



AMERICAN GUY

Masculinity in
American Law
and Literature

Edited by SAUL LEVMORE and MARTHA C. NUSSBAUM

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J. Harvie Wilkinson III is a judge on the U.S. Court of Appeals for the Fourth Circuit. A prominent and influential judge and legal thinker, he is the author of several books, including, most recently, *Cosmic Constitutional Theory* (2012). He has often been mentioned as a potential Supreme Court nominee.

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Douglas P. Woodlock has been a judge of the U.S. District Court of Massachusetts since 1986. A newspaper reporter before law practice in both the public and private sectors, he told an *Esquire* columnist shortly after appointment to the bench that the difference between being a reporter and a judge is that "as a reporter, I used to go chasing people's stories," but as a judge "people bring their stories to me." In the headline to a profile twenty-five years later, the *Boston Globe* reported, "On bench, Woodlock taps life experiences."

...an American, not by sheer striving, not by being a Jew who invents a famous vaccine or a Jew on the Supreme Court, not by being the most brilliant or the most eminent or the best. Instead—by virtue of his isomorphism to the Wasp world—he does it the ordinary way, the natural way, the regular American guy way.

—PHILIP ROTH, *American Pastoral*

Introduction

THE AMERICAN GUY IN LAW AND LITERATURE

Saul Levmore and Martha C. Nussbaum



WHEN JOHN WAYNE rides into town, the film's audience knows to expect rugged individualism rather than legal arguments or other niceties. For many years, the iconic American man was self-sufficient, at home on the frontier, and more often than not a man of few words—and Wayne is identified with roles in which he created or reflected these expectations. Conformity and social skills have not been required of these iconic men, except perhaps for a capacity to hold one's liquor. In contrast, the American Guy's British counterpart, and his cultivated American imitator, was expected to display wit and charm over dinner following a successful hunt or the command of a seagoing vessel by day. With the shrinking of the American frontier, the urban strongman, well represented by Clint Eastwood, took his place on the screen. He often operated where law had failed to maintain order, and his individualism was something of a brief for libertarianism. These contours leave a great deal of room for infilling, and it is here that both law and literature come into play.

Such iconic men offer models of heroic nonconformity, while the details of most legal systems tug in the opposite direction. Law takes free expression seriously, to be sure, but a good deal of law is about conformity; there is a right way to address a court, to accommodate disabilities, to run a factory, and to seek investors. Moreover, rugged individualism, and even self-sufficiency, is constrained by its own conditions. To the extent that law or literature aspires to influence and operate on a society, it must identify qualities that can be scaled up from a model individual. A community can function with a few individualists, but too many citizens of this type is virtually

a contradiction in terms, and especially so for an urbanized population. Similarly, though less dramatically, the useful icon cannot be celebrated for mere leadership, because there is room for only so many leaders. Theodore Roosevelt is known less for his leadership qualities than for his grit and determination to overcome perceived weakness. Even George Washington, another “manly” president, is heralded for his honesty and modesty at least as much as for his qualities as a warrior. Other iconic men are cited for stoicism or for adherence to a code of honor. These are characteristics that are found in the few but can be nurtured in the masses. Unsurprisingly, the contributions in this volume explore manly attributes that could or should be found in every man. They do so in part because they draw on sophisticated literature rather than merely stories or films with popular appeal. The pure hero is the stuff of pulp fiction; ambitious authors prefer to develop characters and to examine their emotions and the difficult choices they make.

This volume is the third in a series of law-literature investigations at the University of Chicago Law School, a school where the “law-literature movement” arguably got its start with the early work of James Boyd White¹ and the pathbreaking book of Judge Richard A. Posner, now in its third edition.² The previous volumes in this series are *Shakespeare and the Law: A Conversation Among Disciplines and Professions*, edited by Bradin Cormack, Martha C. Nussbaum, and Richard Strier (University of Chicago Press, 2013) and *Subversion and Sympathy: Gender, Law, and the British Novel*, edited by Martha C. Nussbaum and Alison L. LaCroix (Oxford University Press, 2013). All three collections derive from conferences but add new material, and all are part of an attempt to reinvigorate the field known as “law and literature” by bringing a wider range of methodological and disciplinary perspectives to bear than are usually found in legal scholarship in this area. We shall not repeat the general observations about the history of the movement made in the introductions to the earlier volumes. It suffices to say that literature and law illuminate one another in a variety of ways. Most pertinent to the present volume is the thought that works of literature depict and often criticize social norms and stereotypes. This critical gaze can lead to questions about legal norms and to a fuller understanding of the role played by law in society. Here, literature is a means of reflecting on the role, and even the gender, of law as it operates on a society that often glamorizes the manly man who is outside the law.

Manliness is a topic ripe for a law-literature investigation for several reasons. First, some prominent legal concepts employ norms like “average man” and “reasonable man.” Homicide doctrine, for example, holds open the possibility of obtaining a manslaughter rather than a murder conviction if the defendant can show that he acted “in the heat of passion,” and that his response to an “adequate provocation” was that of the “reasonable” or “average” man. The doctrine is influenced by a

frontier-inspired view of the manly man as one who responds to insults with force. Another gendered area of law is the idea of the home as one's castle: one is entitled to use violence in defense of one's home, even though similar violence outside the home would not be protected by a self-defense claim. Family law is replete with gendered norms, and an investigation of these leads naturally to literature, which depicts, dissects, and evaluates the costs they impose on individuals.

Literature and law, then, in conversation with one another, do more than attend to attributes that can be scaled up from the singular individual to men at large. They often go far beyond infilling and refining so as to work against popular conceptions of masculinity, and they do so because the stereotype is prone to excesses. A popular academic conception is that law reflects its mostly male origins and leading lights, but in this volume we encourage the coexisting view that law is a corrective, aimed at curbing the antisocial elements of raw men. Law is the ally of many an outsider, even as it might originate with, and be championed by, founding insiders. In turn, men who are anything but iconic, and perhaps men who do not aspire to be "manly," are drawn to law. By way of example as well as oversimplification, we can think of literature and law as working with words, while the rugged individual relies on physical strength or great skill with weaponry. It is not a matter of the pen being mightier than the sword, so much as law and literature's reacting to, or correcting, the iconic man's fondness for sword and shield. Put differently, just as Clint Eastwood regularly fills a void created by the failure of law, law is often needed to do on a large scale what a Lone Ranger can only do at the retail level. The iconic self-made lawman in fiction seems to break as many laws as he upholds, with the ends thought to justify the means. In reality, however, law is often useful precisely where some manly man has been too rugged or so individualistic as to be antisocial. Particular elements of law may well reflect the iconic conception of masculinity. We have already mentioned the unnecessarily violent type who responds to provocation and the (protected) defender who exploits the law's concession that "a man's home is his castle." We might also mention the "reasonable man" in tort law, if by reasonable we mean a hyperrational, cost-benefit-wielding decision maker. But law controls the manly man far more often than it accommodates him. It controls or exacts a toll on men who are vengeful, loyal to the point of discriminatory, quick-tempered, and so forth.

