Article

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Feminist Jurisprudence and the Determinacy of Adjudication

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Abstract: Feminist jurisprudence engages in a critical analysis of the role that law plays in the subordination of women. Its main criticism is that law, far from being a rational enterprise, entrenches the ideals of the patriarchy; it cannot be relied upon to extend justice, procedural fairness, and equality to women on matters such as domestic violence and rape. Feminists raise two kinds of criticisms against law: first, they criticize the objectivity of its content, and second, they criticize the determinacy of its application in court. This article shall advance the thesis that it is a contingent but not a necessary feature of law that it enables the oppression of women. To this end, it shall outline a framework for a source-based model of adjudication based on Joseph Raz's theory of law to illustrate how legal practice can be consistent with feminist ideals. It shall then be argued how a test that distinguishes between binding and background norms rather than law and non-law as other models do captures important presuppositions about the nature of adjudication that are somehow overlooked. It shall conclude by explaining how substantive considerations can be weighed so cases may be decided with a respectable degree of determinacy.

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INTRODUCTION

Feminist jurisprudence is the area of legal theory that is concerned with the role that law plays in the subordination of women. As such, it engages in a critical analysis of the general concepts upon which law rests.[1] Its main criticism is that law, far from being a rational enterprise, entrenches patriarchal attitudes and perspectives; it cannot be relied on to extend justice, procedural fairness, and equality to women on matters such as domestic violence and rape.

While it is conceded from the onset that the law has historically been used to oppress women, the objective of this paper is to challenge the conceptual claim that law is *inherently* oppressive. That is to say, it shall advance the thesis that it is a *contingent* but not a *necessary* feature of law that it enables the subordination of women. It will be argued that not only is it theoretically possible for law to be just, fair, and equitable towards women, but it can also be made compatible with the ideals of contemporary feminist jurisprudence so as to become a powerful tool of social reform. To this end, this paper shall advocate a source-based model of adjudication to illustrate how this vision can gradually be achieved in court.

This paper shall be divided into two parts. First, it shall survey the historical roots of feminist jurisprudence and its criticisms of law. In particular, it shall situate it within the broader Critical Legal Studies movement and explain how American Legal Realism and European Marxism have influenced its views. Second, it shall outline a framework for a source-based model of adjudication in two sub-parts: the formal aspect that is concerned with how judges can objectively determine the content of law, and the substantive aspect that is concerned with how judges can decide cases with a respectable degree of determinacy. In no way is it

[1] Mark Tebbit, *Philosophy of Law*, 3rd Ed. (New York: Routledge, 2017), 273.

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claimed that this model can be used to dismantle the legal patriarchy, but it is more modestly claimed that it makes gradual reform possible even in a patriarchal society.

FEMINIST JURISPRUDENCE

A. HISTORICAL ROOTS

In the 1960s, feminist jurisprudence emerged as an offshoot of Critical Legal Theory. The critical legal scholar rejects the idea that law is a rational enterprise. In his view, law is nothing more than a manifestation of power that is designed to protect the interests of the ruling classes at the expense of the socially disadvantaged. The officials of legal systems are just as bogus. Rather than enforcing a determinate body of legal rules in a manner that benefits everyone equally, their latent biases render the law ambiguous, inconsistent, and unstable for racial, sexual, and cultural minorities. They accept certain legal doctrines in some situations, but reject them entirely in others.[2] The determinacy of law is therefore a myth. It is neither neutral nor objective towards the most vulnerable members of society.[3] As Robert Gordon wrote:

> The same body of law, in the same context, can always lead to contrary results because law is indeterminate at its core, in its inception, not just in its applications. This indeterminacy exists because legal rules derive from

[2] Joseph William Singer, "The Player and the Cards: Nihilism and Legal Theory," in *Yale Law Journal*, 94:1 (Nov. 1984), 15.

[3] Raymond Wacks, *Understanding Jurisprudence*, 5th Ed. (New York: Oxford University Press, 2017), 341.

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structures of thought, the collective constructs of many minds, that are fundamentally contradictory.[4]

The two greatest influences on Critical Legal Theory have been American Legal Realism, on the aspect of legal philosophy, and European Marxism, on the aspect of general philosophy.

1. AMERICAN LEGAL REALISM

Critical Legal Theory is similar to Legal Realism in that it is to the left of the prevailing legal doctrine and belittles the importance of rules. For the realist, the law is whatever the judge says it is; even if a legal rule speaks clearly and unambiguously on a case, the final determination of what the law is ultimately rests on the personal views of the judge. Justice Oliver Wendell Holmes Jr.—foremost of the realists—claimed that law is nothing more than predictions or "prophecies of what the courts will do in fact, and nothing more pretentious."[5] Karl Llewellyn defined law as "what officials do about disputes."[6] Jerome Frank claimed that law depends on a judge's peculiar traits, dispositions, habits, and sometimes, even what he had for breakfast.[7]

The emphasis on the role of officials in determining what the law is—instead of the legal materials themselves—led to inquiries into the social, historical, psychological, and ethical factors that influence judges. In turn, this resulted in skepticism about the certainty that law provides. Feminist jurisprudents have inherited this attitude from the realists,

[4] Richard W. Gordon, "Critical Legal Histories," in *Stanford Law Review,* 36 (1984), 114.

