

Critical Interpretation: The Critical Project of Interpreting the Law

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“A legal rule forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles? What about airplanes? Are these, as we say, to be called “vehicles” for the purpose of the rule or not? If we are to communicate with each other at all, and if, as in the most elementary form of law, we are to express our intentions that a certain type of behavior be regulated by rules, then the general words we use – like “vehicle” in the case I consider – must have some standard instance in which no doubts are felt about its application. There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out.”

– H. L. A. Hart¹

WHAT MIGHT A CRITICAL RACE THEORIST SAY about whether or not a bicycle constitutes a vehicle in a park? At first glance, this question seems fanciful at best. A non-charitable reader may even find this question absurd and beside the point. Yet I would like to argue that critical race theorists, and “Crits” as a whole, have much to say about how the vehicle-in-a-park rule should apply to bicycles. This paper explores the relationship between critical legal scholarship and law as interpretation. I will attempt to show how critical legal scholarship contains ways of approaching and solving problems of interpretation such as pragmatic vagueness. Using three concepts developed by Crits – concrete universalism, an inequalities approach, and intersectionality – I will roughly sketch out what a critical interpretative framework may look like. In line with the privileging of “concrete”-ness entailed by this framework, I detail how this approach would play out in real life by providing (re-)interpretations of the facts behind *Geduldig v. Aiello*, a landmark legal case in which the Supreme Court determined that pregnancy did not constitute a sex-based classification. In answering expected objections, I demonstrate how a critical interpretative framework can be applicable to cases of legal indeterminacy generally; I also propose some substantive changes that can be made within legal scholarship and the community of judges to advance a critical interpretation of law. I conclude by offering my provisional belief that developing and utilizing a more robust framework for critical interpretation can lead to increased legitimacy of our legal system.

Before we move on, let us define our terms. For one, this paper will use the term “Crits” to refer to a diverse group of critical legal scholars including, but not limited to, feminist legal critics, black legal scholars, and critical race theorists. This is not an attempt to minimize the differences between these groups. Indeed, as we know, these scholars utilize contrasting frameworks and are products of different historical moments. For instance, early feminist legal criticism began with traditionally liberal arguments “for the universal application of traditional legal categories” and reluctantly became more radical in the 1960s and 70s as the liberal view faltered,² whereas critical race theory

¹H. L. A. Hart, “Positivism and the Separation of Law and Morals,” *Harvard Law Review* 71, no. 4 (1958), 607

²Patricia Smith, “Feminist Legal Critics: The Reluctant Radicals,” in David Stanley Caudill and Steven Jay Gold, eds., *Radical Philosophy of Law: Contemporary Challenges to Mainstream Legal Theory and Practice* (Humanities

emerged through a “certain dialectical *misalignment* [w]ithin the context of particular institutional and discursive struggles over the scope of race and racism in the 1980s.”³ Where relevant, I will still refer to distinct critiques and ideas using specific terminology. I utilize “Crits” not only to be concise, but also to call attention to how this motley crew of academics critique similarly oppressive functions and characteristics of our legal system. This leads to the second problematic term that I intend to use throughout this paper: hegemonic. I use this term as a descriptor (i.e. hegemonic legal system) to broadly refer to any sort of legal structure, jurisprudence, or legal thought, which serves in favor of dominant oppressive ideologies, be it on the basis of sex, gender, sexuality, race, age, ability, or any other identity category that has been traditionally discriminated against. Again, I do this not to collapse people’s experiences into “the same struggle,” but to highlight how oppression of different peoples, at least in the legal realm, share noticeable similarities.

Interpretation is central to law. Ronald Dworkin, in “Law as Interpretation,” goes as far as arguing “legal practice is an exercise in interpretation not only when lawyers interpret particular documents or statutes but generally. Law so conceived is deeply and thoroughly political.”⁴ We shall return to the political nature of interpretation later in this paper. For now, let us explore what such an “exercise in interpretation” might entail and what sorts of problems can arise.

First, what are we interpreting exactly? This question need not fully answer the related query, “what is law?,” and lead one into the quagmire of the positivist vs. natural lawyer debate. Indeed, I think both a positivist and a natural lawyer can agree with Hart in saying that there is an “open texture,” vagueness in the broad sense, to jurisprudence.⁵ In thinking about law in this way, as an object that is to be interpreted with its “open texture,” it would be helpful to distinguish the sources of law and the law *per se*. Joseph Raz, for one, asserts that legal interpretation is primarily “the interpretation not of the law, but of its sources.”⁶ Raz, here, refers to the legislation and legal precedents that serve as references for judges and legal scholars in elucidating how the law should be applied to specific cases. When we speak of interpreting the law, we should keep in mind that we are primarily interpreting legislation and legal precedents, and not interpreting the idea of law itself. So, for example, in explicating a woman’s right to choose abortion in the legal realm, one is less so expounding upon or contesting the idea of a woman’s right to choose in abstract terms, and more so interpreting *Roe v. Wade* and related cases.

