Law and Literature Movement

If it hasn't happened already, during your second or third year you will be exposed to some relatively new schools of thought. Although these schools of thought are a little unusual, they are not to be rejected out of hand. They are to be carefully considered and weighed. And then rejected.

One current trend is the law and literature movement, which applies methods of literary analysis to legal texts and examines the treatment of legal issues in literature. I have some difficulty with this area, since frankly I don't understand literature very well. I think that a literary work can usually be reduced to a single sentence that captures its essence. A few examples come to mind:

- Odyssey: Never underestimate the value of a good travel agent.
- War and Peace: Russian winters are darn cold.
- Richard III: Never vote for anybody named Richard.
- King Lear: How sharper than a thankful child, to have a toothless serpent (or something like that).
- Metamorphosis: Being a bug is a drag.

Some law and literature groupies try to apply methods of literary criticism to the law. This approach, however, has limitations. Since literature is supposed to make the reader feel things, some literary critics say that the reader's meaning is as important as the author's. Law, on the other hand, describes the official decisions of government, and so the subjective meaning of an individual reader (as opposed to the objective meaning to the average citizen) is irrelevant—at least to the government. It does no good for a burglar to argue, "To me, the burglary statute is really a statement about how we intrude in each other's lives, and nothing more." The court, perceiving that there is in fact something more, will probably respond to the defendant's argument with a little intrusiveness of its own.

A second movement is called Critical Legal Studies (CLS). Critical Legal Studies rests on the following irrefutable syllogism:

Major Premise: Lots of cases could be decided either way. Minor Premise: I don't like the way a lot of cases have been decided. Conclusion: The law is a crock. Practical Application: Come the revolution.

When you ask what happens after the revolution, it gets really fuzzy. Apparently, "hegemony," "illegitimate hierarchies," and other multisyllabic evils will be replaced by "communities of life" with "negative capability," "role jumbling," and "a constitutionalism of permanent mobilization," which will permit us to develop the "species nature," realize "concrete universality," and "discover the organic unity of each other's personalities." Don't worry too much about the specifics. After the revolution is over, Central Command, assisted by the Revolutionary Army, will persuasively explain the details to the survivors.

"Crits" don't believe in hierarchy. These are people who graduated in the top ten percent of their class, were on the law review, are full professors at the nation's elite law schools, and spend their lives training people for a monopolistic profession in a country that owes much of its standard of living to the fact that it keeps most of the world's population out. Well, except for that, they don't believe in hierarchy.

Some Crits argue that, to eliminate illegitimate hierarchies, all jobs should be rotated. I am not kidding. So try this. Ask your CLS professor how come he hasn't, even once, let the building custodian teach his class while the professor scrubs out the toilets in the third-floor bathroom. Huh? How come? He'll tell you to get the hey out of his office, and to take your hegemonic positivist thinking with you. Suddenly, it dawns on you that in the Crits' post-revolutionary world, some people will be wielding the levers of power and others will be wielding the scrub brushes. Apparently, there are illegitimate hierarchies and legitimate ones. If you know what I mean.

Crits say that all language and all truth are indeterminate. But if truth really is indeterminate, why do Crits so fiercely insist that their own view is correct? Why should a person even bother to have a view?

Crits believe that all law is politics, and they spend their time "trashing" or "unmasking" the law to reveal its underlying value preferences. The revelation that the law actually protects real human values has been so shocking as to produce a crisis of confidence in the law as an institution. Previously, everyone thought that the law simply existed for its own sake, much like the Vice Presidency. But Crits argue that the law is hypocritical, and they deconstruct it to expose the hidden values it refuses to acknowledge. Then, after taking us into the wilderness and leaving us there they zoom off in their BMW's.

Someone said that the legal realists did this, too, but I don't remember who said it. In any event, the wilderness is getting pretty crowded. To continue their class struggle against hierarchy and privilege,
crits talk funny. One famous GLS article sounds like "a pair of old acid-heads chewing over a passage in Sartre."44 An example:

It is not inconsistent to, on the one hand, realize the projective temporal character of human existence, in which no one is identity, and the living subject is continually not what he or she is by moving into the next moment in a creative and constitutive way.