[5] Oliver Wendell Holmes Jr., "The Path of the Law," in *Harvard Law Review,* 10 (1897), 461.

[6] Karl N. Llewellyn, *The Bramble Bush* (New Orleans: Quid Pro Quo Books, 2012), 12.

[7] Jerome Frank, *Law and the Modern Mind* (London: Steven and Sons Limited, 1949), 111.

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emphasizing how men dominate every aspect of the legal system, from legislation, to law enforcement, and to adjudication. They argue that the disproportionately strong representation of men inevitably contaminates the law with androcentric values and, like the realists, are resigned to the belief that law provides no constraints upon them. Whereas the realist claims that law is what the judge says it is, feminist jurisprudents claim that law is whatever the male says it is.

2. EUROPEAN MARXISM

Critical Legal Theory is similar to European Marxism in that it claims that law is an expression of the power of the ruling class. Accordingly, it tends to be sociologically-oriented, ideological, and utopian in character, its negative doctrine pursuing a criticism of liberal legal theory, and its positive doctrine stressing the need for a new legal order.[8] The negative doctrine rejects the ideal of the rule of law that power is constrained by rules. The opposite is true: it is those in power who determine the rules to legitimize the prevailing power structures. The positive doctrine is not as well-developed. This is partly because the Marxist debunks the importance of the legal order and focuses instead on how historical and material conditions shape social life. But this is also because there is internal disagreement over what kind of reform is needed. Proposals have ranged from seizing control of the legislature to overthrowing the legal order altogether by means of violent revolution.[9]

Feminist jurisprudence embraces a similar negative doctrine in that it doubts that law entrenches a false consciousness under the guises of the common good and the rule of law, advancing the interests of men at the

[8] For an account of the negative and positive doctrines combined, see Roberto M. Unger, "The Critical Legal Studies Movement," in *Harvard Law Review*, 96:3 (January 1983), 561-675. This paper, however, shall only be concerned with the negative doctrine.

[9] Hugh Collins, *Marxism and Law* (Oxford: Clarendon Press, 1982), 126-127.

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expense of women.[10] Its positive doctrine is more unified than that of the Marxist. Most feminists seek more equitable laws and just applications of these laws. They also seek greater representation in legal institutions. It should be noted, however, that some feminists are also sympathetic with the Marxist; they view the legal order as so inconsistent that no amount of reform can improve their social situation.

B. FEMINIST CRITICISMS OF LAW

Feminist jurisprudents raise two kinds of criticisms against law. First, they criticize the content of law, and second, they criticize the application of the law in deciding cases. The first may be understood as criticisms of the objectivity of law, which refers to its capacity to provide the "correct" answer to most, if not all, legal disputes. The second may be understood as criticisms of the determinacy of law, which exists when the answer that it supplies can be agreed upon by honest, reasonable, and legally-trained men.

1. CRITICISMS CONCERNING THE CONTENT OF LAW

The main criticism concerning the content of law is that it contains androcentric norms, many of which are not, properly speaking, law. Feminists identify three reasons why this occurs.

The first, as Catharine MacKinnon raises, is that legislation is controlled by men, with laws as primary as those in the Constitution written from the male perspective.[11] The same can be said of legislative statues wherein many forms of abuse, such as obtaining sexual submission by fraud, intimidation, or coercion, are excluded from their coverage by

[10] Andrei Marmor, "The Nature of Law," in *The Routledge Companion to the Philosophy of Law*, ed. by Andrei Marmor (New York: Routledge, 2012), 14.

[11] Catharine MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989), 238.

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definition. In some jurisdictions, there is even no such thing as a crime against marital rape. Victims of sexual crimes thus have little to no recourse should they wish to press charges, their best option often being to invoke some vague statute that can be interpreted in favor of the accused.[12]

The second, Carol Smart says, is that schools often teach law from the perspective of masculine logic because it is purportedly neutral and objective.[13] For example, law students are taught that if it can be established in rape cases that a woman consented to have sex with a man, then no act of rape was committed. In this scenario, the legal concept of consent is depicted as a logical binary; either a woman does not struggle and thereby consents to have sex, or she resists and thereby does not. This is an oversimplification, however, for it overlooks underlying contextual factors. Carol Gilligan, for instance, points out that women are conditioned to avoid hurting others, giving into their needs to avoid being labeled "selfish".[14] Women who "consent" to sex often thus do not make genuinely free choices, given how social expectations bear upon them to engage in sexual relations they otherwise would have avoided.