The iconic man in fiction is of course something of a moving target—or ideal. Plots, metaphors, statutes, and opinions take on more than one simple icon, or popular conception, of manly behavior. Exhortations to "man up," to "take it like a man," or to "prove" one's manhood have meanings that depend not only on the tone and identity of the speaker but also on the time, culture, and place of communication. Law's reasonable man and other gendered standards are similarly contextual. Popular

conceptions of manhood and masculinity are surely reflected in a society's law and literature, even as these institutions or media help shape a culture. Yesterday's man needed to be chivalrous in order to gain status; the Southern man felt compelled to wage war; then and now some men need to bully, while others need to protect. There are other constants of manhood, ranging from attire to political conventions, and these are likely refined or even fashioned in fiction and then reflected in law. By focusing on the intersection of masculinity, law, and American literature, we are able to learn something about all three.

We hesitate to set John Wayne aside without noting that he and his kind might be described not as rugged individualists but as dependable characters. It is arguable that Wayne and Eastwood, like the Hardy Boys and so many other model males in popular works, are, above all else, reliable men. The real man gets the job done. The combination of virtues sets a high bar for the aspiring manly man; one must be a self-sufficient and rugged individualist who is also sufficiently other-regarding and thus reliable when it comes to saving the day. The reliability component is, luckily, scalable. No society would flourish if most people stayed in the mountains and descended only to manhandle the bad guys. But a society can advance smoothly, and do so with fewer legal intrusions on personal liberty, if the norm is to be a dependable citizen. The reliability of these iconic men is, however, a little too boring for center stage. Law can afford to be dull, but literature needs to maintain interest and drive introspection. It thrives on tension and uncertainty. Some heroes are direct, and others are subtle; some do what the people want, and others go against the tide. Reliability is a quality with no apparent opposition, and it is found in these iconic men because it is entirely attractive.

Less iconic, but still genuine, men hold our interest because it is easier to identify with them, or because they remind us of real people we know. These men may not be reliable, and some will be positively frustrating. At the very least, they encourage the idea that there is more than one way to be useful. The same can be said of law, which often offers more than one route to social progress and control. Shadowing the iconic man is often an alternative who is hardly subversive, but able to manage his manliness with something other than a straightforward thrust of the sword. The iconic man is decisive, but a perfectly reliable man is often one who reserves judgment and can be labeled as thoughtful. The prototype is physically powerful, but then along comes a genuine man who impresses us with brain rather than brawn, or who captures our hearts because of his determination to overcome physical disabilities. Superman has x-ray vision, but an effective man can also succeed with spectacles and knowledge gained from books. The captain of the football team is the American Guy, but the nerd who disarms enemies with humor may be just as dependable. John Wayne and Clint Eastwood may be the iconic men for most audiences, but literature

starring Sherlock Holmes and Atticus Finch may prepare citizens for Gandhi and Mandela. Most men, and certainly young and impressionable men, would choose the iconic guys as their models, and there may even be something androgynous about selected noniconic heroes, but it is noteworthy that many women are at least as attracted to these alternative, or even mildly subversive, examples of manhood. (This apparent anomaly was already known in antiquity: the ancient Greek satirist Lucian, in *Dialogues of the Gods*, depicts a Zeus who complains because women don't go for a guy who wields thunderbolts; he is advised to get some nice clothes and take dancing lessons.) An unscientific survey suggests that male readers are more inclined to notice the rugged individualism, while many women remark on the characteristic reliability. When Wayne rides into town, half the audience notices the swagger and ease in the saddle, while the other half is secure in the knowledge that good values (and physical prowess) will now defeat the forces of evil.

It is surely the case that law is a substitute for steel and that it elevates intelligence over strength. It allows the thoughtful weakling to be seen as manly enough. But the larger question is whether law promotes, enables, or suppresses popular conceptions of masculinity. Its use of such fictions as “the average man” and “the reasonable man” suggests deference to popular stereotypes. We should, however, be skeptical—all the more since popular notions of masculinity and manliness themselves contain not just the diversity we have already emphasized but also serious tensions and oppositions. Literature thrives on tension, so one contribution of our law-literature enterprise is a set of reflections on how hard, how contested, and how, at times, contradictory the standard notion of masculinity can be.

I

Our volume begins with essays that focus on characteristics we have associated with the manly man. Interestingly, most of the essays in this first part are by judges. Judge Richard Posner begins by noting, and perhaps mourning, the decline of man over the long run and even within twentieth-century literature. He collects evidence of the incidence and use of particular masculine and feminine words and draws on Hemingway's male characters to show the decline. Bullfighters and hunters are contrasted with emotionally and physically maimed men. It is the vulnerable men who prove more interesting and with whom the readers can identify.

In the next essay, William Alsup vividly and powerfully reflects the tension we have highlighted between the iconic man and the man of law. On one level, the essay is about Melville's “Bartleby the Scrivener,” but its characters are explored on another level by two men, hiking in the Sierras. The tension is between rugged man

and a more contemplative, resistant version. It is tempting to guess that the true lawyer or judge is of the latter kind, but there are surprises in store.

J. Harvie Wilkinson explores and identifies with individualism to the point of solitude. Solitude ranges from the rugged individualist of Jack Schaefer's *Shane* to the introspective man of Crane's *Red Badge of Courage*, to the positively alienated man, who may be so because of social stigma, as in Isherwood's *A Single Man*, or inner demons, as one presumes afflicted the murderers at Columbine and Virginia Tech. For those of us who think of judges as solitary figures, Judge Wilkinson drives home the reality of bustling or even harried chambers and interactive judicial panels; the occasional lone dissent offers its author an escape into solitude, if not individualism. The essay describes law as a socializing influence and builds to an optimistic compromise between solitude and companionship, as reflected in the relationship unveiled in Hemingway's *The Old Man and the Sea*.

