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Topics in Jurisprudence

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TOPICS IN JURISPRUDENCE

What do abortion rights, Karen Ann Quinlan, pornography, employment contracts, and the EPA have in common? Virtually nothing. And one might think that this was the most reasonable view of the essays that comprise this section. They all have something to do with "jurisprudence" (a generous and tolerant label if ever there was one), but little to do with each other. Abortion rights, Karen Ann Quinlan, pornography, employment contracts, and the EPA are central examples from the various essays, and the diversity of the examples reflects the diversity of themes. Nonetheless, commonalities are discernible, commonalities that reflect a shared intellectual community. The following snapshot descriptions of the essays, like photos in a family album, reveal underlying resemblances in diverse visions of the various authors.

In *Positive and Negative Liberty*, Steven Heyman criticizes the commonly accepted view that liberty is essentially negative, an absence of governmental inference with private conduct. He argues that the fundamental idea is that of self-determination. On this view, our constitutional commitment to liberty requires the government, not merely to respect individual rights, but affirmatively to protect them. So, if as *Roe v. Wade* holds, the right to abortion is part of liberty, the government has a duty to protect that right against private interference. As Heyman points out, the Supreme Court has refused to find such positive rights in the Constitution, leaving them to the states.

Linda Hirshman's *The Philosophy of Personal Identity and the Life and Death Cases* is also concerned with the protection of private conduct from improper interference. *In Re Quinlan* and *Cruzan v. Missouri* provide the context for this concern. These cases raise the question of how we are to decide when a terminally ill comatose patient should be allowed to die. Hirshman finds the answer in contemporary theories of personhood that emphasize that persons are essentially self-creating beings who are who and what they are by virtue of narratives that make sense of their lives. She suggests that juries, courts, families, and health care professionals decide who is to live and die in light of such a conception of personhood. She criticizes the explicit rhetoric of *Quinlan*, *Cruzan*, and their progeny for too little emphasis on narrative and too much emphasis on autonomous choice.

Does Hirshman commit the fallacy James Lindgren identifies in *The Lawyer's Fallacy*? The fallacy is to assume that people to whom a legal

category applies—such as making pornographic films—understand themselves in light of that category. The lawyer's fallacy is, e. g., assuming that the pornographic film maker, in aiming to make a certain kind of film, is guided by the criteria that compose the Supreme Court's definition of pornography. The assumption is unwarranted, as Lindgren makes plain, yet, as he also makes plain, examples of the fallacy are easy to find. Indeed, isn't Hirshman an example, or at least an example of an essentially similar fallacy? She suggests that courts decide certain cases in light of a particular *philosophical* conception of personhood. Isn't this to assume that the courts see the issue in the way certain *philosophers* would see it? It is, but it is not a fallacy. The fallacy is to make the assumption *without warrant*, and Hirshman argues at length for her position. The two essays are complementary. Lindgren identifies a common, and important, intellectual failing; and Hirshman provides a model of how to avoid it.

Martin Malin's *The Distributive and Corrective Justice Concerns in the Debate over Employment At-Will* also provides a model of how to see the law through the lens of philosophical concepts. Malin argues that the tort of abusive discharge should address the *corrective* justice concern of redressing the terminated employee's unjustly violated reasonable expectations of job security. However, courts, in developing the tort of retaliatory discharge, have concerned themselves with *distributive* justice issues, weighing the employer's need for the power to fire at will against the social utility of employee job security. Malin argues that this distributive justice issue is best left to the legislature; the legislature is in the best position to compare the relative needs of employers and employees.

Richard Warner is concerned with just such comparisons in *Incommensurability as a Jurisprudential Puzzle*. Warner argues that reasons are not always comparable as better, worse, or equally good. Nonetheless, when courts resolve disputes, they should—ideally—do so based on the *superiority* of one set of reasons over the others. The assumption that courts can, at least in principle, compare competing reasons underlies most of jurisprudence. The assumption is, moreover, not just of theoretical significance. It informs practical politics; the EPA, for example, assumes the comparability of reasons when framing environmental policy. Warner argues the assumption is mistaken, and this leaves us with the puzzle: how should courts—or, more generally, the government—decide where reasons are not comparable? How do we proceed when it is *impossible* to decide on the superiority of one set of reasons over the others?

Warner argues that the puzzle is not insignificant, that incommensurability is a pervasive feature of the law.

Richard Warner