The third is that legal institutions enforce androcentric norms *as if* they were law, even if they fall outside of their ambit. Nancy Fraser gives several examples to support this claim. For instance, some states that grant asylum to refugees classify genital mutilation as a "cultural practice" and refuse to aid women who have fallen victim to it. Meanwhile, social-welfare programs favor two-parent families and stigmatize single mothers as sexually irresponsible scroungers.[15] The patterns of subordination are

[12] Patricia Smith, "Four Themes in Feminist Legal Theory: Difference, Dominance, Domesticity, and Denial," in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, (Oxford: Blackwell Publishing Ltd., 2005), 95.

[13] Carol Smart, *Feminism and the Power of Law* (New York: Routledge, 1989), 67.

[14] Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge: Harvard University Press, 1993), 139.

[15] Nancy Fraser, "Feminist Politics in the Age of Recognition: A Two-Dimensional Approach to Gender Justice," in *Fortunes of Feminism: From State-Managed Capitalism to Neoliberal Crisis*, (New York: Verso, 2013), 169.

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harmful enough as cultural phenomena, but they become more pernicious when the state perpetuates them itself.

2. CRITICISMS CONCERNING THE APPLICATION OF LAW

The main criticism concerning the application of law is that legal interpretation occurs against a background of androcentric norms. This means that the set of legal reasons is never sufficient by itself to explain or justify the decision to a case, for non-legal considerations dilute the ways in which they apply. But this has the effect of making legal practice uncertain, unstable, and inconsistent; hence, the law cannot be relied on as a dependable source of reform and only serves to disenfranchise women. There are three ways in which this occurs.

First, given that judges are bound to adhere to past decisions in accordance with the doctrine of *stare decisis*,[16] it is difficult to reverse precedent in favor of a more progressive jurisprudence. Rae Langton gives the example of how pornography became legally protected as a form of free speech under the First Amendment of the United States Constitution.[17] Not only did this obscure the silencing effect that pornography has on women who are degraded into objects by their partners,[18] but it made it more difficult to challenge other exploitative practices within the industry, as in *Aschroft v. Free Speech Coalitio*n[19] when pornography was upgraded into a form of "lawful speech". Cass Sunstein explains that this has criminal implications as well, citing testimonial evidence that men who watch

[16] The doctrine of *stare decisis* is better known as a principle of formal justice that directs judges to treat like cases alike. See Peter Wesley-Smith, "Theories of Adjudication and the Status of Stare Decisis," in *Precedent in Law*, ed. by Lawrence Goldstein (Oxford: Clarendon Press, 1987).

[17] Rae Langton, "Speech Acts and Unspeakable Acts," in *Philosophy & Public Affairs,* 22:4 (Autumn, 1993), 293.

[18] *Ibid.*, 315.

[19] *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

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pornography are more prepared to commit rape and other forms of violence against women.[20]

Second, legal concepts are interpreted against the predominantly male standards of judges. Nancy Bauer gives the example of how "obscenity" was differentiated from "hard-core pornography" in *Jacobellis v. Ohio*. Justice Potter Stewart simply explained, "I know it when I see it."[21] The irony is that a male identified himself as a connoisseur for of illegal erotic materials despite the fact that females are most affected by these materials.[22] This was by no means an isolated case. As Andrea Dworkin pointed out, obscenity law covers a range of cases such as nudity, lewd exhibitions, exposed genitals, sodomy, and masturbation. Until relatively recently, the legal test for obscenity was whether an artwork, photograph, or movie produced an erection in the male. It was only when more women were allowed to become judges, lawyers, and jurors that the standard was lowered to the inducement of sexual arousal.[23]

Third, the procedures of litigation themselves tend to be androcentric. As Nicola Lacey points out, in rape cases, the credibility of the victim is questioned more than that of the defendant. This occurs when victims are cross-examined by opposing counsel intent on proving that they seduced or misled their clients.[24] In domestic abuse cases, judges overlook factors such as uneven power relations between spouses, often deeming them irrelevant to the case at hand.[25] Not only do these occurrences make

[20] Cass Sunstein, "Pornography and the First Amendment," in *Duke Law Journal,* 1986:4 (1986), 598.

[21] *Jacobellis v. Ohio* 378 U.S. 184 (1964).

[22] Nancy Bauer, "What Philosophy Can't Teach Us About Sexual Objectification," in *How To Do Things With Pornography*, (Cambridge: Harvard University Press, 2015), 21.

[23] Andrea Dworkin, "Against the Male Flood: Censorship, Pornography, and Equality," in *Harvard Journal of Law and Gender,* 8 (Spring 1985), 7-8.

[24] Nicola Lacey, "Unspeakable Subjects, Impossible Rights: Sexuality, Integrity, and Criminal Law," in *Unspeakable Subjects: Feminist Essays in Legal and Social Theory*, (Oxford: Hart Publishing, 1998), 113.

