbolized by Antonio and the spirit of equity symbolized by Portia. The legalistic cast of mind can indeed be exasperating and lead to injustice, but does it really pave the way for genocide? Although Professor Weisberg thinks so, the idea is sufficiently outré to require some evidence, but he offers virtually none. In fact, the opposite proposition could be argued from his own analysis of *Billy Budd*: for if Weisberg is right about eighteenth century British naval law, *Billy Budd* would not have been executed—not so soon, anyway—had Captain Vere been a stickler for legal niceties. The insinuating style of the European examining magistrate similarly illustrates not the operation of legal technicalities but the power of informal procedures. A criminal justice system such as the American, which throws greater protections (many highly legalistic) around the criminal suspect, would have made it more difficult for the examining magistrate in *Crime and Punishment* to wheedle a confession out of Raskolnikov. "Legalism" is just a

8. See infra text accompanying notes 34–38.
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disparaging term for the rule of law, to whose social function Weisberg seems oddly indifferent.

### III. The Murderer as Hero

Behind the concept of ressentiment lies an opposition between two human types—which Nietzsche called Übermensch and Untermensch but which, more neutrally, might be called “natural man” and “social man”—that has animated much of Western literature. The former, whose original representative is Achilles in the *Iliad* (Nietzsche was a distinguished classicist), is the individualist *par excellence*, whose boundless ego and devotion to honor put him on a collision course with the herd of ordinary men with their supine conformity to social norms. Homer depicts Achilles’ placing his own honor entirely above the welfare of the Greek cause in the Trojan War as admirable rather than (as in a modern perspective it might seem) treasonable.\(^1\) The Greek and Elizabethan tragedies temper admiration for unbounded individualism with an awareness of the competing claims of society and often present the great protagonists as evil (Macbeth) or greatly deluded (Oedipus, Lear, Brutus, Othello). In explicitly Christian literature, such as *The Divine Comedy* and *Paradise Lost*, the social virtues receive their most powerful literary celebration and the great individuals are consigned to Hell. In the Romantic period the hero makes a comeback: Compare, for example, Marlowe’s Faustus with Goethe’s Faust, and consider the explicit inversion of conventional values in the poetry of Blake: The natural man is good, society repressive and evil. This theme receives much play in twentieth century literature as well, as in Yeats’s *Crazy Jane* poems or in the frankly immoralist novels of Gide, Genet, and Céline.

Philosophical advocacy of the replacement of Christian values with pagan ones is found in Rousseau, of course, and most clearly in Nietzsche, who pushes the romantic cult of the hero to its furthest extreme. The poet Blake, a Christian albeit a heretic, is content to inveigh against institutional Christianity (for example, in *The Garden of Love* or *The Marriage of Heaven and Hell*); but Nietzsche inveighs against Christianity in its purest New Testament form and against the Jews as the inventors of Christianity.

Because of the importance that Professor Weisberg assigns to Nietzsche in formulating the system of values that Weisberg sets up in opposition to Nazi anti-Semitism, it is well to recall Nietzsche’s view of the role of the Jews in the overthrow of that very value system:

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10. *On Homeric values, see A. Adkins, *Merit and Responsibility: A Study in Greek Values*, ch. 3 (1960).*

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[T]he priests are the most evil enemies of powerful physicality, a flourishing abundant, even overflowing health, together with that which serves to preserve it: war, adventure, hunting, dancing, war games, and in general all that involves vigorous, free, joyful activity—but why? Because they are the most impotent. It is because of their impotence that in them hatred grows to monstrous and uncanny proportions, to the most spiritual and poisonous kind of hatred. The truly great haters in world history have always been priests. . . . All that has been done on earth against "the noble," "the powerful," "the masters," "the rulers," fades into nothing compared with what the Jews have done against them; the Jews, that priestly people, who in opposing their enemies and conquerors were ultimately satisfied with nothing less than a radical revaluation of their enemies' values, that is to say, an act of the most spiritual revenge. . . . [W]ith the Jews there begins the slave revolt in morality: that revolt which has a history of two thousand years behind it and which we no longer see because it—has been victorious.\[11\]