As one may expect, numerous difficulties become apparent when one attempts even a shallow interpretation of law. Vagueness immediately comes to mind. Timothy A. Endicott says that “an expression is vague if there are borderline cases for its application.”⁷ Roughly speaking, vagueness arises when there is practical linguistic indeterminacy in a particular application of a word or expression. There are two types of vagueness: semantic vagueness, which can be understood as “not knowing whether a statement applying it would be true,” and pragmatic vagueness, i.e. “not knowing whether it would be appropriate in the circumstances to make such a statement.” Cases that involve both semantic and pragmatic vagueness can be thought of as “vagueness in the broad sense.”⁸

There are numerous potential sources that lead to vagueness. While I think the Crits have something to say about all of these sources, such as incompleteness and incommensurability, I will focus on only one source of indeterminacy in order to provide a more fleshed-out framework for critical interpretation – dummy standards. Endicott tells us that a dummy standard is a provision

Press, 1995), 73-77.

³Kimberlé Williams Crenshaw, “Twenty Years of Critical Race Theory: Looking Back to Move Forward,” *Connecticut Law Review* 43, no. 5 (2011), 1259

⁴Ronald Dworkin. “Law as Interpretation.” *Critical Inquiry* 9, no.1 (1982), 179.

⁵Timothy A. Endicott. *Vagueness in Law* (Oxford: Oxford University Press, 2000), 37.

⁶Joseph Raz. “Why Interpret?” *Ratio Juris* 9, no. 4 (1996), 349.

⁷Endicott, 31.

⁸*Ibid.*, 32.

that “calls on the courts to develop their own test of standing.”⁹ As an example, Endicott cites a 1981 British Supreme Court Act, which declared that only individuals with “a sufficient interest in the matter” have standing to seek judicial review of administrative action. He explains:

The Supreme Court Act might have been no different in effect if it had provided that applications must have a ‘substantial interest,’ or if it had provided that standing was ‘in the discretion of the court’. These three possibilities are *different*, because “substantial interest’ seems to *set* a standard (although it has no sharp boundaries), ‘sufficient interest’ seems to *presuppose* a standard but not to set one, and ‘in the discretion of the court’ seems to say that there *is no* standard.¹⁰

These differing potential standards (or lack thereof) can be characterized as the difference between a dummy standard, a vague standard, and an express grant of discretion. According to Endicott, all three should be understood in relation to pragmatic vagueness, since it is unclear what these standards look like under different circumstances.

It is my contention that vagueness in the broad sense, and pragmatic vagueness in particular, has the potential to be rendered in service of legal hegemony. Consider the dummy and vague standards above: what would interpreting and enforcing these benchmarks call for? Setting a dummy “substantial interest” guideline seems to presume a general understanding of what a “substantial interest” looks like. Similarly, presupposing a “sufficient interest” criterion assumes some sort of universally prior position whereby the vague term “sufficient” has already been generally decided. In sum, these pragmatically vague standards appeal to a model of *abstract universality* – an objective reality that can be neutral in its application to all potential parties.

As numerous feminists have singled out, abstract universality (at the very least in the legal realm but, as I would believe, in general) by and large assumes maleness as the norm and ends up perpetuating patriarchal and misogynistic attitudes. One need only think of *Geduldig v. Aiello* (1974), in which the court came to “the stunning conclusion that discrimination based on pregnancy does not involve a sex-based classification,”¹¹ as a good example of how men and maleness become assumed, unsaid norms in legal appeals to abstraction. Writing for the majority, Justice Potter Stewart stated that the denial of insurance benefits to pregnant women whose jobs were terminated due to (“normal”) pregnancy did not constitute sex-based discrimination, and that pregnancy can be excluded from California’s list of compensable disabilities. He continues:

These policies provide an *objective* and wholly noninvidious basis for the State’s decision not to create a more comprehensive insurance program than it has. There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program. There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.¹²

If I am interpreting Stewart correctly, since men are not protected from the “risk” of pregnancy by law, failing to protect women from the “risk” of pregnancy cannot constitute sex-based discrimination. Stewart’s analysis only holds if one assumes men as the neutral standard to be compared to; that is to say that because male pregnancy, whatever that means, is not covered by this policy, exclusion of female pregnancy does not discriminate because it is *no different* to exclusion of male pregnancy. This, of course, is ridiculous. Patricia Smith finds that, “what feminists have realized

⁹Ibid., 49.