Douglas Baird's very American Guy is Dreiser's Frank Algernon Cowperwood, from *The Financier*. This manly man is the decisive and calculating capitalist who emerged in the nineteenth century and whose business it was to control the resources and persons around him. After a serious and carefully described encounter with the criminal law and the penal system, the hero is even more fully in control. At the same time, Baird argues that the American man is not a lawmaker or even a responsible leader, but rather one who stands in opposition to the law.

Janice Rogers Brown offers a startling and multilayered essay on manly courage, the desire to impart lessons across the generations, and the deep desire to read moral lessons into fiction and nonfiction alike. The central texts are *Gilead*, by Marilynne Robinson, and *In Sunlight and in Shadow*, by Mark Helprin, but the real subject is the constant threat that change may bring about the decline of civilization.

Robin West's contribution is an essay on law's domain, and in particular a tort law view of *The Great Gatsby*. An important character in Fitzgerald's novel is the automobile, an instrument that brought nearly every citizen into contact with the legal system. The increasing prevalence of the automobile brought distinctions between intentional and unintentional torts, negligent acts and dangerous activities, and premeditated as opposed to negligent homicide into everyday lives and news. These distinctions raised questions of morality, progress, and inequality. West uses the novel to teach us about law's adaptation to new technology and the problems it wrought. The lesson works despite the fact that the tort victims in *Gatsby* do not pursue legal remedies. It is enough that their lives are wrecked by careless people.

Even while depicting the virtues of iconic men, literary works have a way of showing how difficult it is to embody that role, for manliness fetters personality. One way to frame these tensions is to think about social stigmas and the attendant psychic costs that attach to nonconforming men. Although the American Guy comes in

many versions, there are both constants and ideal forms; all types of dominant manliness stress the avoidance of certain socially feared and stigmatized traits. As Erving Goffman wrote in his classic book *Stigma*:

[I]n an important sense there is only one complete unblushing male in America: a young, married, white, urban, northern, heterosexual Protestant father of college education, fully employed, of good complexion, weight and height, and a recent record in sports.³

Goffman's point is that the norm is impossible. No man has all of these traits or, at any rate, not for long; all men age and the aging hero has itself become iconic (as in the later work of Clint Eastwood). This means that tension and self-concealment are necessary features (even) in the manly men. Had Goffman included reliability and courage in the formula for the ideal type, the impossibility of its attainment would have been even clearer. Literature unmasks, so we can expect that even the most manly man becomes more compromised and less formulaic as each plot unfolds.

Accordingly, the next essays in the volume dwell on these tensions and the tragic toll they exact. Howard Matz's essay on Wallace Stegner's *Angle of Repose*, a novel unjustly neglected in recent years, ponders the slow collapse of an iconic man who finds his "manly" role a dead end, because it neither leads to success in business, which requires verbal skills he lacks, nor promises happiness in love, which requires gentler virtues. The narrator is another would-be manly man, whose profession (historical scholarship) and physical condition (severely disabled) prevent him from fulfilling a role he feels he ought to play. Crushing shame and an obsession with the old West are the result.

Michael Warner's essay, "Manning Up," studies a range of literary men who feel stifled or even fractured by the demands of manliness, and who seek a way to extricate themselves from these pressures. The essay draws on a number of classics, including Melville's "Billy Budd" and the poems of Whitman. It serves as a bridge to Part II of the volume, with essays devoted to men who do not even aspire to the dominant manly role.

II

Inasmuch as literature is often social criticism, it is no surprise that many American works focus on "outsiders" who, often defiantly and proudly, proclaim and instantiate a different way of being male. These outsiders, or even misfits, are themselves a heterogeneous lot, although they share such unmanly traits as talkativeness, open

emotion, and visible vulnerability. More often than not, these “unmanly” types are on the side of law, or at least law as it ought to be.

Martha Nussbaum’s essay investigates a countertradition of Jewish masculinity, in which compassionate emotion is valued above efficient legalism and subversive, delighted physicality over grit and aggression. Investigating an early short story by Philip Roth, “Eli, the Fanatic,” concerning an assimilated Jewish lawyer who eventually embraces his outsider identity, she links the story to the history of Jews in American legal practice and their role in shaping a legal tradition that values justice as well as efficiency.

David Halperin turns to another group of outsiders, gay men. He argues that gay male culture purveys a counternorm to the John Wayne icon, one that emphasizes open vulnerability, pain, and ironic defiance. The gay man seems both hysterical and abject, but the culture reveals these traits as virtues, involving an honest acceptance of embodiment. Halperin links these issues to legal debates about discrimination on the basis of gender, arguing that rigid norms limit possibilities of creative subversion.

Saul Levmore’s essay on Faulkner’s story “Barn Burning” concerns the tension between the manly man’s loyalty to his own and the needs of a society under law. The “rat,” a young man who eventually betrays his father, is not a manly man, though he has been taught to admire that archetype. He chooses to be disloyal, but his snitching is done to preserve others and is thus a model of social and legal responsibility.

Judge Douglas Woodlock ponders a different type of outsider status through the lens of John Dos Passos, who was fascinated by social and political outsiders and their efforts to become insiders. Instead of the courageous choice to forgo the “inside” for the “outside” that Levmore’s essay depicts, Dos Passos is drawn to the way in which outsiders attribute their own insecurities to the society around them, concluding that these projections compromise judgment. On the basis of a reading of *Adventures of a Young Man*, Woodlock reflects upon the interaction between substance and process in the work of a judge.

Richard McAdams studies a successful outsider, Atticus Finch, in Harper Lee’s *To Kill a Mockingbird*. Atticus pursues justice through law in part by exemplifying an empathy and lack of standard aggressiveness that is culturally categorized as feminine. At the same time, he is heroic precisely through his role as an outsider pursuing justice. The iconic man thus gives way to the iconic lawyer.