Admittedly this passage does not give a complete view of Nietzsche's attitude toward the Jews: Alongside it must be placed passages of almost lyrical philo-Semitism\[19\] together with vitriolic denunciations of anti-Semitism and of German nationalism. Although Nietzsche was the source of those notorious Nazi expressions Übermensch and Untermensch, he did not use them with any racial connotations, nor did he advocate genocide, slavery, or the rule of a master race.\[18\] Often, indeed, he used the expressions metaphorically, to denote warring elements within human nature—one vital and healthy, one sickly and repressive—rather than to represent different people. As Professor Weisberg stresses, Nietzsche admired much that is in the Old Testament and reprobated the Jews chiefly for having invented Christianity.

Yet the fact remains that Nietzsche repeatedly asserts that the Jews are ultimately responsible (though perhaps not culpably so) for virtually everything that is bad in the modern world and repeatedly advocates pagan values in opposition to the gentler Christian ones.\[14\] One may doubt

11. F. Nietzsche, supra note 2, at 33–34. There is much else in this vein in Nietzsche's writings: for example, "Israel, with its vengefulness and revaluation of all values, has hitherto triumphed again and again over all other ideals, over all nobler ideals." Id. at 35.
12. In particular, see F. Nietzsche, Beyond Good and Evil ¶ 251–52 (W. Kaufmann trans., 1966); see also pp. 15–16. Yet in the same work Nietzsche speaks of the Jews as "a people 'born for slavery' " (quoting Tacitus approvingly) and says once again that "they mark the beginning of the slave rebellion in morals." F. Nietzsche, supra, at 195.
14. As in: "You say it is the good cause that hallows even war? I say unto you: it is the good war that hallows any cause." F. Nietzsche, Thus Spake Zarathustra 47 (W. Kaufmann trans. 1966). On the matter of Nietzsche and the Jews, Danto remarks judiciously that it is hard not to suppose that [Nietzsche] meant to imply that the Jews were really natural inferiors and enemies of life if the slave morality itself is life-contrary—which he often enough
whether Nietzsche, properly understood, is the antidote to Nazism, or, indeed, a guide to resolving any ethical issues, including the issue of crime, an issue important to the legal system in general and to several of the works of literature that Weisberg discusses.

Nietzsche's advocacy of turning the moral order upside down and replacing the "slave morality" of the Jews and Christians with the pagan amorality of the Homeric heroes did not extend to revaluing that most fundamental social taboo, the taboo against murder. However, several of the works discussed approvingly in The Failure of the Word seem, at least as interpreted by Weisberg, to take Nietzsche a step further and to depict rancorous Untermenschen repressing the noble, inarticulate—but also homicidal—Übermensch. Raskolnikov, the protagonist of Crime and Punishment, is an aspiring Übermensch who, to express his defiance of conventional morality, commits two murders, one of which would be first-degree murder in our system. Meursault, the protagonist of The Stranger, kills an Arab apparently for no reason except that it is a hot day at the beach: second-degree murder. (The Arab had drawn a knife, but Meursault was not in apprehension of being attacked, and after shooting the Arab once and pausing, he shot him four more times.) Billy Budd strikes a petty officer, killing him, but without intent to kill: manslaughter (at least in civilian law—a pertinent qualification).

In discussing these works, Weisberg at times expresses a complacent—even, it seems, an approving—attitude toward crime. He says that "The perception of the criminal act as a declaration of freedom from resentment is a fundamental contribution of modern literature,"17 "the criminal is not prone to resentment";18 "[a]lmost diametrically opposed to the case of the criminal is that of the intellectual."19 Meursault rebels against an "arbitrary value system";20 he has "his own system of what are, on balance, positive values. Meursault stands, as an individual, for

15. His complaint about Christian values is not that they repress homicidal impulses, but that they are "anti-life." He would have us compare Odysseus, who at the opening of the The Odyssey rejects immortality in a reasonable facsimile of paradise on the island of Ogygia to fight his way back to rocky Ithaca and middle-aged Penelope, with the medieval Christians who viewed our life on earth as merely an unpleasant way station to eternity.