Crits also talk a lot about "inter-subjective zap" and "un-alienated relatedness." They speak in this manner because if they just openly announced that, what the hey, we should overthrow American democracy and replace it with a Marxist Utopia, people would begin wondering why the only Marxists left in the entire world teach at American universities. The Crits' strategy has worked pretty well, considering that they have been able to last two decades on about ten minutes' worth of ideas.

Another school of thought is called "law and economics." While Crits believe that all law is aimed at SUPPORTING free-market capitalism, the "Econs" believe that all law is an unwar. Crits argue that all power structures, including language, are propped up from the inside, perpetuate hierarchy, and exclude others. Therefore, Crits use an untranslatable, circular, self-referential vocabulary that supports their arguments from the inside, perpetuates the hierarchy of the Crits as Gnostics who pretend to know a Mystery, and excludes others. See Orson Scott Card, Prophets and Assimilationists, Sunstone (Feb. 1989).

Since Crits are radical nondeterminists, they quite naturally advocate one of the most deterministic political ideologies ever created: Marxism ranted INTERFERENCE with free-market capitalism. Other than that, the two groups pretty much see eye to eye.

Econs basically believe that material wealth is the highest human value, and that justice, fairness, the environment, and protecting the helpless all cost money, and are therefore "economically inefficient." The money could be better spent on much more transcendent things, like pet rocks, hemorrhoid pads, and other items needed to satisfy AGGREGATE DEMAND.

Econs prove their theories by devising little mathematical formulas that assume whole truckloads of untrue things and then come to a particular conclusion. The conclusion is always--get this--"The market will take care of it itself." SURPRISE!!! According to the Econs, there is a GIANT INVISIBLE DISEMBODIED HAND that magically takes care of everything. Before you get too excited about this, remember that this is the same invisible hand that gave us the invisible GREAT DEPRESSION. Oh! THAT invisible hand.

When you point out that the assumptions in the formulas are simplistic (a euphemism for "false"), the Econs get really testy and tell you that you don't understand the discipline. Besides, although sitting in an office and writing little mathematical formulas may not be the most EFFECTIVE way to solve the world's problems, it is at least one of the highest paid, and you can't have everything. Moreover, law and economics doesn't require any empirical studies, which, after all, would be tedious and time-consuming. So the Econs don't want to hear you say that their delicate theories are about to be smashed flat by a ton of hard facts.

The character of the assumptions is illustrated by the story of an economics professor who was walking across campus with a student. "Look," said the student, pointing at the ground, "a five-dollar bill." "It can't be," responded the professor. "If it were there, somebody would have picked it up by now."

"Economics is a closed system; internally it is perfectly logical, operating according to a consistent set of principles. Unfortunately, the same could be said of psychosis."

Econs believe that modern judges should analyze and resolve all legal issues by using the tools of law and economics. The whole evolution of the common law, they urge, is to get judges to walk upright as Homo economicus.

Let me give you an example of law and economics. Suppose Seller has signed a contract to sell widgets to Buyer. Then Third Party comes and offers Seller one dollar more than the contract price. Many Econs believe--now listen closely--that Seller has a MORAL OBLIGATION to breach his solemn contract with Buyer and pay damages so that the widgets will go to their highest and best use. Econs call this greedy and wretched act of treachery an EFFICIENT BREACH. Never mind that Buyer has to scramble to find other widgets. Never mind that BUYER should have the opportunity to sell the widgets to Third Party and get the profits, instead of that breaching grime ball Seller.

Never mind that the certainty and stability of contracts will be undermined, resulting in fewer contracts and
ultimately less economic exchange. Although Econs admit that this free-for-all law-of-the-jungle auction-without-a-gavel may be unjust, justice is mere chicken spit compared to wealth. While money may not buy happiness, it at least affords us the particular kind of misery that we most enjoy.

So the Crits attack from the left and the Econs from the right. The Crits are negative and the Econs are positive. Wouldn’t it be fun to put all the Crits and Econs in the same room and see whether, like ions, they combine to form one humongous molecule of inert gas? Unfortunately, since most of these people refuse to get in the same room with each other, modern science will never know whether it would work.

Find Upright Law job listings on LawCrossing.