African American literature offers its own range of outsider types. Here, readers are forced to grapple with the harsh constraints that racism, often embedded in the law itself, imposed on the formation of masculinity. By stigmatizing African American men as criminals, while at the same time depriving them of equal opportunity, American culture has twisted their paths to manliness. The law’s treatment

of these men can lead to tragedy, as it does in Julie Suk's essay about James Baldwin's *If Beale Street Could Talk*, where the would-be good father is prevented from being "manly" and reliable by the unjust legal system. Interestingly, Baldwin's women are better able to manifest the iconic man's protective and courageous attributes.

Their success in the majority culture has not removed the pressures faced by African American men. Glenda Carpio laments the constraints that American public life has apparently imposed on President Barack Obama, causing him no longer to manifest the outsider virtues of deep reflectiveness, emotional ambivalence, and uneasy curiosity that mark his first autobiography, in favor of a more stereotypical self-presentation. Politics and perhaps racial sentiments pushed President Obama to sound like Gary Cooper in *High Noon* with fundraising pleas that depict the president's political opponents as bad guys by beginning with the very manly subject line, "This has gone too far!" If social pressure and tension confine the self-expression of most American Guys, then all the more so for a black American president. It would be dangerous for him to be too reflective, too nonresolute, or too skeptical.

An optimistic take on this group of outsiders comes in Paxton Williams's essay on a mostly forgotten play by Ossie Davis. Through comedy, and with an engaging use of a "trickster" character drawn from African American folk traditions, *Purlie Victorious* illuminates a path to successful rebellion against constraint, and ultimately to a more joyful and celebratory style of manliness, for blacks and whites alike.

III

Let us now step back to look more closely at language. Our title announces the subject of "masculinity." Our essays, however, often refer to "manhood," "manliness," and "maleness." It is useful to ask how these terms differ and what the opposite of each might be.

"Male" and "female" are perhaps the simplest antonyms on our list. They purport to describe fixed natural categories, into which one is simply born. Things are actually more complicated, since some children have ambiguous biological characteristics and yet society cannot rest content until they are assigned definitively to one category or the other. In sports, in restrooms, in virtually every area of life, a binary division of the sexes has great importance, and society pretends (at least) that it is obvious and "natural" who is what—until a difficult case forces it to confront the fragility of its categories.

"Masculinity" and "masculine," by contrast, are eminently social. Like "male," these terms are purely descriptive. Their opposites are "femininity" and "feminine." None of these terms is normative; it would not be odd to criticize a person for being

too masculine or too feminine. And yet, when such criticisms are made, they are usually addressed to someone of the opposite gender who is venturing into the terrain of the “wrong” gender. A woman can be “too masculine” or a man “too feminine,” but a man is almost never described as “too masculine” and women are not often called “too feminine,” though women are called that far more often than men are called “too masculine.”

What’s this all about? What the terms “masculine” and “feminine” describe are styles associated with socially manufactured categories of gender. One is assigned to one of these categories at birth, usually on the basis of biological sex; one is henceforth brought up in the ways of that genus, and one is expected more or less to toe the line. There is a spectrum and, with respect to clothing, speech, gesture, and behavior, overlap between what is “masculine” and what is “feminine,” but on the whole society expects and enforces a binary division. The judgments “too masculine” of a woman and “too feminine” of a man express disapproval of transgression. However, things are not quite this simple. The masculine gender is associated with power and dominance, so when a woman aspires to be more “masculine,” that is perceived quite differently from a man’s aspiring to be more “feminine.” As David Halperin’s essay argues, the latter kind of gender transgression is seen (and perhaps also sees itself) as a way of becoming vulnerable, even low or object. Up to a point, it’s only to be expected that a successful woman will be “masculine”: she may wear tailored suits, talk aggressively, even lower the pitch of her voice. So “masculine,” although descriptive, has a barely concealed normative content: it is the name of a set of characteristics usually deemed superior.

One might think that in this era of gender equality, the binary division would long since have disappeared. One sign of its continued force, however, is the recent success of “transgender” people in winning recognition for their gender identities. Quite distinct from wanting to change biological sex—and very often it is quite apart from sex change—many people want to drop the characteristics originally assigned to them and take up the other set of traits. As they do so, they often give new vividness and sharpness to the binary division, enacting a pretty extreme version of the “feminine” or the “masculine” in order to put their identity beyond doubt.

What about “manly” and “manliness”? These terms are unquestionably normative. They characterize a set of valued traits. Their opposites are “unmanly,” “unmanliness,” even “cowardice” or “degeneracy.” To call a guy “masculine” is in itself to say something subtly evaluative and positive. But many men are masculine without having the valued properties of “manliness” already associated with John Wayne. The conventional notion is of an ideal type to which men ought to aspire, and it includes such things as courage, toughness, and reliability. It is “manliness” that inspires

nostalgia—such as that which suffuses Harvey Mansfield’s book on the topic⁴—for a simpler age with defined male and female roles.

The “manly” label is itself cultural, and thus variable. A recent article in the *Times of India* proclaimed various requirements for a manly man, among them good grooming, a feel for style, a sense of humor, demonstrative caring through hugging and handholding, and a sexy smile or wink. There may be some overlap with the American norm, inasmuch as the iconic American man often has a type of wry humor, but not very much!⁵

Can a woman be “manly”? If “manliness” were simply a set of moral characteristics, this would be a straightforward question. But it is a matter more of an ideal type than of abstract characteristics, and this ideal type is attached to a definite sort of body. It seems easier for a woman to earn the appellation “masculine” than “manly.” And, to judge from Internet examples, while saying that a woman’s clothes or manner are “masculine” is a fairly routine observation, to say that a woman is “manly” is to describe her as scary or threatening in some way. A woman can be praised in straightforward fashion as “courageous” or “reliable,” but it will not do to encapsulate these characteristics in a word that is linked to biology.

And what about “manhood”? Its opposite is “childhood,” and it denotes male maturity or coming-of-age. And “manhood,” because it is adulthood for males, involves taking on the paraphernalia of manliness, or at least aspiring to do so and becoming more reliable and more able to protect one’s “own.” Women come of age too, of course, but into a different set of roles. “Womanhood,” which also contrasts with “childhood,” signifies some of the same things (constancy, reliability), but some very different things (supportiveness, cooperativeness, and even delicacy).

As even these brief remarks show, the terrain is slippery, and there is room for ambiguity and personal style.