16. See infra notes 33–47 and accompanying text.
17. P. 27.
18. Id.
20. P. 119.
the total rejection of verbal sentimentality. As such, he partakes of the free flow of human existence with honesty, if not perfect Cartesian rationality."21 (Is homicide merely a lapse from perfect Cartesian rationality?) Weisberg takes the witnesses at Meursault's trial to task for "fail[ing] to convey the benignity of the defendant's moral system."22 Criticized for "almost willfully ignoring" what Meursault had actually done,23 Weisberg acknowledges that among a group of fictional characters who include both Meursault and one character falsely accused of murder (Dmitri Karamazov), "[n]one, taken alone, is meant to be a sterling moral paradigm."24 But are we to understand from this that there is no moral difference between a murderer and a nonmurderer, that murderers can be moral paradigms but not "sterling" ones, or that a group dominated by murderers could be an assemblage of sterling moral paradigms?

Has not Professor Weisberg committed the very sin he denounces—the wordy evasion of reality? What people (fictional people, granted) do seems not to interest him. In discussing how the examining magistrate in *Crime and Punishment* uses lawyer's wiles to entrap Raskolnikov into confessing his crimes, Professor Weisberg compares Raskolnikov's plight to that of Joseph K. in Kafka's *The Trial*,25 neglecting (as he did in lumping together Dmitri Karamazov with Meursault) that Raskolnikov has murdered two people while Joseph K. never even discovers what crime he is accused of. Weisberg calls Billy Budd "an innocent man,"26 a "joyful innocent"27—who struck a lethal blow to a superior officer in a warship during wartime. To Professor Weisberg the notion of innocence is not a legal notion. The legally guilty are morally innocent in his eyes; the law and its agents, being repressive, are morally guilty.

Weisberg overlooks the fact that law is not merely, or mainly, repressive. Not only is much law enabling rather than prohibiting—examples are contract law, which allows people to make binding contracts, and property and corporate law, which facilitate investment—but even the "repressive" part of law serves human liberty. A world in which there were no security against the depredations of thieves, rapists, and murderers would be a world without freedom. Dostoevsky and Melville are more sensitive to this point than is lawyer Weisberg.28 The reader of *Crime

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21. P. 120.
22. Id.
25. P. 51.
27. P. 162
28. Camus is another matter: Meursault is in the Gallic tradition of immoral protagonists appar-
and Punishment is intended to be horrified by Raskolnikov—and not because he eventually displays remorse, and thus fails to live up to his self-billing as Übermensch. As for the examining magistrate in that novel—to Weisberg a typical embodiment of ressentiment who "coerce[s] Raskolnikov into confession and moral conformity"—his duplicity in tricking out a confession from Raskolnikov is standard, albeit dramatized, interrogative practice likely and apparently intended to be accepted as such by the readers of Crime and Punishment.

Professor Weisberg owes it to his readers to confront more directly the question whether they should condone the killings depicted in the works he discusses. His book is about law and morals as well as about literature, and even if all the killers were approved of within the fictional universe that they inhabit, which they are not, it would not follow that we should approve of them. Weisberg's concluding apology for Meursault lays Weisberg open to the accusation of not taking crime seriously:

When the defendant [Meursault] declares that "the sun" produced the homicide, we know that within a system based on openness to sensual experience, the natural environment on the day of the murder—coupled with his slight drunkenness from the luncheon wine, a condition never revealed by the legal ratiocination—did in effect rob him of free will. Indeed, in an American court, Meursault's lack of real premeditation would have formed the basis of a viable defense; with the "personality" issue virtually inadmissible there as well, Meursault might have received a relatively light sentence for manslaughter.