[25] *Ibid.*

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it less likely for women to win in court, but they also generate a chilling effect that discourages women from coming forward to file cases.

ADJUDICATION

Both kinds of criticisms against law may be framed as matters of adjudication, defined as the process by which judges review the evidence and arguments presented by opposing parties to resolve disputes. Adjudication has been defined in terms of rationality and legitimacy. It is rational in that any judicial decision must be justified in terms of articulated reasons, while it is legitimate in that a judge alone possesses the authority to create legal duties.[26]

It might be asked why this paper offers a partial solution in terms of adjudication as opposed to legislation. This is because law-applying bodies have greater authority than lawmaking bodies in two respects. First, since there are multiple sources of law in most legal systems, the only way to determine which institutions and procedures possess the authority to create law is to establish which are recognized by the courts. Second, when the actions of law-creating and law-applying organs conflict, it is the actions of the latter that are treated as the final, authoritative declarations of what the law is.[27] That is to say, courts, not Congress or Parliament, have the last say in determining the content of law and its application.

The solution this paper offers is a framework for a source-based model of adjudication based on Joseph Raz's theory of law, with some modifications. In no way is it claimed that this model will solve all of the problems that have been raised in this paper, but it is argued that doing so can make adjudication objective, determinate, and consistent with the

[26] William Lucy, "Adjudication" in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. by Jules Coleman and Scott Shapiro (New York: Oxford University Press, 2002), 207.

[27] Joseph Raz, "The Identity of Legal Systems," in *The Authority of Law*, (Oxford: Clarendon Press, 1979), 88.

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ideals of feminist jurisprudence even in a patriarchal society. The arguments to follow should thus be taken as reasons for feminists to reject the claim that law is conceptually indeterminate. This section shall be divided into three parts: the first shall explain what a source-based model is, the second shall describe its formal aspects and explain how adjudication can be objective, and the third shall cover its substantive aspects and explain how judges can decide cases with a respectable degree of determinacy.

A. THE SOURCE THESIS

A model of adjudication is a method by which judges can determine the content of law in order to decide cases. Legal philosophers throughout history have proposed various kinds of models. Jeremy Bentham, for instance, proposed a purely formal model of adjudication. He believed that the entire body of law could be codified into a comprehensive repository known as the *Pannomion* that covered every conceivable case. All the judge would have to do would be to open the rule book, search for the relevant law, and logically deduce the correct decision, virtually eliminating the need for adjudication altogether.[28] On the other side of the spectrum, Ronald Dworkin proposed the model of Constructive Interpretation. In his view, no rule book can ever exhaust the content of law no matter how many rules are written in it. Rather, judges have to take explicitly written law in addition to the unwritten moral principles that figure into their soundest justification, treat them as raw materials, and construct the morally best interpretations of legal concepts out of them to decipher what the law "really" says on a case.[29]

[28] Jeremy Bentham, *Of Laws in General*, ed. by H.L.A. Hart (London: The Athlone Press, 1970), 246.

[29] Ronald Dworkin, *Law's Empire* (London: Fontana Press, 1986), 65-66.

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Raz, like other positivists, conceives of law as a system of norms whose content is determined through some kind of mechanical test.[30] For H.L.A. Hart, the test was the rule of recognition—a customary rule shared among judges by which they determine what is binding based on social fact criteria, such as a law's enactment as a constitutional provision, legislative statute, or judicial precedent.[31] Raz, intellectual successor to Hart and torchbearer to the positivist tradition,[32] however, developed the concept of the rule of recognition in greater rigor and introduced a source-based test for law explicated in the Sources Thesis:

> A jurisprudential theory is acceptable only if its test for identifying the content of the law and determining its existence depend exclusively on facts of human behavior capable of being described in value-neutral terms, and without resort to moral argument.[33]

The Sources Thesis means that anything that is law is necessarily based on a social fact or source, which may be defined as any convention that establishes the requirements for the creation, modification, or annulment of legal standards. This means that any test of legal validity must apply only value-neutral terms and never turn on moral

[30] Joseph Raz, *The Concept of a Legal System* (Oxford: Clarendon Press, 1970), 1.

[31] H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 92-93, 97-107.

[32] Legal Positivism accepts four central theses: (1) the Social Thesis that law is a matter of social fact, (2) the Separation Thesis that says that there is no necessary connection between law and morality, and the (3) the Social Efficacy Thesis that the validity of law presupposes that it is socially efficacious, and (4) the Semantic Thesis that normative legal terms such as 'right', 'duty', or 'authority' have different meanings (senses) from their corresponding moral terms. See Torben Spaak and Patricia Mindus, "Introduction," in *The Cambridge Companion to Legal Positivism*, ed. by Torben Spaak and Patricia Mindus (Cambridge: Cambridge University Press, 2021), 7.