¹⁰Ibid.

¹¹Smith, 76.

¹²*Geduldig v. Aiello*, 417 U.S. 484 (1974), <https://supreme.justia.com/cases/federal/us/417/484/>, emphasis added.

is that equal protection law itself, while claiming to be neutral, in fact assumes a male standard of what is normal.”¹³ In *Geduldig*, six out of the nine male justices held a discriminatory law constitutional by appealing to a (silently male) “*objective* and wholly noninvidious basis.” Remembering *Geduldig* moving forward requires us to remain vigilant to any sort of appeal to ideal objectivity that masks maleness, or any other hegemonic ideal such as Whiteness, as the norm.

If vagueness and abstract universality privilege legal hegemony, what should we have in its stead? One alternative was provided by feminist legal scholars decades ago – substituting abstract universality for “concrete universality.” Appeals to concrete universality forces one to appeal to empirical realities and recognize the differences and multiplicities that are characteristic of the world we live in, instead of assuming that there is some sort of universal standard applicable to every citizen. In contrast to abstract universality, concrete universality reinterprets difference in three crucial ways. The prominent feminist legal scholar Ann C. Scales states: “First, concrete universalism takes differences to be constitutive of the universal itself. Second, it sees differences as systematically related to each other, and to other relations, such as exploited and exploiter. Third, it regards differences as emergent, as always changing.”¹⁴ An appeal to concrete universality may have led the Court in *Geduldig* to a different ruling as it would have forced them to consider the constitutive relational differences between men, women, and pregnant women, rather than compare pregnant women to the supposed standard of pregnant men.

Substituting abstract universality with concrete universality can significantly improve our understanding of vagueness. Abstraction and the assertion that there is one universally applicable truth to people’s lives may have one think that most legal interpretation deals with semantic vagueness and vagueness in the broad sense. After all, we need not think much about pragmatic vagueness and whether or not precedent is applicable to specific circumstances if a judge can apply an “*objective* and wholly noninvidious basis,” to which all can agree with. In contrast, accepting concrete universality and the emphasis on difference would have judges recognize the complex world we live in and that most cases of legal indeterminacy result from *pragmatic* vagueness. Scales provides us with a useful analogy – the world is a fuzzy scene. “A precise picture [i.e. abstract universalism] of a fuzzy scene is a fuzzy picture.” A fuzzy picture [concrete universalism] of a fuzzy scene is still a fuzzy picture, but at least it would be more honest to the reality of things.¹⁵ I think this can lend more legitimacy to our legal system, but I will return to this point later.

Crits have other helpful methodologies in their theoretical toolkit that can provide the basis for a critical legal interpretation framework. Here, I will only focus on two – an inequalities approach and intersectionality. In 1979, Catherine MacKinnon contended that the test in any legal challenge should be “whether the policy or practice in question integrally contributes to the maintenance of an underclass or a deprived position because of gender status.”¹⁶ Mackinnon termed this technique the “inequality approach.” We know, of course, that gender status is not the only axis along which discrimination can occur. Expanding upon Mackinnon, we may say that the test in any legal challenge should be whether the policy or practice in question integrally contributes to the maintenance of any underclass or a deprived position due to one’s membership to *any* protected class.¹⁷ This can be thought of as an *inequalities* approach.

In matters of legal interpretation, applications of the inequalities approach can be extremely useful in cases of pragmatic vagueness. Again, pragmatic vagueness is defined as “not knowing whether it would be appropriate in the circumstances to make such a statement.” The inequalities

¹³Smith, 77.

¹⁴Ann C. Scales, “The Emergence of Feminist Jurisprudence: An Essay,” *Yale Law Journal* 95, no. 7 (1986), 1388.

¹⁵Ibid.

¹⁶Ibid., 1394.

¹⁷U.S. Equal Employment Opportunity Commission, “Discrimination By Type,” Accessed 27 October 2018, <https://www.eeoc.gov/laws/types/>

approach provides one with a standard to test whether or not it would be appropriate to interpret legal sources in a certain way. To be explicit, using an inequalities approach, a judge should choose interpretations that least contribute to the maintenance of an underclass or a deprived position due to one's membership to *any* protected class. In the case of *Geduldig*, for instance, had the Supreme Court adopted an inequalities approach, the Court would have had to interpret federal insurance regulation in a way that would have protected pregnant women. A decision otherwise, like the one they reached in reality, would have led to pregnant women being put into a deprived social position vis-à-vis other members of our polity.