Notice how in this passage the nature of Meursault's act is obscured by fuzzy language ("in effect," "real," "viable") and by failure to mention that Meursault had shot his (unnamed, unFrench, depersonalized) victim five times and never expressed anger or remorse. I would prefer not to share a beach with Meursault.
IV. LEGALITY AND JUSTICE IN BILLY BUDD

Professor Weisberg’s *pièce de résistance* is a strikingly unconventional analysis of *Billy Budd*. To recapitulate the story briefly, Billy Budd has been impressed onto a British man-of-war during the war between Britain and the French Directory (which ruled France between the Revolutionary regime and Napoleon). The British navy has recently experienced a serious mutiny and everyone is on the lookout for a recurrence, especially among impressed seamen. For reasons that Professor Weisberg persuasively explains in terms of ressentiment, a petty officer, Caggart, who is in charge of security on the ship, decides to frame Billy. Caggart tells Captain Vere that Billy is a mutineer. Vere doesn’t believe him, and summons Billy to confront his accuser in the captain’s cabin. Billy, who suffers from a speech impediment, is unable to respond to Caggart’s accusations. Vere puts his arm on Billy’s shoulder in a fatherly way and tells him that there is no hurry about speaking, but the enraged Billy strikes Caggart dead with a single blow. Vere convenes a drumhead court-martial, the members of which are inclined to leniency until Vere reminds them that striking one’s superior in wartime is a capital offense and that any leniency might encourage mutiny. They reluctantly sentence Billy to death and he is hanged the next morning—his last words being, “God save Captain Vere.” Vere, fatally wounded in a battle shortly afterward, dies whispering “Billy Budd.”

There are three obstacles to fitting *Billy Budd* into Weisberg’s mold, in which Billy is the noble savage, Vere as well as Caggart is consumed by ressentiment, and the execution of Billy is both unjust and illegal. Melville portrays Billy Budd as a stand-in for Christ, and Caggart for Satan. Vere is portrayed as a man of humanity and moral courage. And Melville depicts Billy Budd as being lawfully found guilty of a capital offense in circumstances where leniency would be risky because of the recent mutinies and because of Caggart’s position as the ship’s chief of security.

Professor Weisberg meets the third point, as I said earlier, by arguing that the court-martial was irregular. The argument is developed at length and with considerable ingenuity, but the tone is one of special pleading; for example, Weisberg suggests that Caggart was not “in the execution of his office” when Billy struck him. Weisberg’s argument that the death penalty is excessive for Billy Budd’s offense is refuted by

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33. LaRue, in his review of *The Failure of the Word*, supra note 9, criticizes Weisberg’s reading of *Billy Budd* on grounds parallel though not identical to my own. Other reviewers, however, including Page, supra note 9, and Heinzelman & Levinson, supra note 23, accept Weisberg’s reading.


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the historical record: In the eighteenth century British navy, a seaman who struck a superior officer was likely to be executed. Most of the supposed procedural errors in the court-martial simply reflect the difference between the fairly elaborate procedures required in regular courts-martial and the informality of a drumhead court-martial. Weisberg argues that under English law Vere should have waited until the ship rejoined the fleet before proceeding against Billy and then asked the admiral commanding the fleet to convene a court-martial; the drumhead court-martial was proper only if Billy’s striking Claggart could be construed as mutinous. But there is authority that striking a superior officer in wartime was considered mutinous per se.

More important, there is no hint in the text of *Billy Budd*, nor could the reader be assumed to know from other sources, that there is anything illegal about Vere’s mode of proceeding—harsh, perhaps horrible, but not illegal. It is Melville as narrator, not Vere, who tells the reader that the drumhead court-martial was proper in the circumstances. Moreover, it is a novelistic imperative that Billy Budd should be tried by a drumhead court-martial. A delay to rejoin the fleet, followed by a shifting of the action to a court-martial in which Vere would play no role, would have complicated and blurred the plot and postponed the dénouement to no artistic purpose.