IV

Most essays on law and literature are written by professional scholars. Even when judges occasionally enter the fray, they typically do so as scholars. It is unusual to find judges who have not been professional academics writing in this area. Apart from the informal remarks by Justice Stephen Breyer and (retired) Judge Robert Henry in the panel discussion reproduced in *Shakespeare and the Law*,⁶ we know of no previous published essays on law and literature by sitting judges. And yet many judges love literature and are influenced by what they read. We felt that it would be revealing to ask a group of influential judges to discuss a literary work dealing with masculinity and to relate it in some manner to their own thoughts about the practice of judging.

Six federal judges accepted our invitation. (One retired before completing his essay.) They are politically diverse and all have been widely recognized as influential. They offered surprising insights—from Matz’s subtle ruminations on the relationship between masculinity and judicial language to Alsup’s anxious self-portrayal as a macho outdoorsman drawn to the anti-macho and anti-heroic figure of Melville’s Bartleby. Wilkinson and Brown, who have both been frequently mentioned as possible Supreme Court nominees, offer contrasting reflections on traditional manliness—Brown affirming its connection with norms inherent in our nation’s founding and Wilkinson connecting the manly man with solitude and alienation, but also envisaging a rapprochement between literary solitude and legal socialization. Finally, Woodlock offers a meditation about the judicial role based on tensions in the novels of Dos Passos.

There is by now a large body of literature that studies judicial conduct in terms of relatively rigid ideological commitments, predicting decisions based on the party that appointed the judge. This literature, combined with a more general cynicism, has created a widespread perception that judges do not reflect, ponder, or listen to one another. A detailed study of the conduct of at least one federal circuit, the U.S. Court of Appeals for the Seventh Circuit, casts doubt on this claim, showing that judges do change their minds in response to arguments brought forward by other judges.⁷ Not coincidentally, two of the judges whose cross-ideological flexibility is demonstrated in this study of judicial behavior are prominent contributors to the law-literature movement: Judge Posner and Judge Wood. The third, Judge Frank Easterbrook, has publicly expressed a commitment to deliberation and responsiveness as a hallmark of his tenure as chief judge.⁸

Our volume contributes to this more nuanced view of the federal judiciary. It shows judges as deeply reflective about the world and about their job, aware of cultural trends, and able to think imaginatively with and about complicated texts. Judges have some traits of the “manly man”: they are (or ought to be) strong, reliable, determined, and courageous. But they are also creatures of words and arguments, valuing words over steel, and attempting, after all, to make something useful of confrontation, with ideas as their weapons.

NOTES

1. See, for example, James Boyd White, *The Legal Imagination* (Chicago: University of Chicago Press, 1985); James Boyd White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (Chicago: University of Chicago Press, 1985); James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1994).

2. Richard A. Posner, *Law and Literature*, 3rd ed. (Cambridge: Harvard University Press, 2009).
3. Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (New York: Simon & Schuster, 1963).
4. Harvey C. Mansfield, *Manliness* (New Haven: Yale University Press, 2007).
5. “Six Manly Qualities Women Love in Men,” *Times of India*, September 20, 2013, articles.timesofindia.indiatimes.com. Although the headline mentions six, there are only five listed in the article!
6. And even these are not full exceptions: Breyer was an academic for many years and still coauthors a casebook, and Henry is now a university president.
7. Martha C. Nussbaum, “Deliberation and Insight: *Bloch v Frischholz* and the ‘Chicago School’ of Judicial Behavior,” *University of Chicago Law Review* 77 (2010): 1139–64.
8. In a forum at the University of Chicago Law School discussing the Nussbaum paper and other contributions to that issue of the *Law Review*, which was dedicated to a celebration of his twenty-fifth anniversary on the court.

PART ONE

American Guys

1

Hemingway and the Decline of Manhood

*Richard A. Posner**



HEMINGWAY'S SEEMING AMBIVALENCE about masculinity—the impression his fiction gives that its ostentatious machismo is hiding something—is a preoccupation of literary critics of his work.¹ They generally offer a psychological explanation of one kind or another for that seeming ambivalence—for example, that he had a “passive and masochistic sexual nature,” compounded of such elements as “misogyny” and “extreme homophobia.”² But probably all would agree that Hemingway's novels and stories offer “a multi-angled inquiry into masculinity.”³

I am going to offer, but as a complement rather than as a substitute, a cultural explanation: the decline of manhood in the twentieth century. I will point out that the literary consequences of that decline are general, rather than being somewhat special to Hemingway.

The graphs with which I begin, generated by Google's Ngram Viewer,⁴ *trace the* frequency of appearance in English books published between 1800 and 2000 of words including and related to “manhood.” (Not the absolute number of appearances, but the number relative to all words in Google's database of books in English.) The Ngram Viewer contains data from before 1800 and after 2000, but both the earlier and the later data are considered less reliable.⁵ For what it's worth, however, I present one graph (Figure 1.2) tracing changes between 1700 and 2008 (the latest date in the Ngram database).

The words in the first graph are “manly,” “manhood,” “masculine,” “feminine,” and “feminist.” “Manly” peaks in 1780, but has a lesser peak in 1860, which is also a peak year for “manhood,” a slightly less sexist term. The later peaks of these two words

