Not So Fast on the Crits:

A Grudging Tribute (or Concession) to Crit Style

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This is a piece about the crits for people who do not like them. The message is: Do not be so sure of yourself.

If you have read this far, you know who the crits are: the Critical Legal Studies group, that ragtag assemblage of neo-neos who have made life so, well, unpleasant around the faculty lounge these last ten years.

And you know who you are. You certainly are not a crit. That is easy: Crits do not read journals like this in the first place (or write for them either, I suspect). Moreover, you do not much like the crits. Not that you feel all that good about it. After all, you are not schooled in crit lore. In fact, you are more or less peeved at their fecundity, not to say irritated at their bad manners.

In short, you have a bad conscience. But you have a trump card. After all, the crits write poorly. And bad writing, we all know, is not just an inconvenience. Rather, it is a vice.

Right?

The thesis of this essay is: not quite. Or, to expand: Crit writing, or some of it, may be bad by some conventional standard. But much of it is not. And even the bad stuff turns out, on close scrutiny, to be far more effective in the getting-the-cows-to-Abilene sense than the apostles of good writing (or the opponents of the crits) might like to admit.

There are several points here. I will try to do justice to all of them, but let us start with good writing. Lately, there seems to have arisen a convention that good writing means spare writing: short sentences with simple structures and a sixth-grade vocabulary. On this constricted definition, the sodality of good writing turns out to be a highly exclusive club:

Hemingway makes it, and Orwell, and some carefully chosen portions of the King James Bible. But the list of the excluded is simply breathtaking: no room for Proust's great cathedrals of commas and semicolons, none for the sheer superfluxity of Shakespeare. And not even a thought for the haunting "badness" of a Faulkner, say, or a Dreiser; these writers grip us and hold us while they break every rule.

The very oddness of this list invites further inquiry into our motives and meaning. When we talk about "good" writing, just what do we have in mind? I offer three not very similar definitions:

- Good writing is an aesthetic category; we like good writing because it gives us pleasure, and for no other reason.
- Good writing is a defense against mendacity.
- Good writing is tactically shrewd, because it makes good reading.

On reflection, it seems to me the Hemingway definition is not very helpful on any of these points. On aesthetic grounds, it would be sheer impudence to rank Hemingway ahead of Shakespeare, or Orwell ahead of Proust. On the matter of "mendacity," the proponents may appear to have a point—lies can be hard to detect when they are whirled up in a cloud of verbiage. But a moment's reflection will suggest just how superficial the point is. "Simple" writing can be elegant and truthful; it can just as easily (or more easily) be crude, vulgar, and simplistic. For every Hemingway a Posner, for every Orwell a Flesch: Plenty of lies get told in declarative sentences with verbs that make the paper crawl.

As to the third definition—good writing as good tactics—more about that in a moment. But first, what does this all have to do with the crits? Well, the one thing I suspect everyone can agree on is that there is no Crit Hemingway. To

which the response may be: lucky for the crits. On the other hand, when people say the crits are bad writers, they certainly forget Mark Tushnet, whose style, if not "plain," is easy, fluid, and entirely comprehensible. Tushnet is not a pleasant writer, and this may be important. Anti-crits seem to feel that the crits make a virtue out of unpleasantness, and Tushnet would seem to provide strong evidence in their favor on the point. But unpleasantness is one thing. Badness is quite another and, on this record, much harder to sustain.[1] Clarence Darrow said that he had suffered from being misunderstood, but that he would have suffered more if he had been understood. Tushnet will never face that dilemma. In any event, Tushnet is not the crits' only conventionally good writer. Robert Gordon, the crits' best intellectual historian, manages an almost overwhelming body of erudition with a deceptive ease—and with the grace and charm of a good diplomat.

If Tushnet and Gordon are not crits, then I cannot imagine who is. On the other hand, I concede that they are atypical in the fluidity of their prose—others are more culpable of linguistic crimes than they. And clearly there are some more general charges against crit writing to be addressed.

Of these, perhaps the most obvious is the imputation of the vice that Bryan Garner calls "jargon-mongering."[2] Garner says that "the favored words in the field" are "*purposivist, constitutive, coopting, demobilizing, structuralism, deconstruction, formalism,* and *praxis*, among others."[3] This list is instructive. One choice—*formalism*—seems extremely odd, because it comes out of the center of mainstream legal thought. Is not the whole story of 20th-century jurisprudence,

1. Calvin Massey seems to fall into this misunderstanding in his able review of Mark Kelman's new book. *See* Massey, *Book Review*, 39 HASTINGS L. J. 1269, 1270 n. 2 (1988).
2. B. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 8 (1987).
3. *Id.*

after all, the story of the "revolt against the formalists" and the substitution of the "realist" approach?