The officers of the drumhead court-martial do exhibit misgivings, but not on legal grounds; their doubts arise because Billy Budd is such an attractive person and because the provocation (in a layman’s, not a lawyer’s, sense) for striking Claggart was so great. The opposition portrayed is between the sympathies of subordinate officers and the responsibilities that rest on the captain’s shoulders alone. Professor Weisberg’s attempt to entangle Vere in a net of legal technicalities is an ironic commentary on the theme of *The Failure of the Word*, which is that lawyer figures entangle the inarticulate in such nets.

36. For a detailed survey of cases, see 2 J. MacArthur, *Principles and Practice of Naval and Military Courts-Martial* 419–51 (4th ed. 1813). Illustrative is the case of seaman John Cumming, tried in 1784 for striking the boatswain of his ship, and sentenced to be hanged at the fore-yardarm, with no recommendation for mercy, even though so far as appears he did not kill the boatswain. See id. at 437. Professor Weisberg casts far afield in his effort to show that Billy Budd would not have been executed in the British navy of 1797. His main source, see p. 152, is a pamphlet that contains a brief undocumented reference to leniency in Cromwell’s navy, more than a century earlier.


38. “In wartime on the field or in the fleet, a mortal punishment decreed by a drumhead court—on the field sometimes decreed by but a nod from the general—follows without delay on the heel of conviction, without appeal.” H. Melville, *Billy Budd, Sailor* 114 (H. Hayford & M. Seals eds. 1962).
Weisberg attempts to overcome the second obstacle, Melville’s symbolic depiction of Billy Budd as Jesus Christ, by inverting the Christian imagery in *Billy Budd*. Acting the role of devil’s advocate in almost a literal sense, Professor Weisberg argues that Billy Budd is Nietzsche’s Übermensch and Claggart is Jesus Christ (“Claggart-Christ,” Weisberg calls him).\(^3\) Billy does have many of the qualities of natural man—robust health and high animal spirits, heedlessness of the future (he doesn’t worry about being impressed onto a warship in wartime), inarticulateness (symbolized by the speech impediment that conveniently silences him at the critical moment), and primal rage. But he is also associated in the novella with Adam before the Fall—Christ is frequently referred to in Christian literature as “the second Adam”—and with the Lamb of God; heavenly portents attend his execution; and he forgives Vere. Claggart is thoroughly loathsome; the characteristic metaphor that Melville uses of him is “serpent.” He is not a symbol of Jesus Christ, but of Christ’s opposite, Satan.

Professor Weisberg further inverts Melville’s fictive world by making Vere a villain. Mirroring changes in the political culture of intellectuals, the traditional view of Vere as a hero has, as Professor Weisberg notes,\(^4\) been challenged in recent years by left-wing literary critics (of whom Professor Weisberg is not, however, one). Leftists tend to dislike capital punishment (especially when meted out in Western nations), military discipline, military officers—the military, period—and authority generally. But Professor Weisberg goes them one better: accusing Vere not only of twisting military law to obtain a death sentence against Billy Budd, but of doing so out of rancorous envy of Admiral Nelson. Weisberg’s thesis is that Vere, though a competent officer, is no Nelson; that Vere resents the comparison; and that because Nelson and Billy Budd share the quality of perfectly uniting thought and action, Vere identifies one with the other and by condemning Billy expresses his envy of Nelson.

I can find no basis for any of this in the novella. Melville presents Vere to the reader with high accolades:

>a sailor of distinction even in a time prolific of renowned seamen . . . [Vere] had seen much service, been in various engagements, always acquitting himself as an officer mindful of the welfare of his men, but never tolerating an infraction of discipline; thoroughly versed in the science of his profession, and intrepid to the verge of temerity, though never injudiciously so.\(^5\)

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To take Vere down a peg, Professor Weisberg quotes the following: "Ashore, in the garb of a civilian, scarce anyone would have taken [Vere] for a sailor . . . ." But Weisberg omits the words that follow: "more especially that he never garnished unprofessional talk with nautical terms, and grave in his bearing, evinced little appreciation of mere humor . . . . But in fact this unobtrusiveness of demeanor may have proceeded from a certain unaffected modesty of manhood sometimes accompanying a resolute nature . . . ." True, Vere is no Nelson, but neither was Nelson in 1797, for that was before the battles of the Nile, of Copenhagen, and of Trafalgar—the victories (together with St. Vincent, which came earlier) for which Nelson is remembered.