Intersectionality is another useful philosophical concept for legal scholars and interpreters. Developed by Kimberlé Crenshaw, intersectionality highlights how those who hold multiple identities that have been historically marginalized cannot condense the discrimination they face in any unidirectional fashion. Crenshaw's traffic intersection analogy is worth quoting in full:

Consider an analogy to traffic in an intersection, coming and going in all four directions. Discrimination, like traffic through an intersection, may flow in any direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is in the intersection, her injury could result from sex discrimination or race discrimination.¹⁸

Taking intersectionality seriously is another way in which a legal scholar can be honest to the "fuzzy scene" that is reality. It helps one recognize how interconnected oppressive hegemonic legal practices are and how one can never separate an individual's interconnected sense of self. Returning to *Geduldig*, an intersectional approach may have a judge recognize the obvious fact that a pregnant woman's pregnant status cannot be separated from their status as a woman, and thus discrimination against pregnancy must constitute sex-based discrimination.¹⁹

I expect three main objections to the claims I have made thus far: 1) what I have said only holds true theoretically and not in the day-to-day practice of law, 2) a critical interpretation is only applicable to certain domains and is not relevant to legal interpretation at large, and 3) utilizing a critical interpretation undermines the authority commanded by our current rule of law. I will address these three objections in turn and use them as springboards to further develop my argument.

One objection that a critic might raise is that what I have argued thus far only holds true in theory and not in practice. The critic might claim that the critique of "abstract universalism" obfuscating assumed maleness as the norm in legal thought does not actually hold true; in the real world, there is an "objective reality" one can appeal to. Moreover, judges are exemplars of objectivity and nonpartisanship within our society, and are thus the best people to ascertain the truths of our law. What makes you think that they would appeal to White male norms and hegemonic thought?

Facts do. In the United States, only 33 percent of our judges are women.²⁰ Only 20 percent of our judges are people of color. Women of color, though comprising about 20 percent of the U.S. population as a whole, only make up 8 percent of our state judges, while White men alone comprise

¹⁸Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," *University of Chicago Legal Forum* 1, article 8, (1989), 149.

¹⁹An intersectional approach can be extremely productive when combined with an inequalities approach. For instance: we know that childcare disproportionately falls upon women in heterosexual relationships, and that such undue burden cannot be separated from either their pregnant status or their status as a woman.

²⁰National Association of Women Judges, "2018 US State Court Women Judges," Accessed 27 October 2018, <https://www.nawj.org/statistics/2018-us-state-court-women-judges>

a whopping 58 percent of our benches.²¹ The empirical realities alone tell us that judges, who are disproportionately White and male, are likely to assume White male standards and obscure those assumptions as “objective truth.” Explicit appeals to White male rationality exist even landmark cases that have benefited historically disadvantaged groups.²²

Facing the startling lack of diversity on our benches, one has two general paths to advancing a critical interpretation of law. On one hand, a pessimistic approach would be to say that the only way we can change our hegemonic legal structure is by changing who our judges are. As Scales laments, “At less optimistic moments, candor would compel me to admit that implementation of a feminist approach will ultimately depend upon significant changes in judicial personnel.”²³ On the other hand, a more optimistic approach would be to say that judges are influenced by social factors around them, particularly by the dominant mode of thoughts in legal scholarship. If legal scholars can challenge hegemonic ideas in law schools across the country, then, eventually judges will get it right. Deciding on what path to take would require one to provide an account of the relationship between *jurisprudence*, “a description of the course of court decisions,” and *legal scholarship*, “the science or philosophy of law,”²⁴ a discussion that is beyond the scope of this paper.

Another more generous critic might accept most of my claims but maintain that this approach is limited to specific domains of law. The critic would argue something along the lines of “sure, this makes good sense and all in anti-discrimination law, but this tells us nothing about problems of indeterminacy like vagueness generally. Your critical approach to interpretation falls short. What can it possibly tell us about whether or not a bicycle constitutes a “vehicle in a park?”