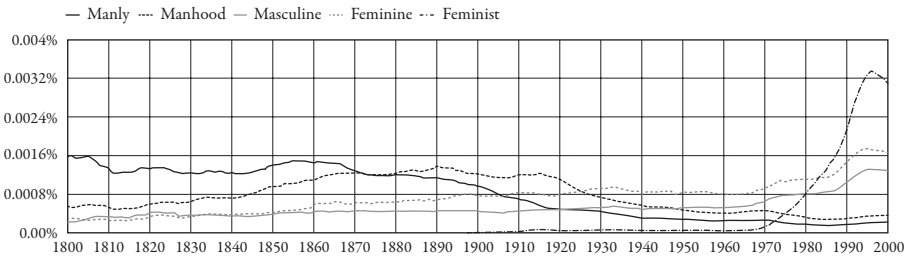


FIGURE 1.1

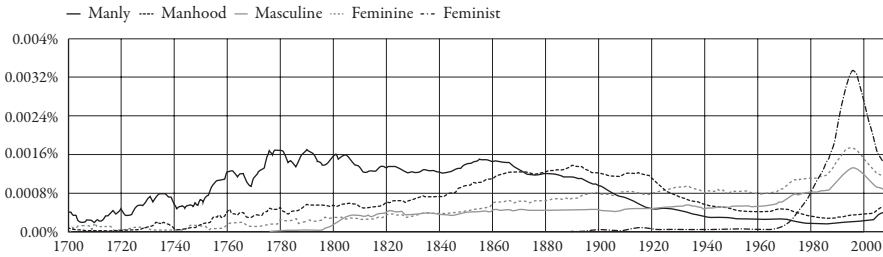


FIGURE 1.2

probably reflect the rise of English imperialism in the late nineteenth century, a prestigious masculine enterprise. But beginning in 1880 these words begin a steady decline, with just a slight recent uptick. The words “masculine” and “feminine,” which are somewhat more neutral (the first especially), rise in tandem as interest in gender issues rises. The aggressively feminist word “feminist” surges beginning in the mid-1960s, reflecting the rapid and steep rise of the feminist movement, but has declined in recent years. The decline reflects not the failure but the triumph of the movement; women no longer bother to refer to themselves as “feminists.”

The second graph (Figure 1.2) expands the period 1800 to 2000 to become 1700 to 2008. The pattern is similar.

The third graph (Figure 1.3) is similar to the first but tracks different though similar words: “masculinity,” “feminism,” “hero,” and “heroine.” We see “hero” peaking in 1900 and declining irregularly but decisively since, and “heroine” peaking in 1930 (though little changed from 1900) and declining only slightly since. “Masculinity” and “femininity” began rising significantly in 1970, in tandem most of the time, but recently “masculinity” has taken the lead, perhaps reflecting its having become an embattled, and therefore more interesting, concept. It differs interestingly from “masculine,” a word that lacks the problematic character that has come to characterize the word “masculinity.” I am surprised that “femininity” has grown at all, since it has come to have a rather nineteenth-century sound.

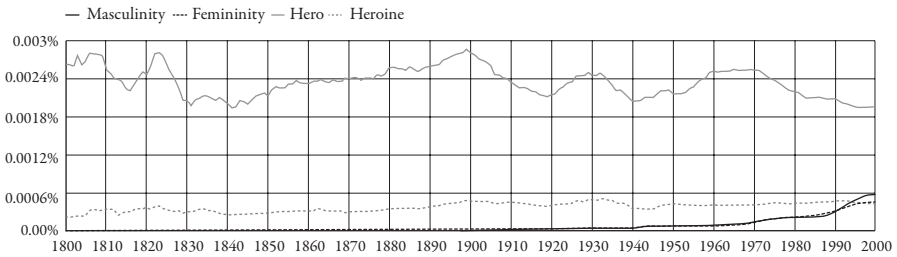


FIGURE 1.3

I identify three stages in the decline of manhood (1914–1918, 1918–1939, and 1960–2012), although they do not coincide precisely with the trends shown in the graphs. War is the quintessential masculine activity—the most remote from the domestic sphere, traditionally associated with women—and its glamor took a beating in World War I. This was not only because of the enormous casualty toll, but also because modern military technology is deglamorizing: colorful uniforms, cavalry charges, swordplay, duels between frigates, and charismatic leadership all became passé and gave way to the machine gun, artillery barrages, trench warfare, aerial bombardment, khaki uniforms, enormous expenditures on munitions, and, not least, large-scale employment of women in munitions manufacturing. The deglamorizing trend had been foreshadowed by the Crimean War, the American Civil War, and the Boer War, but World War I had a far greater impact on perceptions of the changing nature of war.

And so it's not surprising that in the remarkable imaginative literature written and published between about 1915 and 1939 we find a procession of unmanned or unmanly protagonists. Think of Leopold Bloom in *Ulysses* (compare him with the original Ulysses); think of the “small house agent's clerk” and Mr. Eugenides in T. S. Eliot's *The Waste Land*; think of Kafka's protagonists (Joseph K in *The Trial*, the officer in “In the Penal Colony,” the hunger artist Georg in “The Judgment,” Gregor Samsa in *Metamorphosis*); think of Jay Gatsby, and of Dick Diver in *Tender Is the Night*; think of Edward Ashburnham in Ford Madox Ford's *The Good Soldier*; think of the protagonists of Faulkner's novels, especially Quentin Compson III in *The Sound and the Fury* and the male characters in *Absalom, Absalom!*; think of Hans Castorp in *The Magic Mountain*; think of Paul Bäumer in *All Quiet on the Western Front* and Dr. Ravic in another novel by Remarque, *Arch of Triumph*, a neglected work.

Above all, think of Hemingway's male characters. Hemingway juxtaposes obsolete models of manliness—Spanish bullfighters, loyalist soldiers during the Spanish Civil War, and white hunters in colonial Africa—against men who are maimed physically (Jake Barnes, the impotent protagonist of *The Sun Also Rises*) or psychologically

(Robert Cohen in the same novel, a loser despite his surprising boxing skills), or disillusioned (Frederic Henry in *Farewell to Arms*), or doomed (Robert Jordan in *For Whom the Bell Tolls*). The models of manliness in Hemingway's novels were peripheral to Hemingway's society, as they are to ours. It's the losers in his novels whom we recognize and can identify with.

At the conference at which I gave the talk on which this paper is based, one of the participants criticized Hemingway's fiction for its "one thing after another" style. The criticism was misplaced. Hemingway's paratactic style, with short sentences, and clauses within the sentences, all linked by simple connectives such as "but" and "and" (or no connectives at all)—subordinate clauses being avoided—is the Homeric style. It is also the style of such modern works as Camus's *L'Étranger*. It is highly effective in conveying a sense of detachment and resigned, nonjudgmental acceptance—and of what is so marked in the *Iliad*, as in Hemingway's novels: a sense of a heroic age ending.

The third stage in the decline of masculinity begins in the 1960s and is an effect ultimately of highly effective contraception, household labor-saving devices, economic changes that have lightened work through automation and through a shift from manufacturing to services, an increasing financial return to high IQ, and a growth in personal freedom and self-respect owing to increased wealth. These factors gave rise to the feminist movement but also reduced the "demand" in an economic sense for traditional male attributes, such as upper-body strength, physical daring, tolerance for dirty and dangerous working conditions, traditional close-quarters combat, and leadership by intimidation (also by height, yet that persists: CEOs of large firms are almost always tall men, while entrepreneurs typically are aggressive short men).