The literary function of the apostrophe to Nelson in Chapter 4 of Billy Budd is not to pull down Vere and may even be to suggest what he might have become had he not fallen in action shortly after the trial and execution of Billy Budd. For someone remarks of Vere, ""Spite the gazettes, Sir Horatio [Nelson] is at bottom scarce a better seaman or fighter"" than Vere, albeit Vere is ""pedantic."" Maybe Vere dies because he committed an impious deed; maybe one does not kill Christ and live. Or maybe Vere dies just so that Melville can show us (through Vere's dying words) the impact of doing one's duty on a sensitive person. Vere is a tragic figure, doing his duty in impossible circumstances.

Professor Weisberg is right in seeing in Billy and Vere the contrast between natural and civilized man (a contrast sharpened by the emphasis placed on Billy’s stammer and lack of education and on Vere’s bookishness—Vere is no rough-and-tumble old salt), but wrong in thinking that Melville evaluates the contrast as Nietzsche might have done. Vere is in sole command of a major warship in a major war. Melville regards this as an awesome responsibility. When the most popular sailor on board kills the most hated petty officer in circumstances of provocation which do not, under the Articles of War, extenuate the capital nature of his offense, Vere—a sensitive man, not a martinet—finds himself torn between private feeling and public responsibility, and feels compelled to choose the latter.

Even if Melville in Billy Budd "is wondering whether youth, feeling, and love can survive into the drabness of a civilization dominated by material and organizational values;" he presents Vere as "a very superior

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42. Id. (quoted in part at p. 168).
43. H. Melville, supra note 38, at 60.
44. Id. at 63.
45. Reich, The Tragedy of Justice in Billy Budd, 56 Yale Rev. 368, 388–89 (1967). For other discussions, see Domnarski, Law-Literature Criticism: Charting a Desirable Course with Billy Budd, 34 J. Legal Educ. 702 (1984); Johnson, Melville's Fist: The Execution of Billy Budd, in The Critical Difference: Essays in the Contemporary Rhetoric of Reading 79 (E. Johnson
and very human man, ”46 “faced with an awful choice.”47 Billy Budd is sufficiently ambiguous to enable the reader to shade the meaning according to whether he sympathizes more with Nature personified by Billy Budd or Culture and Society personified by Captain Vere, but it does not fairly permit the reading proposed by Professor Weisberg.

V. THE HOLOCAUST

The most ambitious and least convincing of Professor Weisberg's theses is that the attitudes he finds in the examining magistrates in Crime and Punishment and The Stranger and in Captain Vere in Billy Budd lead up to and explain the Nazi experience, and in particular the Nazis' treatment of the Jews. I am unconvinced that the punishment of criminals paves the way for Nazism48 or that the spiritual distance between Nietzsche and Nazism is greater than that between Christianity (on which so many of our legally enforced social norms ultimately rest) and Nazism. It is true that Nietzsche disliked anti-Semites and German nationalists and that his work as a whole is perhaps better understood as a protest against conformity than as an invitation to war and domination. It is also true that the roots of European anti-Semitism are Christian, that conformity and submission played an important role in Nazism, that there was collaboration between organized Christianity and fascist regimes,49 and that many individual Nazis were consumed by ressentiment.60 Nevertheless, the celebration of barbarism and the condemnation of Judeo-Christian values as worthy only of slaves were important strands in National Socialist ideology, while, conversely, Judeo-Christian values have nothing in common with National Socialist ideology. I am not persuaded that “the passivity of [Christ's] religion’s followers has often allowed, and sometimes encouraged, the dominance of injustice on earth during the two mil-

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46. Reich, supra note 45, at 379.
47. Id. at 381.
48. On the question whether all punishment reflects ressentiment, one can quote Nietzsche against Weisberg:

There is a point in the history of society when it becomes so pathologically soft and tender that among other things it sides even with those who harm it, criminals, and does this quite seriously and honestly. Punishing somehow seems unfair to it, and it is certain that imagining “punishment” and “being supposed to punish” hurts it, arouses fear in it. “Is it not enough to render him undangerous? Why still punish? Punishing itself is terrible.” With this question, herd morality, the morality of timidity, draws its ultimate consequence.