[33] Joseph Raz, "Legal Positivism and the Sources of Law," in *The Authority of Law*, (Oxford: Clarendon Press, 1979), 37-38.

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considerations. A test such as 'Law is whatever conforms to justice' is not a source-based test because 'justice' is not a value-neutral term. On the other hand, a test such as 'Law is whatever is enacted by Congress' deploys only value-neutral terms and does not depend on moral considerations. Thus, it has been said that under a source-based test, law becomes binding by virtue of its source rather than its content.[34] On this view, The Magna Carta for Women[35] is legally binding not because it expresses moral standards of equality, but because it has a source of law—its enactment as a legislative statute. Conversely, the norm that women and men are not paid equally is not binding regardless of how deeply entrenched it is in a patriarchal society, not because it is inherently unequal, but because it is not tied to any source of law.

B. THE FORMAL ASPECT OF THE SOURCE-BASED MODEL

This section shall propose a minor modification to the source-based test: instead of drawing a sharp distinction between law and non-law, one should distinguish between binding and background norms. Three reasons will be given in favor of the latter.

a. BINDING NORMS

The first reason is that, as feminists point out, the matter of what law is may not be objective. Law may be contaminated by androcentric norms when it is predominantly written by men, taught through the lens of masculine logic, and enforced by patriarchal institutions. It is thus not always possible for judges to objectively determine what, is, properly speaking, law. It shall

[34] Andrei Marmor, "Exclusive Legal Positivism," in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. by Jules Coleman and Scott Shapiro (New York: Oxford University Press, 2002), 117.

[35] Republic Act No. 9710, "An Act Providing for the Magna Carta of Women" (2009).

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now be argued that rather than ask, "What is law?", judges should ask, "What is binding?"

In any community, there are norms of such great importance that judges are bound to apply them to cases they directly cover. If they failed to do so, they would not only be said to have acted arbitrarily, but also to have been remiss with their duties.[36] These norms can be tied to authoritative sources such as constitutional provisions, statutes, and precedents. Thus, the answers to "What is law?" and "What is binding?" have virtually identical extensions, retaining the distinctions that the positivist makes. They do, however, have different senses. The correct answer to the latter is not necessarily defined in terms of what is law *per se*, but in terms of what has a source. Fortunately, determining what has a source is a straightforward task that depends on publicly ascertainable standards of behavior.[37] Any judge can identify what is binding by mechanically referring to the sources of law, allowing him to separate it from the misogynistic presuppositions, masculine logic, and androcentric values that underlie it. For example, it is plain to the judge that the law against rape is binding because it has a source. But the view that a woman who dresses provocatively is "asking for it" is not binding. Hence, even in a patriarchal society, judges are under a duty to actively exclude it from consideration.

In this sense, binding norms are exclusionary reasons. This phrase requires some explanation. First, binding norms are reasons for people to behave in certain ways. For example, even if the Chief Executive Officer of a company were reluctant to grant employees paid maternity leaves, certain labor laws constitute reasons for him to do so. Second, reasons may be first or second-order in terms of their mode of operation. Whereas first-order reasons are direct motivations to perform a certain action, second order reasons are grounds to behave or refrain from acting on the basis of first-

[36] Joseph Raz, "Legitimate Authority," in *The Authority of Law*, (Oxford: Clarendon Press, 1979), 3.

[37] *Ibid.,* 33, 52.

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order reasons. For example, a mother might instruct her daughter to be home by midnight even though she plans to stay at a party until three o'clock in the morning. The daughter now has a second-order reason—the fact that her mother gave an order—to refrain from acting upon her first-order reasons for staying out later, such as the fact that her friends will be there, or the fact that it is a weekend. A second-order reason of this sort is known as an exclusionary reason, for it excludes first-order reasons from factoring into deliberation. An exclusionary reason thus does not affect the balance of reasons by adding its weight, but by pre-empting first-order reasons.[38] As Martha Nussbaum writes, legal reasoning is a kind of practical reasoning;[39] it is to know how different reasons factor into adjudication.

Binding norms are second-order exclusionary reasons insofar as they must be applied even against the personal preferences of judges or at the cost of undesirable consequences. For example, consider *United States v. Virginia*,[40] a landmark case in which the Supreme Court struck down the male-only admission policy of the Virginia Military Institute after ruling that it violated the Equal Protection Clause of the Fourteenth Amendment. Let it be assumed that the first-order reasons for upholding this policy outweighed those for abolishing it: that institutions have a right to define their identity, that few female students are expected to enroll even if they can be admitted, that the few who do will be harassed by their male peers, and that there is already another military institute in Virginia that exclusively caters to women. Even if these first-order reasons constituted more weight, they were pre-empted by the Equal Protection Clause that binds regardless of the context or justification.