I think this critic is right in pointing out that a critical interpretation may be more useful in some cases more than others, but I would like to hold that critical interpretation can provide legal scholars with a methodology of interpreting *all* sources of law. Let us return to Hart’s vehicle-in-the-park. Hart himself, interestingly but predictably enough, appeals to masculine notions of rationality. In articulating the “problems of the penumbra” Hart explains:

In this area *men* cannot live by deduction alone. And it follows that if legal arguments and legal decisions of penumbral questions are to be *rational*, their *rationality* must lie in something other than a logical relation to premises. So if it is rational or “sound” to argue and to decide that for the purposes of this rule an airplane is not a vehicle, this argument must be *sound or rational* without being logically conclusive.²⁵

But why the emphasis here on being “sound or rational”? In the epigraph to this paper, Hart seems to suggest that the problems of the penumbra rest upon the fact that there are cases where there are doubts felt about its application. But why should no doubts be felt about our law? Is our democracy not fundamentally about genuine disagreement and working out or differences?

²¹Jawando, Michele L., and Allie Anderson, “Racial and Gender Diversity Sorely Lacking in America’s Courts,” 15 September 2016, Accessed 27 October 2018, <https://www.americanprogress.org/issues/courts/news/2016/09/15/144287/racial-and-gender-diversity-sorely-lacking-in-americas-courts/>

²²Consider, for instance, what Justice Harry Andrew Blackmun said in *Roe v. Wade*: “One’s philosophy, one’s exposure to the raw edges of human existence, one’s religious training, one’s attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one’s thinking and conclusions about abortion... Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection. We seek earnestly to do this, and because we do, we have inquired into and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about *man’s* attitudes toward the abortion procedure over the centuries.” Perhaps appeals to male rationality is part of the reason why *Roe* was decided on the basis of privacy rather than a woman’s rights *per se*; *Roe v. Wade*, 410 U.S. 113 (1973), <https://supreme.justia.com/cases/federal/us/410/113/>, emphasis added.

²³Scales, 1398.

²⁴Jerome McCristal Culp Jr., “Toward a Black Legal Scholarship: Race and Original Understandings,” *Duke Law Journal* 1991, 49.

²⁵Hart, 608. Emphasis added.

Once more, Hart appeals to abstract rationality, implicitly coded as White and male. A critical interpretation, substituting abstract for concrete rationality, of the vehicle-in-the-park ordinance would have one recognize that the standard of “vehicle” does not arise *ex nihilo*. Instead, one’s understanding of “vehicle” is shaped by one’s lived experiences of what is and is not appropriate in a public park, such as seeing children play with their toy automobiles and commuters biking through the park on their way to work. With such an understanding of the world around us, suggesting that this ordinance cover toy automobiles or airplanes the same way it covers automobiles (as Hart does) would simply be ridiculous. As a whole, critical interpretation helps us recognize that standards are not fashioned *ex nihilo*, and asks legal interpreters to rethink assumed standards through *concrete* reality.

Finally, I would like to answer the objection that critical interpretations of law may diminish the authority of law. The objector, in this case, need not hold that there are universal truths and an objective reality for judges to appeal to. This objector need only hold that it is important for people to *believe* that our law and our judges are objectively rational. Such a belief rests in the assertion that for the common lawperson to accept the law as law, our legal system needs some sort of claim to authority – and the best claim to authority is the claim to objective truth (even if we, theoretically, know that this cannot be the case).

I share the worries raised by this objector. Accepting law *as* interpretation can have profound impacts on how one conceives of and relates to law, and we must think about how new interpretations, such as the advancement of critical interpretation, would challenge the coherence of our existing legal system and social order. Following Joseph Raz, we should ask: “How can the law form a stable guide for people’s actions if it is subject to innovatory interpretation? How can there be a fact of the matter as to what the law is if there can be a plurality of valid interpretation?”²⁶

Nevertheless, though there is much work to be done, I would like to offer the provisional belief that if lawyers and judges can accept and advance critical interpretations of the law, they could eventually further legitimize the legal system. As Raz reminds us, “*An interpretation successfully illuminates the meaning of its object to the degree that it responds to whatever reasons there are for paying attention to its object as a thing of its kind.*”²⁷ Raz believes that authority and continuity are the two primary “reasons” that law should be interpreted in relation to, while equity and the courts’ role in the development of law are secondary reasons.²⁸ Yet how is a body of law supposed to remain authoritative and continuous if it has no claim to equity? Does our country not have a long and rich history of overturning unjust law? It seems to me that advancing critical interpretation would allow us to simultaneously interpret the law in light of equity while also promoting the legal ideas of authority and continuity. Equitable laws, after all, generally command more respect and have longer lifespans. In other words, despite offering innovatory ideas, critical interpretations of the law does seem to offer the potential to “form a stable guide for people’s actions.”

²⁶Raz, 363.

²⁷Ibid., 355. Original emphasis.

²⁸Ibid., 356-362.

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