F. NIETZSCHE, supra note 12, ¶ 201, at 114.
49. Weisberg, however, exaggeratedly describes this collaboration as “the participation of all Christian institutions in an unthinkable victimization of innocents.” Pp. 69–70.
50. A Goebbels, for example, with his club foot, small stature, and warped intellectuality, could be the very archetype of the Nietzschean Untermensch.
From *Billy Budd* to Buchenwald

lennia [sic] of Christian culture,"\(^{51}\) or that "[t]he susceptibility of contemporary Western culture to ressentiment stems from the freedom from restrictions upon advancement that a democracy theoretically grants to any individual or group"\(^{52}\)—a sentence that precedes the celebration of criminality as liberating that I quoted earlier.\(^{53}\) I am not persuaded that ressentiment is "modern Western culture's own deepest malaise"\(^{54}\) or that "the source of modern literature's holocaustic predictions and postmortems [is] in the futile wordiness of legalistic protagonists."\(^{55}\)

Perhaps because ressentiment and hence anti-Semitism are associated in Professor Weisberg's mind with Christianity and legality, forces not influential in Nazi Germany (to put it mildly), he is led to condemn French anti-Semitism more strongly than German. His symbol of ressentiment in World War II is the Vichy lawyer's case note, not anything written by a German. Weisberg says that "France reveled in the racial possibilities brought onto its territory by the foreign conquerors. . . . Western egalitarianism and liberality embraced racial ostracism and ultimate genocide more effusively than had the still seemingly neobarbarous and deeply romantic Germanic states."\(^{56}\) Although there was much anti-Semitism in France before and during World War II, the proposition that France would have tried on its own, as it were, to exterminate the Jews or that it embraced genocide "more effusively" than Germany is sufficiently startling to require more than assertion. The fact that a number of Frenchmen fell in with and abetted the Nazis' schemes is unforgivable but also understandable considering that France was a conquered country.

Elsewhere Weisberg has provided evidence that the Vichy racial laws were indeed more severe, and more severely administered, than the Nazi laws.\(^{57}\) But overzealous collaboration with a conqueror should not be equated with the voluntary adoption of genocidal policies. And the principal source for Weisberg's discussion of Vichy France's racial policies refutes the suggestion that France behaved more viciously than Germany. Three-fourths of the Jews in France (many of them refugees from Nazism) survived the war, and the Vichy government tried to protect French nationals who were Jewish from the Nazis and, more generally, to dissociate itself from the "Final Solution."\(^{58}\) The behavior of the Vichy offi-

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51. P. 66 (emphasis added) (footnote omitted); *see also* p. 203 n.7.
52. P. 27.
53. *See supra* text accompanying note 17.
54. P. xiii.
55. *Id.*
56. P. 2.
57. *See Weisberg, Avoiding Central Realities: Narrative Terror and the Failure of French Culture Under the Occupation,* 5 HUM. RTS. Q. 151, 161 (1983) ("French law, and the executive and police authority, effectively outdid the Germans at their own racial game." (footnote omitted)).
cials was on the whole neither courageous nor admirable, but it was not comparable to the enormity of the Germans' behavior.