[38] Joseph Raz, *Practical Reason and Norms*, 2nd ed. (New Jersey: Princeton University Press, 1990), 35-48.

[39] Martha Nussbaum, "Legal Reasoning," in *The Cambridge Companion to the Philosophy of Law*, ed. by John Tasioulas (Cambridge: Cambridge University Press, 1959), 59.

[40] *United States v. Virginia* 518 U.S. 515 (1996).

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There is no necessity, however, for norms to be explicitly promulgated to be binding. It is sufficient for officials to recognize them as such even if they do not originate from within the legal system. The Civil Code of the Philippines, for instance, acknowledges custom as a source of law provided its existence can be demonstrated as a matter of social fact.[41] Similarly, courts apply international treaties, indigenous laws, company regulations, and private contracts *as if* they are binding,[42] even though they are not, strictly speaking, law. This is the second reason in favor of distinguishing between binding and background norms: in adjudication, not everything that is enforced as binding is 'law', though everything that is binding has a source. Hence there are legal norms that direct judges to apply some non-legal norms as binding.

Judges may be directed to apply moral norms as binding as well, even if these norms are not themselves incorporated into law. As long as judges determine that a case is covered by a rule that references morality (e.g., justice, fairness, or equality), they may reach value-laden conclusions. For example, the Anti-Rape Law of the Philippines of 1997[43] does not explicitly cover marital rape. This was partially based on Matthew Hale's Implied Consent Theory that a man cannot be guilty of raping his wife because of their mutual matrimonial consent and contract.[44] In 2014, however, the Supreme Court ruled for the first time in *People v. Jumawan*[45] that a man *can* rape his wife under the provisions of the same law, reasoning that the Anti-Violence Against Women and Their Children

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[41] J.B.L. Reyes and R.C. Puno, *An Outline of Philippine Civil Law Vol. 1* (Manila: Central Book Supply, Inc., 1965), 7-8.

[42] Joseph Raz, "Legal Validity," in *The Authority of Law*, (Oxford: Clarendon Press, 1979), 149.

[43] Republic Act No. 8353, "An Act Expanding the Definition of the Crime of Rape, Reclassifying the Same as a Crime Against Persons, Amending for the Purpose Act No. 3815, As Amended, Otherwise Known as the Revised Penal Code and for Other Purposes", (1998).

[44] Matthew Hale, *The History of the Pleas of the Crown*, ed. by Sollem Emlyn (1786), 629.

[45] *People of the Philippines v. Jumawan*, G.R. No. 187495, (2014).

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Act of 2004[46] regards rape within marriage as a form of "sexual violence", that gender equality is covered by the constitutional principle of the "fundamental equality" between women and men before the law,[47] and that it was "*morally certain that the accused-appellant [was] guilty of raping his wife*". Even if the Anti-Rape Law remains silent on marital rape, the decision created a new source-based norm—a judicial precedent—that is binding upon future judges who preside over similar cases.

b. BACKGROUND NORMS

Binding norms are by no means the only norms that judges consult. This is because the collection of binding norms cannot contain within it all that is relevant to the resolution of a case. As Raz points out, there are also background sources of law which contain information about beliefs, ideals, and other standards that aid in the interpretation of norms.[48] They derive from anywhere and may either be written or unwritten. The written sources may be found in literature, newspapers, academic journals, or textbooks. Meanwhile, the unwritten sources are found in cultural attitudes, moral beliefs, and the meaning of terms in ordinary language. Although none of these amount to authoritative declarations of what is binding, many laws would be rendered unintelligible without them. Binding norms may conflict, be open to diverse interpretations, lead to manifest absurdities, or cause grave injustices. Judges must therefore consult background sources to temper the law with a sense of justice and reason. Herein lies the third reason in favor of distinguishing binding norms from background norms: it captures the fact that the law says more than is explicitly stated. For this reason, background sources also factor into adjudication and should be

[46] Republic Act No. 9262: Anti-Violence Against Women and Their Children Act, (2004).

[47] Constitution of the Republic of the Philippines, Art. II, Sec. 14, (1987).

[48] Joseph Raz, "Dworkin: A New Link in the Chain," in *California Law Review,* 74:3 (May, 1986), 1105.

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allocated the commensurate weight in the balance of reasons. But it does not follow that all background norms are part of the law.[49] Only some of them are, and this is by virtue of their relevance to a case.

There are two reasons why background norms are valuable to feminists. First, even in a patriarchal society, androcentric norms can be offset by other background norms that speak to the equality of women. For instance, academic research that women are just as productive as men in the workforce, news accounts revealing the rampancy of sexual abuse within lower-class families, progressive social attitudes inspired by Western media, and moral beliefs concerning the wrongness of arranged child marriages may factor into how judges decipher what the law says on feminist issues and override androcentric reasons. In short, patriarchal views may be refuted through rational argument based on background information.

