

The Value of Rights

Leif Wenar

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There are, in the broadest terms, two views of the value of the right to free speech. On the first view speech rights are good in themselves. To respect a person's speech rights is just to respect the inherent dignity and worth of that person as a rational and autonomous being. On the second view speech rights are means to ends. We ascribe speech rights because doing so will help us to achieve desirable states of affairs like democratic stability, market efficiency, and greater enlightenment.

Thomas Nagel labels these two perspectives on the value of speech rights the "intrinsic" and the "instrumental" views. Nagel, following Frances Kamm and Warren Quinn, favors the intrinsic. For these authors speech rights are not means to some further end, but are rather "a nonderivative and fundamental element of morality."¹ Indeed these authors hold this view not only for speech rights, but for *all* fundamental individual rights. All fundamental rights express the intrinsic value of each person as an end in herself, and so all fundamental rights are themselves intrinsically valuable. The rational nature of each person determines her moral status as a sovereign and inviolable being, and the dimensions of her sovereignty and inviolability are marked out by the fundamental rights that entitle her to protection against oppression and abuse.

Nagel contrasts this intrinsic view to the utilitarian thesis that fundamental rights are merely instrumentally valuable. For a (rule) utilitarian individual rights are simply tools for increasing weal and decreasing woe. If ascribing a right will maximize utility, a utilitarian will ascribe it; if not, not. Interests, not dignity, have justificatory priority for the utilitarian, and the value of rights derives entirely from the goodness of the states of affairs in which the agglomeration of interests is largest.

The general lines of the conflict between these two views of rights are familiar. Opponents say that the instrumental view of rights cannot plausibly account for the strength of individual rights. The instrumental view must struggle to explain, for instance, why one should not violate the speech right of one person in order to prevent the violation of the speech rights of two other persons. On the other hand, as Nagel says the challenge for the intrinsic view is that "it has proven extremely difficult to account for such a basic, individualized value such that it becomes morally intelligible."² The idea of individuals as ends-in-themselves is compelling, yet a cogent explanation for the intrinsic value of rights has remained elusive.

Nagel's work presents an excellent opportunity for evaluating these two views of the value of rights, and of the right to free speech in particular. For Nagel considers rights at a much

finer level of detail than is normally done. Nagel is not content to show how the intrinsic view might account for “manifesto” rights like a vaguely-defined “right to free speech.” Rather, he argues that the intrinsic view explains why it would violate individual rights to prosecute pornographers, or to prosecute Holocaust deniers; to prosecute those who make hateful statements about racial minorities, or those who make unwanted sexual proposals to others. Nagel’s advocacy of the intrinsic approach at this level of specificity puts clear space between the intrinsic and the instrumental views, which will enable us to test which approach captures better the nature of our reasoning about rights.³

Here I will first lay out the general features of the intrinsic and the instrumental views of rights, focusing on the right to free speech. The first important conclusion here is that many more theories than utilitarianism take an instrumental approach to rights. Since several of these other theories do not share utilitarianism’s problems with weak rights, the comparison between the intrinsic and instrumental views begins to look more like a real contest. We then isolate specific, uncontroversial examples where the intrinsic and the instrumental views favor different speech rights. The aim is to run “controlled experiments” on these examples to evaluate which view of the value of right to free speech is more plausible. These comparisons will lead to the final conclusion, that the two views do not—as is often held—characterize different types of theories of rights. Rather, the two views work at different levels of familiar rights-oriented theories.

Rights as Intrinsically Valuable

Nagel joins Quinn and Kamm in defending the view that rights are intrinsically valuable. Quinn explains the connection between a rational being and his rights in this way:⁴

A person is constituted by his body and his mind. They are parts or aspects of him. For that very reason, it is fitting that he have primary say over what may be done to them—not because such an arrangement best promotes overall human welfare, but because any arrangement that denied him that say would be a grave indignity. In giving him this authority, morality recognizes his existence as an individual with ends of his own—an independent *being*. Since that is what he is, he deserves this recognition.