Terms like *praxis* and *coopting* may sound unfamiliar to the lawyer's ear. But the difficulty here is with the notion of "jargon." Your "jargon" may be my precise, highly calibrated technical language. And while *praxis* and *coopting* may have little to do with the history of the law, they are certainly well recognized in Marxist thought, where they are at least as well defined as, say, *negotiability* or *basis* in law.

So also with *structuralism* and *deconstruction.* Let us concede that they are strangers to the law (at least as it stood circa 1980). But they are hardly mere coinages. They are terms with an elaborate social and cultural context of their own. Now, there may be a conflict over whether they are any of our business—whether law professors should spend any of their scarce resources learning or debating terms of that sort. Indeed, Alisdair MacIntyre has argued that there is nothing so central to a flourishing tradition than the very content of the tradition itself, and the culture of the law will be one thing with words like *structuralism* as part of its vocabulary, quite another without it. But that is very far from being a debate over the quality of writing.

A related charge is that crit writing is too abstract. This is hardly surprising in legal or social thought: John Rawls, for example, the quintessence of establishment ideology, is surely also the quintessence of abstraction. Still, it is clear that much crit writing becomes, as Garner charges, abstract.[4] But it is not clear just where this difficulty begins, or where it might stop. Take, for example, the work of Duncan Kennedy, the Crit Pope if there is one, and his student, Mark

4. *Id.* Garner says "abstractitis." I assume he finds this word less imbued with "jargon" than the words "mongered" by the crits. [The word is that of Sir Ernest Gowers. *See* H.W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 5 (E. Gowers 2d ed. 1965).— Ed.]

Kelman, the chairman of the congregation for the doctrine of the faith. Both Kennedy and Kelman have given some of their best energies to a detailed and comprehensive attack on the most mainline modern school of legal thought—I mean "law and economics." Both Kennedy and Kelman are masters of what you might call the Prince Rupert strategy—catch the enemy in camp and burn the tents. Less elegantly: Their job is to show that L&E does not make sense on its own terms. If law and economics is important, then this kind of attack is important. And if you like abstract argument, this is certainly going to give you delight. But there can be no surprise if the argument gets snarled in subtlety.

Ironically, this charge of abstruseness has tended to come not so much from the center or right as from the left. From the left, it takes the form of an accusation of irrelevance—the assertion that critspeak is the speech of the faculty lounge, where it has little or nothing to do with the life of the promised revolution. Again, this may or may not be true, but it hardly becomes mainstream critics to complain that the vice of the crits is that they are insufficiently revolutionary.

I know. I am still making life too easy for myself. Intricate as the crit argument might be, still it does not require all the portentous abstruseness. Fine. Let us get down to cases. We do not have to go far. Take, for example, Kelman's *Guide to Critical Legal Studies*—one of the most wretchedly misnamed books in the history of legal thought. (I wonder how many readers hoping for a West *Nutshell on the Crits* have plunged into the Kelmanian thicket, only to find themselves ensnared beyond all rescue in the tangle of doctrinal ploy and counterploy?) Kelman quickly provides material that invites suspicion. Take, for example, this sentence from the second page:

> Mine will be a rather "academic" account of what I perceive to be the most basic claims, largely about the struc-

> ture and meaning of standard legal discourse, made repeatedly by certain early participants in the Conference, but I by no means suggest that I can capture the essence of all the work that has been done by people who have identified themselves with this organization (come to meetings, put themselves on a mailing list, engaged heavily in the incestuous, mutual citation practices toward which "schools" of academic lawyers tend), much less identify the essence of what a critical "theory" of law might be in a more general sense.

What can be said about this sentence? For indeed, it would be very easy to show Kelman, as a first-year student, how to disassemble (I hesitate to say "deconstruct") that sentence to make it easier to read. Thus, with the most paltry intervention, you can break it down from one sentence into three:

> Mine will be a rather "academic" account of what I perceive to be the most basic claims, largely about the structure and meaning of standard legal discourse, made repeatedly by certain early participants in the Conference. But I by no means suggest that I can capture the essence of all the work that has been done by people who have identified themselves with this organization (come to meetings, put themselves on a mailing list, engaged heavily in the incestuous, mutual citation practices toward which "schools" of academic lawyers tend). Much less do I try to identify the essence of what a "critical theory" of law might be in a more general sense.

It is equally possible—even easy—to go further, although it takes a little more intervention. Thus, the first sentence of the revision divides naturally into two:

> Mine will be a rather "academic" account of what I perceive to be the most basic claims, largely about the structure and meaning of standard legal discourse, made repeatedly by certain early participants in the Conference.

> These claims are largely about the structure and meaning of legal discourse.

The next sentence should be:

> But I by no means suggest that I can capture the essence of all the work that has been done by people who have identified themselves with this organization.

In the original, the next phrase is:

> (come to meetings, put themselves on a mailing list, engaged heavily in the incestuous, mutual citation practices toward which "schools" of academic lawyers tend).