The second reason is that background norms may become binding norms themselves. For example, a background feminist principle may acquire the status of judicial precedent if it forms part of the *ratio decidendi* of a case.[50] This is what occurred in *People v. Biala*,[51] a rape case in which the Supreme Court ruled that full weight was to be ascribed to the testimonies of female child rape victims henceforth. The ruling was based on the principle that rape victims—especially young girls—are highly unlikely to lie about deeply traumatizing events. In this scenario, the principle was a reason for the decision that became *res judicata*. Moreover, even if a background principle is not explicitly laid down in a single ruling, it may be elevated to the status of a legal principle if it is invoked in a line of cases. For example, if the principle that women have autonomy over their own bodies is alluded to in enough decisions, then a judge may declare that there is a legal principle to this effect, thereby making it binding.

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[49] *Ibid.*, 1106.

[50] For an explanation of how this occurs, see A.L. Goodhart, "Determining the *Ratio Decidendi* of a Case," in *The Yale Law Journal*, 40:2 (Dec. 1930).

[51] *People of the Philippines v. Bernardino Biala*, G.R. No. 217975 (2015).

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It might be objected that background norms undermine law's objectivity for virtually any decision can be made to appear to be the "correct" one. This point, however, ignores that a source-based test not only determines what is law, but draws its very limits and boundaries as well. As Gerald Postema points out, law has a limited domain that is defined by sources,[52] and the only background norms that enter it are those that attach to these sources. And those that do only apply to the extent permitted by source-based law. Thus, the "correct" answer is objective in a qualified sense, in terms of an internal logic and procedure that govern the interpretation of background considerations.

THE SUBSTANTIVE ASPECT OF THE SOURCE-BASED MODEL

The claim to objectivity goes hand-in-hand with that to determinacy. All that has been argued, however, is that there is a "right" answer to cases as provided by law, but it has not yet been explained how different judges can arrive at the same answer. To this end, this sub-section shall outline a framework by which background considerations can be factored into adjudication in a manner that aids judges in deciding cases with a degree of determinacy.

Background norms, like binding norms, express reasons in favor of a decision. The difference is that whereas binding norms are formal reasons that directly determine the outcome of cases,[53] background norms are substantive reasons that factor into adjudication on the basis of their weight. According to Robert Summers, there are two kinds of substantive reasons: rightness-reasons that express socio-moral norms such as justice, culpability, or equality, and goal-reasons that serve desirable social goals.

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[52] Gerald Postema, "Law's Autonomy and Public Practical Reason," in *The Autonomy of Law: Essays in Legal Positivism*, ed. by Robert George (New York: Oxford University Press), 80-94.

[53] Joseph Raz, "Reasoning with Rules," in *Between Authority and Interpretation,* (New York: Oxford University Press, 2009), 214.

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Rightness-reasons are cited by judges when they decide cases on the basis of rights, punitive deserts for rapists, or just compensation for victims, whereas goal-reasons are cited when cases are decided on the basis of promoting reproductive health, providing educational opportunities, or upholding family harmony.[54] Neither kind of reason, however, has the logical properties of binding norms such as legal rules; they can pull the judge towards a decision but not guarantee the outcome.

A framework for weighing substantive reasons must account for how their role in adjudication differs from that of binding norms. First, a substantive reason, no matter how sound or forceful, is insufficient by itself to justify a decision. It must be anchored in a binding norm under whose ambit the facts of the case fall to have concrete and specific applications. Second, whereas substantive reasons express merely one rightness or goal value, binding norms reflect the relative weights of various substantive reasons. Oftentimes, substantive reasons conflict against each other and pull the judge in opposite directions. In this sense, binding norms are authoritative determinations of how different reasons figure into a case. Third, the purpose of determining the scope of substantive reasons is to ascertain their relevance. Only if they survive this test do they become non-excluded and factor into the decision. Meanwhile, the purpose of determining the scope of the subsumptive rule is to decide whether and how they justify the decision. Therefore, rules function as intermediaries through which the justificatory force of substantive reasons are transferred so they may apply indirectly to a case.

The overall values of substantive reasons cannot be measured in a vacuum. They must be evaluated in relation to the framework provided by the subsumptive binding norm and to each other. The framework is an amalgamation of several factors such as the wording of source-based law, the history of its invocation, legislative intention, its social context, and its

[54] Robert Summers, "Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification," in *Cornell Law Review,* 63:5 (June 1978), 717-719.

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subsequent development. This renders the weighing of substantive reasons neither straightforward not logical. The unique facts of the case and its competing substantive reasons are balanced back and forth until reflective equilibrium is attained.