Intrinsically valuable rights are *status-based*, while utilitarian rights are *interest-based*.⁵

Fundamental human rights, at least, are not concerned with protecting a person’s interests, but with expressing his nature as a being of a certain sort.... They express the *worth of the person* rather than the *worth of what is in the interests of that person*, and it is not unimaginable that it will be harder to protect the other interests of a person just because of the worth of his person.

Because of their focus on status, theorists like Nagel and Kamm and Quinn are relatively unconcerned with the consequences of ascribing rights. Rights are ascribed because they are appropriate to persons, not because their ascription will bring about some further state of affairs. As Quinn puts it, “It is not that we think it fitting to ascribe rights because we think it is a good thing that rights be respected. Rather we think respect for rights a good thing precisely because we think people actually have them—and... that they have them because it is fitting that they should.”⁶

Consequences are not *wholly* irrelevant on the intrinsic view of rights. If respecting a right would have consequences that are above some threshold level of badness, then the right no longer holds. As Nagel says, there may be “evils great enough so that one would be justified in murdering or torturing an innocent person to prevent them.”⁷ Yet on the status-based approach, consequences are only grounds for qualifying rights—they are not the basis for justifying rights. Below the threshold of very bad consequences, individual rights are grounded solely the status of the individual as a sovereign and inviolable being.

Thus a status-based argument for entrenching an individual right within a legal code will not be an argument based on the good effects of doing so. A status based argument for entrenching a legal right “is not supposed to be merely an argument for *creating* or *instituting* rights, through laws or conventions. In a sense the argument is supposed to show that the morality that includes rights is *already true*—that this is the morality we ought to follow independently of what the law is, and to which we ought to make the law conform.”⁸ On this view, we know which rights people have before we look at legal institutions, and we make institutions fit the rights that are set by the nature of persons. This does not mean that legal institutions must be the same everywhere—as Nagel says different institutional setups can instantiate the same entitlements. But whatever the institutional arrangements are, they must realize the same pre-established rights. When a status theorist argues that a legal right should be “ascribed” to citizens, he is arguing that the legal code should be brought into line with the fundamental rights that are known to be appropriate to sovereign and inviolable persons.⁹

An instrumental approach to rights is quite different. When an instrumental theorist recommends that a legal right should be “ascribed” to individuals, he is saying that the entrenchment of that right in the legal code will promote better results overall. Rights are not justified by the antecedent nature of the individual, but by the desirable states of affairs subsequent to their recognition.

The two views thus approach rights from opposite directions. A status-based justification begins with the nature of the rightholder and arrives immediately at the right, with only a brief nod to the negative effects that respecting the right may have on others’ interests. The instrumental approach starts with the desired consequences (like maximum utility) and works backwards to see which rights-ascriptions will produce those consequences.

Status theorists like Nagel and Kamm aim to rescue the right to free speech from the vagaries of instrumentalist calculation. On their view the justification for free speech must be

more immediate, and deeper, than the instrumental view provides. Speech rights must flow directly from the nature of persons:¹⁰

The right to speak may simply be the only appropriate way to treat people with minds of their own and the capacity to use means to express [them]... It fails to respect people not to give them the option of speaking. Someone may waive (or perhaps even alienate) the right in order to promote his greater interests. But to say that any given person is not entitled to the strong right to free speech is implicitly to say that no one person is so entitled noninstrumentally. That is, it is a way of saying that certain crucial features of human nature are not sufficient to generate the right in anyone. And this seems to be a mistake. [On the status-based account of rights] we might say that some rights are a response to the good (worth, importance, dignity) *of* the person and/or his sovereignty over himself, rather a response to what is good *for* the person (what is in his interests).

The sovereignty of individuals “with minds of their own” is crucial both for those who would speak and for those who would hear:¹¹

The sovereignty of each person’s reason over his own beliefs and values requires that he be permitted to express them, expose them to the reactions of others, and defend them against objections. It also requires that he not be protected against exposure to views or arguments that might influence him in ways that others deem pernicious, but that he have the responsibility to make up his own mind about whether to accept or reject them.

The essence of the status-based position is that speakers must be allowed to speak, and audiences to listen, out of respect for the sovereignty of each person’s reason over his own beliefs and values.