Let us take a closer look at the French lawyer, Joseph Haennig, whose case note "leaves us gasping." In Professor Weisberg's eyes a French lawyer who is also a "literary lawyer" is the very embodiment of resentment. Yet all we know about Haennig is that he was a Parisian lawyer who wrote a two-page note entitled, "What Means of Proof Can the Jew of Mixed Blood Offer to Establish His Nonaffiliation with the Jewish Race?" The note, about a decision of a court in Leipzig, suggests that the decision might provide guidance for interpreting the Vichy racial laws, which were modeled on Hitler's Nuremberg laws. Haennig obsequiously commends the Leipzig court for "a largeness and objectivity of spirit" in allowing a Jewish woman of mixed blood to prove nonaffiliation with the Jewish "race" without having to show affiliation with a Catholic or Protestant denomination. He points out that "[t]he Court affirmed the lower court judge's view that she had only attended [Jewish] New Year's services in order to preserve family peace. The view that there was no sufficient tie to the Jewish community in this case was thus deemed correct." Haennig concludes that the court's "analysis indicates a possible route, without risk of distorting the statute writers' intention, and in conformity with the principles which underlie the racial statutes and cases."

Is this the work of a man guilty of "fatal evasiveness"—a man whose behavior raises questions extravagantly described as "more potentially catastrophic in their resolution than those posed by the leaders of European repression and racism?" Without knowing more about Haennig, I hesitate to say that it is. Although the note contains no hint of disapproval of the racial laws, it would not have been published if it had. The note does not praise the laws. The only thing it praises is a German decision that saved a woman who was half-Jewish from the gas chamber. Maybe the note saved some French half-Jews. Maybe it saved more lives than if Haennig had thrown up his law practice and joined the Resistance, for which he may have been neither physically nor emotionally suited (how old was he?). Maybe he made his best contribution to humanity by writing this case note for which he has been vilified posthumously. Maybe he thought the racial laws grotesque but knew it would not help to let his feelings show in the note. What would Professor Weisberg have had Haennig do?

59. P. 7.
60. P. 117.
61. P. 181.
62. P. 182.
63. Id.
64. P. 1.
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From Weisberg’s treatment of Haennig, can it not be argued that *The Failure of the Word* exemplifies as well as denounces ressentiment? Can one not find the symptoms of a disembodied, legalistic intellectualism in Weisberg’s bookish conceit that events like the Holocaust have primarily intellectual causes and are foretold by novelists, in his propensity to euphemize barbarism—in particular the murder committed by Meursault—without Haennig’s excuses, in his hectoring prosecution of Captain Vere in the dock of history, and in his lack of sympathy for people like Vere forced to exercise power and make painful choices in the course of national defense? Such paradoxes asserted or implied in *The Failure of the Word* as that Nazism was the product of too much head and too little heart, that *Mein Kampf* is in the line of descent from the *Sermon on the Mount*, that the Judeo-Christian ethical tradition and the Western legal tradition are stifling, and that people who investigate and punish murders are on the same moral plane as the murderers, bring to mind some words of George Orwell: “One has to belong to the intelligentsia to believe things like that: no ordinary man could be such a fool.”

And yet to end this review on a negative note, as if the only noteworthy parts of *The Failure of the Word* were the parts that seem wrongheaded, would give insufficient emphasis not only to the strengths that I mentioned at the outset but to the many shrewd observations that the book makes about the works it discusses and to the fact that it sustains at least one of its major theses by showing that Nietzsche’s thought provides a fruitful perspective from which to examine a diverse group of nineteenth and twentieth century novels. Moreover, Professor Weisberg advances his heterodox theses in so civilized, entertaining, forthright, good-natured, and stimulating a manner that their truth or falsity becomes almost a detail. The failings of *The Failure of the Word* are the kind that fertilize debate and by doing so advance the search for truth.

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65. “Little ween the snug card players in the cabin of the responsibilities of the sleepless man on the bridge.” H. Melville, supra note 38, at 114.
67. G. Orwell, *Notes on Nationalism*, in 3 The Collected Essays, Journalism and Letters of George Orwell 361, 379 (S. Orwell & I. Angus eds. 1968). The “that” Orwell was referring to was the rumor in left-wing English intellectual circles in World War II that American troops had been sent to Europe not to fight the Germans but to crush an English revolution.