Men on the way down cross women on the way up. The sexes become increasingly difficult to distinguish. There are house husbands (though the PC term is "stay-at-home dads"), there are engagement rings for men, and there are male nurses and a growing number of men in other traditionally female jobs as well, while women are bomber pilots, firemen (now called "firefighters"), a majority of doctors, and soon to be a majority of lawyers. Just the other day, all combat roles in the U.S. armed forces were opened to women. Female children increasingly are preferred to male, and male children are given drugs to make them less rowdy and undisciplined—more like girls. The latest blow has been the revaluation of risk taking in the wake of the financial collapse. Men are far more prone to take risks, economic as well as physical, than women; the finance industry remains almost completely dominated by men; the crisis has made us more conscious of downside risk. The increasing respectability of homosexuality, rapidly culminating in what appears to be an irresistible trend toward recognition of homosexual marriage, is another sign of the decline of the ideal of manliness, given the traditional association (emphasized in

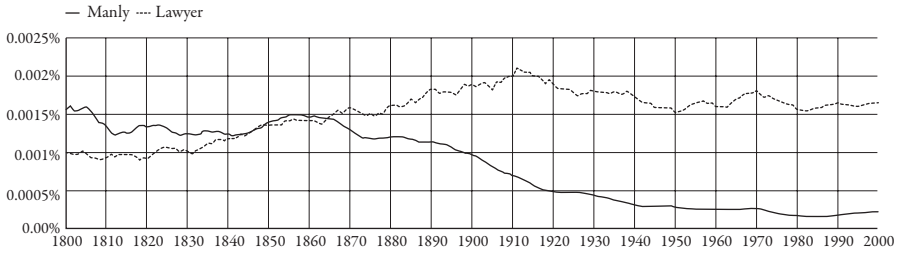


FIGURE 1.4

David Halperin's conference paper, and visible in Hemingway's fiction) between homosexuality and effeminacy.

In each of the three stages in the decline of manhood, and in the graphs, the drivers are technology. I agree with the late Richard Rorty that one can observe moral progress (that is, our idea of moral progress) in the expansion, in the civilized parts of the world, of the community in which we recognize moral obligations. It has expanded to include people of different nations, races, ethnicities, and physical and mental capacity—plus animals—plus of course, as I have been emphasizing, women; in the process it has diminished the traditional concept of and regard for manhood, manliness, masculinity, the heroic. But the ultimate drivers of this cultural change are not, in my view, philosophy or even politics, let alone religion. The ultimate drivers are technological changes. The philosophy, even the politics, is epiphenomenal.

It remains to consider—since the title of the conference for which this paper was prepared was “Manhood in Law and Literature”—whether changes in the concept of manhood or womanhood are reflected in literature about law. Figure 1.4 suggests not. “Lawyer” peaks long after “manly,” begins to decline much later, and after a relatively brief decline levels off.

Lawyers (including judges) have never been much associated with manliness, and in literature as in life they are frequent objects of suspicion, disapproval, or ridicule, capsulized in the slogan that the lawyer's job is to make the worse appear the better cause and in the endless lawyer jokes, as well as in Ambrose Beirce's definition of “lawyer” in *The Devil's Dictionary* as “one skilled in circumvention of the law.” The low regard in which lawyers are held is shown dramatically in Figure 1.5.

“Manliness” and cognate words connote physical and moral courage, risk taking, literal self-sacrifice for an ideal, affinity for dangerous sports like mountain climbing and prizefighting; the warrior is the male archetype (think of the *Iliad*). The typical lawyer depicted in literature is an antihero.⁶ There are occasional depictions of “heroic” lawyers—often absurd, as in the case of Atticus Finch in the good-natured potboiler *To Kill a Mockingbird*, or if not absurd then unconvincing, as in the portrayal of Gavin Stevens in several of Faulkner's lesser novels, or pedestrian as in the

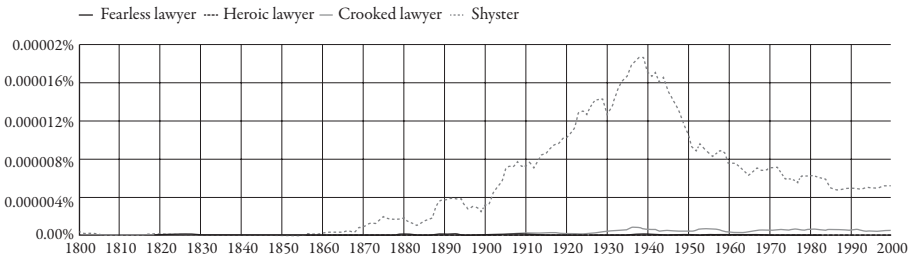


FIGURE 1.5

novels of James Gould Cozzens. But the heroic lawyer is an infrequent figure in literature⁷; the term “heroic lawyer” is so rare that it doesn’t appear in an Ngram. Lawyer Jaggers in *Great Expectations* is highly competent, but mercenary, and on the whole not admirable, though more so than other lawyers in Dickens’s novels. Lawyers when presented sympathetically in fiction tend to be wooden, sometimes (like Joe Pesci’s character in *My Cousin Vinny*) comical, in rare instances both endearing and competent (I am thinking of Rumpole). The best depiction of a heroic lawyer that I am familiar with is the most recent: the 2009 BBC television series *Garrow’s Law*, which depicts a late-eighteenth-century English barrister who, fearlessly, steadfastly, singlehandedly overcoming overwhelming odds, leads a successful legal revolution in favor of the rights of criminal defendants. And there is the occasional strong woman lawyer: not only Portia, but also the lawyer played by Katherine Hepburn in *Adam’s Rib*. Portia, though, is a trickster.

Judges don’t fare much better in fiction than lawyers do; one of the few exceptions that come to mind is Judge Kovitsky in Tom Wolfe’s novel *The Bonfire of the Vanities*. He is typical of the fictional depiction of judges in being a marginal character in the novel. There is the occasional villainous judge, typified by Angelo in *Measure for Measure*—a villain, *and* weak.