Nagel’s status-based position on speech has two striking features. The first is that the justification for speech rights is content-neutral. The only valid reason for restricting speech, Nagel says, is when this is “clearly necessary to prevent serious harms *distinct from the expression itself*.”¹² On Nagel’s account speech rights flow immediately from the nature of persons as reasoners, and not from the interests that people may have in speaking on particular topics or in listening to others speak on particular topics. Whatever the issue at stake, people must be allowed to exchange their views so that they can form their own opinions. To censor speakers because of the content of their views is, Nagel says, “an offense to us all.”¹³

The second striking feature of Nagel’s status-based justification for speech rights is that (short of catastrophe) it permits restrictions on speech only for the sake of limiting *direct* harms—harms inflicted by the speech act as such. Speech, for example, can be deafening if it is amplified too greatly, and speech can wake the sleeping if shouted in residential areas at night. In these cases the sovereignty of the speaker encroaches too much on the inviolability of those who

would be subject to his speech, and Nagel allows that such directly harmful speech may be restricted. Nagel also grants that graphic images can be kept off the newsstands if the public would find them genuinely revolting, and that “extreme cases” of direct personal insult “can legitimately be considered a form of assault liable to legal action.”¹⁴

What Nagel denies, however, is that speech rights may be qualified out of concern for the *indirect* effects of speech. Speech may not be restricted, that is, because it convinces one person to act in a way that is harmful to another person. Sexist or racist speech, for example, must not be restricted on the ground that it encourages the spread of false beliefs about women or minorities, which beliefs then make audiences more likely to harm women or minorities. Speech that directly harms may be restrained, but speech that convinces audiences that they have reason to harm must remain free. We must not restrict speech for the sake of preventing indirect harms, Nagel says, because we must respect each listener’s capacity to decide for himself what courses of action are worth taking.¹⁵

An instrumental account of speech rights will of course have quite a different character. An instrumental account will likely not be content-neutral, as people can have very different interests in speaking and in hearing speech on different topics. Moreover, an instrumental account will be concerned not only with the direct harms that speech can inflict on listeners, but with all the benefits and burdens of speech whether directly or indirectly produced. Indeed an instrumental account will see the entire justification of speech rights as hanging on the benefits and burdens that their ascription generates—however these benefits and burdens are produced and to whomever they accrue. John Stuart Mill for example favored speech rights similar in robustness to those favored by Thomas Nagel. But Mill rested his case for strong speech rights on both the direct and indirect effects of their exercise. Mill recognized that strong speech rights will engender indirect harms, but also thought that these harms will be more than compensated by the tendency of such rights to further the discovery of truth and to discourage a deadening social conformity.¹⁶ Instrumental justifications of speech rights thus embrace facts about indirect harms and benefits that intrinsic justifications spurn.

Yet it is of course the expansive and contingent nature of the utilitarian calculus that has generated the general suspicion about the weakness of utilitarian rights. If Mill were really to carry through a full utilitarian defense of speech rights, it is said, he might well have to concede that the rights that he could derive were not as strong as he hoped.¹⁷ If the sheriff could stop the riot by framing an innocent man, would utilitarianism not require him to do so? Instrumentally-justified rights have seemed to many to be simply too flimsy to be plausible, and the weakness of instrumentally-justified rights has attracted many to the status-based alternative.

These complaints about the weakness of utilitarian rights may be correct. However we should not rush to hand the laurel to the status-based approach. For utilitarianism is in fact just one of many contemporary theories that view individual rights as instrumentally justified. Moreover, as we will see it is features specific to utilitarianism that generate the familiar worries about weak rights. Other theories that take an instrumental approach to rights do not share these features. Before comparing the intrinsic and instrumental theses in detail, we need a broader view of the conceptual terrain.

Rights as Instrumentally Valuable

Consider a utilitarian engaged in evaluating a particular right to free speech. In order to determine whether this right is a good instrument for reaching the fundamental goal of his theory, the utilitarian will need information about the impact of ascribing the right on the interests of all of the parties concerned. Figure 1 shows in schematized form the information that a utilitarian will require in deciding whether to ascribe such a right.

	With Right Ascribed	Without Right Ascribed
Speakers	i_1	i_4
Audiences	i_2	i_5
Third Parties	i_3	i_6

FIGURE 1: A Matrix of Interests for a Right to Free Speech.