If Kelman were my student, I would urge him to omit it, or at least reduce it to a footnote. It is not that it is wrong, or even poorly put.[5] Quite the contrary, it offers just that touch of saving concreteness that one is said to miss in crit writing. But it does seem off the point here. Anyway, that would leave only the final clause, which I would make a separate sentence:

> Much less do I try to identify the essense of what a "critical theory" of law might be in a more general sense.

Or, in total:

> Mine will be a rather "academic" account of what I perceive to be the most basic claims made repeatedly by

5. It seems to me there is at least one nonagreement: Early crits "come" to meetings, and "put" themselves on mailing lists, although they "engaged" in mutual citation. The editor of this journal argues that all three relate back to the single *have* before the parenthesis, and are therefore to be read as past participles, not present-tense verbs. He might be right, but I am still inclined to ascribe it more to good luck than to good planning on Kelman's part.

> certain early participants in the Conference. These claims are largely about the structure and meaning of legal discourse. But I by no means suggest that I can capture the essence of all the work that has been done by people who have identified themselves with this organization. Much less do I try to identify the essence of what a "critical theory" of law might be in a more general sense.

And there it is. One could go further, but this is probably enough to show that Kelman's sentence—the original version—has a meaning and that it is perfectly well abstractable from the original.

This can hardly be the end of the matter, of course. One cannot be expected to acquit—or to convict—the crits on the strength of one rather unwieldy sentence. On the other hand, it seems to me that conscientious readers of Crit Lit will recognize this sentence as being about as representative as a crit sentence can be—abstruse, more than a little irritating in effect and perhaps also in intention, yet in the last analysis comprehensible and therefore communicative.

There is really only one other name in the crit front line: Roberto Unger. Unger, anyone would have to admit, is an original, as much an exotic in crit legal thought as, say, Handel in English music. But what of that? If crit writing is either bad or good, he is one of the prime reasons why it is so.

As with everything else about Unger, so with his writing: He does not track in the usual grooves. He is not ugly in print, like Tushnet, or whiny, like Kelman and Kennedy, or even conversational, like Gordon. What is he?

I think the easy answer is: Brazilian. In the strict sense. I do not mean to say that this is a vice. Quite the contrary. I have no special ear for a "Latin" style, but I think I would have to say that it is a style, and that I cannot ignore it without exposing myself to a charge of parochialism. If Ortega or Unamuno—or, for that matter, Carlos Fuentes—

deserves a hearing, then certainly Unger has some claim on our attention. The charges against Unger are pretty much the same as the charges against Kennedy and Kelman, and stand or fall on pretty much the same basis. Yes, he does use a "technical vocabulary" (a.k.a. "jargon"), and yes, he does (a la Rawls) engage in abstraction. But as I have argued, that is not necessarily the same as being unclear, or even unforceful. Indeed, Unger's most famous line—the notorious closing, "Speak, God," at the end of *Knowledge and Politics*—seems to me best understood in precisely this perspective. Moony or silly it may be. But anyone who has read the book knows perfectly well what it means—as one would have to, of course, in order to sneer in the first place.

I could go on—heaven knows there is plenty of crit writing out there. But if I have any point, it must be immanent in the ground I have already covered or it is not going to be anywhere at all. So let me try to generalize.

First, on the score of sheer elegance, nothing about crit writing really stands out, one way or the other. It is not clearly more elegant than other law writing—but how could it be less so? After all, once you stop to think about it, you realize that the good guys have no monopoly on good writing, and the bad guys, no monopoly on bad. In modern legal theory, Lon Fuller could be elliptical, Karl Llewellyn could be maddeningly quirky, and McDougal and Lasswell could be—well, whatever. But you still pretty much knew, within the breadth of a barn door, what they were driving at, and whether or not it was important.

Second, on the charge of imprecision-as-mendacity, the case seems to me very doubtful. The crits may be in error on important points—indeed I have a strong conviction that they are. But for the most part they can be arraigned, tried, and convicted on what they say, not on what they fail to say. That is exactly as it should be.

We are left only with pragmatics—the idea that "bad" (read "adorned") writing is tactically wrong because it reduces your chance to get an audience. This is the charge that I previously deferred. And of my three different perspectives on the evil of bad writing, this one seems to be the easiest to sustain. Yet, oddly enough, on close scrutiny it does not seem to survive at all. For the evidence, look around you. The crits are everywhere: They are out of the closet, they are into the faculty lounge, they have tapped the bung out of the white wine cooler, they have taken most of the good seats. And what is worse, they have made us listen. It simply will not suffice to say that the crits have nothing to do with legal theory. For good or ill, they are legal theory, or at least a substantial portion thereof. To continue to complain about them is like continuing to complain that the Germans gave Lenin a railroad car in 1917.

Back to where I came in: If you do not want to read the crits—well, terrific, be my guest. Be theirs, even. Life is short, and there is plenty else to read, from Holy Scripture down through to Moscow subway transfers. But do not use the "bad writing" ploy. It is cheap and convenient, but in the end, I think, simply wrong.