Along with the homosexual and the lawyer, the black has been a marginal figure in the fictional depiction of manliness, though interestingly Hemingway is a major influence in black fiction.⁸ The black as the law’s victim—unmanly victim versus unmanly oppressor—is a theme in black literature traced recently in an interesting book about James Baldwin.⁹

So: “manhood” and “lawyer” are not an apt pair.

NOTES

* Judge, U.S. Court of Appeals for the Seventh Circuit; senior lecturer, University of Chicago Law School.

1. See, for example, Richard Fantina, *Ernest Hemingway: Machismo and Masochism* (Palgrave Macmillan, 2005); Thomas Strychacz, *Hemingway's Theaters of Masculinity* (Louisiana State University Press, 2003); Dana Fore, "Life Unworthy of Life? Masculinity, Disability, and Guilt in *The Sun Also Rises*," *Hemingway Review* 26 (2007): 74–88; Jacob Michael Leland, "Yes That Is a Roll of Bills in My Pocket: The Economy of Masculinity in *The Sun Also Rises*," *Hemingway Review* 23 (2004): 37–46.
2. Fantina, *Ernest Hemingway*, 163.
3. Strychacz, *Hemingway's Theaters of Masculinity*, 262.
4. Ngram Viewer, Google, accessed June 19, 2012, books.google.com/ngrams.
5. Culturomics, accessed June 19, 2012, www.culturomics.org/Resources/A-users-guide-to-culturomics.
6. See, for example, John Mullan, "Ten of the Best: Bad Lawyers in Literature," *Guardian*, January 1, 2010, www.guardian.co.uk/books/2010/jan/02/charlesdickens-jane-austen.
7. See Richard A. Posner, *Law and Literature*, 3rd ed. (Cambridge: Harvard University Press, 2009), 561 (index entry for "lawyers").
8. See *Hemingway and the Black Renaissance*, ed. Gary Edward Holcomb and Charles Scruggs (Columbus: Ohio State University Press, 2012).
9. D. Quentin Miller, *A Criminal Power: James Baldwin and the Law* (Columbus: Ohio State University Press, 2012).

2

On the Trail with Melville

LAW AND LETTERS IN THE HIGH SIERRA

William Alsup



SUNRISE AT THE Alabama Hills Cafe. This was Lone Pine, a tiny desert town in the Owens Valley on California's east side. The Sierra Nevada loomed large. Pancakes and coffee were on our minds.

Around came the laminated menus. Also came coffee, wanted or not, which it was. We were feeling superior, having arrived in time for a booth. The cafe was named for a geologic marvel situated between the town and the Sierra. The cafe was our annual favorite. It was always a local favorite. At six o'clock, six mornings a week, the room filled. Women were welcome, but this day they were scarce and the cafe belonged to cowboys, fishermen, patrolmen, ranchers, and the two of us. Dressed in our hiking shorts and shirts, we stood out.

"Bartleby the Scrivener!" Sean announced, manifesto-like, adding more quietly "Melville." With his shaved head and beak nose, he looked like Lenin. He affected a crazed look. Were others watching? I was too embarrassed to check.

We were habitual hiking pals. I was a mountaineer and a reliable one, Sean exceptionally so. One summer he climbed every peak in the Cascade Range, solo. Since his days as a grad student at Davis, we had explored any number of remote Sierra peaks and venues. He had also become a man of letters, a writer, a professor of literature. In the genial way of mountain conversation, some of our expeditions had developed a literary theme. Fitzgerald had found us one summer, Muir another. Now Melville was edging onto our map. Having myself been confined to less literate reads and the courtroom, I had never heard of Bartleby.

Time to order. The craze fled from his face. This was our last real meal for a week—so, I went whole hog: pancakes plus eggs, bacon, toast and orange juice, at least for me; Sean went the vegetarian route. The moment gave me a chance to steal a glance. Good. No one was watching from under all those cowboy hats.

“It’s a story as told by a lawyer on Wall Street,” he began, “who does a snug business taking his slice out of bond and mortgage transactions with the likes of John Jacob Astor. In those days, they make copies by hand. They employ scriveners to make copies. The lawyer already has two scriveners. But he needs a third, and Bartleby answers the ad. He is hired at the rate of four cents per hundred words. He is pallidly neat, pitifully respectable, and incurably forlorn. If Bartleby has a first name, we never learn it.”

Practiced, I thought. He had given this lecture before.

“The lawyer puts Bartleby in the same room with him but behind a high folding screen that removes him from sight but not from voice commands. Bartleby’s tiny desk is by a small window looking out at a grimy brick wall a yard away. Remember, this is Wall Street. Bartleby turns in entirely satisfactory copies.”

“Thank God for Xerox,” I said, without effect.

“One day, however, the lawyer asks Bartleby to read along to vet his work, a routine chore. From behind the screen, Bartleby softly replies, ‘I would prefer not to.’ In disbelief, the lawyer repeats the request. Slowly comes the same reply, ‘I would prefer not to.’ The lawyer’s blood starts to rise. He comes close to dismissing Bartleby on the spot, but the matter is otherwise resolved. Bartleby gives no reason, and no outward excuse presents itself. Nothing is wrong with his copies. He just declines to help check them. A similar thing happens a few days later; again, Bartleby’s only reply is: ‘I would prefer not to.’ It is maddening and mysterious.”

“Surely this guy was terminated,” I pronounced.

“No. The reason Bartleby keeps his job is that his manner is so nonthreatening, so pathetic, that he provokes little ire. Plus, Bartleby continues to copy satisfactorily and the lawyer, being busy, needs him. Soon adding to the mystery, the lawyer discovers that Bartleby is living and sleeping at the office. This annoys the attorney. But he goes along because Bartleby seems honest, and his scrivening skill is good.”

Our plates came, warm food with hot syrup on the side. More coffee came. Was service any better than this? Bartleby would not last long at the Alabama Hills.

“To solve the mystery, the perplexed lawyer eventually tries to get Bartleby to unbosom himself, but the strange man merely continues to say, ‘I would prefer not to.’ Then comes the day when Bartleby ceases to work altogether. The lawyer speculates that his eyes have gone bad. Bartleby just stares out the window at the grimy bricks and says that he prefers not to copy any longer. He ceases all work. Doom becomes his constant companion. He becomes an embarrassment. Clients ask