There is no necessity for binding norms to reflect consistent permutations of reasons, values, and weights. As Raz points out, there may be multiple valid but incommensurate interpretations of the law.[55] This does not mean that any decision is as good as any other. It would be still inexcusable for judges to radically deviate from precedent, and if they do, then they would not only be objectively wrong, but they would also be called a disgrace to the judicial profession. Moreover, the weights of substantive reasons may change over time. Rightness-reasons that were once held to be incontrovertible may be taken exception to, while goal-reasons that were formerly valued lose their appeal. These have led to landmark decisions being reversed, such as when the Supreme Court of the United States overturned the decision to *Plessy v. Fergusson*[56] in *Brown v. Board of Education*,[57] ruling that racial segregation in schools, did, in fact, violate the Equal Protection Clause of the Fourteenth Amendment. Similarly, it is plausible that pornography will one day no longer be upheld by courts as a form of free speech under the First Amendment. Should this occur, it will be due in no small part to changes in the way rightness-reasons pertaining to dignity and goal-reasons such as reducing the objectification of women are currently valued. But just because the frameworks provided by binding norms may evolve, it does not follow the adjudication is inherently determinate.

It can now be explained how the source-based model is determinate notwithstanding the possible intrusion of subjective elements. This "correct" decision to a case is arrived at through the natural elucidation of

[55] Joseph Raz, "Interpretation: Pluralism and Innovation," in *Between Authority and Interpretation,* (New York: Oxford University Press, 2009), 302.
[56] *Plessy v. Fergusson*, 163 U.S. 537 (1896).
[57] *Brown v. Board of Education*, 347 U.S. 483 (1954).

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binding norms and the ascription of weight to substantive reasons, which are both supplied by the legal system itself and judicial practices pertaining to their correct interpretations. It should be noted, however, that the claim of determinacy rests on whether or not the judge applies the correct framework. Prone to human error, he may fail to subsume a case under the "correct" binding norm, which may cause him to overlook some substantive reasons or miscalculate their weights. But the background norms included in the source-based model offset these factors and assure a degree of practical determinacy. These include the legal training of judges, their knowledge of the sources of law, the wealth of judicial literature, their familiarity with the hierarchy of norms, and general knowledge of what constitutes sound substantive reasons. These constitute some of the "ideal epistemic conditions" that Jules Coleman and Brian Leiter claim that judges must access in order to decide cases with "modest" objectivity. It is modest in that what is correct is what the community of judges under these ideal conditions takes the law to be while acknowledging that it is also possible for them to be wrong.[58] It can also be said that these ideal conditions allow cases to be decided with a modest degree of determinacy, for although judicial conventions and the shared legal culture might be mistaken, they undoubtedly guide most judges towards the same decisions in most cases.

Furthermore, because the courtroom setting allows both sides to be heard, the selection of the correct binding norm is narrowed down. In the adversarial method of resolving disputes, the judge will simply have to select among the legal rules presented by opposing counsel who are keen on offering the best legal reasons to further their client's cause. Hence, the source-based model is not only theoretically determinate, but practically so as well.

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[58] Jules Coleman and Brian Leiter, "Determinacy, Objectivity, and Authority," in *Law and Interpretation: Essays in Legal Philosophy*, ed. by Andrei Marmor (Oxford: Clarendon Press, 1995), 271-272.

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Take the example of *Estrada v. Escritor*,[59] in which Alejandro Estrada filed a complaint alleging that Soledad Escritor, a court employee, should be dismissed on the ground of immorality. This occurred after Estrada discovered that she had been living with a married man who was not her lawful husband for twenty years. Escritor suffered the brunt of the public shaming for she was the unmarried party in the relationship. She was the "other woman". During the trial, substantive considerations about the social impropriety of their domestic relationship came into play. These did not, however, tip the scales in favor of Estrada. As her main defense, Escritor invoked religious freedom and explained that she and her partner executed a Declaration Pledging Faithfulness as members of Jehovah's Witnesses, after which the elders of their congregation allowed them to live as husband and wife until they obtained the legal remedy that would allow them to marry. The Supreme Court ultimately ruled that this was not an issue of sexual immorality, but of the constitutional right to the free exercise of religion. By subsuming the facts of the case under this binding norm, the decision was logically entailed. Additionally, the legal training of the judges, their recognition of the primacy of the Bill of Rights, their knowledge of American jurisprudence on the right to religious freedom, and the principle of the Separation of Church and State all conspired to point to the same decision. Thus, even if one assumed that legal concepts of sexual morality were predominantly defined by men, or that the procedures of litigation and public opinion were slanted against Escritor, the theoretical and practical determinacy of adjudication resulted in a decision in her favor. Not all cases may end as favorably, but many of them can and do.

[59] *Estrada v. Escritor*, A.M. No. P-02-1651 (2003).

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CONCLUSION

The androcentrism of legal practice has been well-documented, and feminists are undoubtedly justified in criticizing the legal system for its many failures. But to claim that law and adjudication are *conceptually* indeterminate is a different matter altogether. It has been shown, on the contrary, that this radical claim is unwarranted.

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