As the example illustrates, utilitarianism views rights as *instruments for achieving an optimal distribution of interests* among all those who will be affected by the rights' ascription. For the utilitarian, an optimal distribution is simply one that maximizes the sum (or the average) of the interests of all parties. Yet seen in these general terms, utilitarianism is just one theory within a large set of theories that takes an instrumental view of rights. Many contemporary normative theories see rights as instruments for achieving an optimal distribution of interests. They differ from utilitarianism primarily in what they view an optimal distribution as being.

An egalitarian theory, for example, ranks distributions according to their degree of inequality. An egalitarian will require the same type of information as a utilitarian regarding the distributions of interests that the ascription of a particular right will engender. But because he is looking for equal instead of maximal distributions, an egalitarian will evaluate the information contained within a matrix of interests differently. An egalitarian will ascribe a right only if its ascription will lead to a less unequal distribution of interests—that is, only if the distribution in the left column is less unequal than that in the right. To take another example, a prioritarian theory resembles a pure egalitarian theory except that its specification of the optimal distribution gives extra weight to the interests of the worst-off.¹⁹

Each of these theories sees rights as instruments for achieving an optimal distribution of interests. These theories may also of course differ in how they *measure* individual interests. They

may differ, that is, as to what the variables in Figure 1 should be taken to represent (what Sen calls their “informational bases”²⁰). A utilitarian theory will require a matrix in which i_{1-6} represent levels of utility. Posner’s normative theory of law uses a metric of wealth instead of utility.²¹ Hurka’s perfectionism uses a metric of human excellence instead of utility.²² The various contributors to the “equality of what” debate have their own interpretations of how to measure interests: capabilities (Sen), resources (Dworkin), opportunities for welfare (Arneson), opportunity for advantage (G.A. Cohen) and so on. All of these theories aim for an optimal distribution of interests, whatever they take interests to be.

Indeed, once we see the instrumental approach as including all those theories which view rights as instruments to engendering an optimal distribution of interests, we discover that the range of instrumental theories is quite wide indeed. It includes, for instance, Rawls’s justice as fairness, Scanlon’s contractualism, and Dworkin’s normative theory of law. Rawls seeks a *fair* distribution of interests (represented by primary goods), where the fairness of distributions is discovered through the original position thought experiment.²³ For Scanlon’s contractualism, the optimal distribution of interests is one that *no one could reasonably reject*. If a right produces a distribution of interests that is not reasonably rejectable then a contractualist will ascribe it, otherwise not.²⁴ Dworkin’s theory of legal rights, like utilitarianism, seeks a maximal distribution of utility—but only after utility has been sanitized of “external” preferences.²⁵ Each of these theories evaluates potential rights according to whether these rights engender what is regarded to be an optimal distribution. As with utilitarianism, egalitarianism, prioritarianism, and perfectionism, these theories begin with a fundamental distributive goal and work backwards to find the rights that will produce the distributions they want.

The initial concern about instrumentally-justified rights was that they would be implausibly flimsy. Yet with our wider view it now appears that weak rights are a problem for utilitarianism specifically, but not for the instrumental approach more generally. Utilitarian rights may be weak, but this is because utilitarianism’s drive toward maximal distributions make it insensitive to other features of distributions—such as whether some individuals are required to make large sacrifices for the sake of others. There is no reason to think that instrumental theories which aim for equal distributions, or fair distributions, or distributions that no one could reasonably reject will also suffer from this defect. Indeed, the Rawlsian case demonstrates that an instrumental approach can require rights that are neither limited, nor marginal, nor flimsy. The parties in the original position agree to a principle of robust individual rights that “have an absolute weight with respect to reasons of public good and perfectionist values.”²⁶ Here rights are instruments, yet they are anything but weak. They are, as in Dworkin’s theory, trumps.

What distinguishes the intrinsic and the instrumental views is not the strength of their rights but the style of their justifications. Quinn, in explaining the intrinsic view, says that it is *fitting* for beings with a certain nature to have particular rights, and that the former *deserve* the latter. Kamm prefers to speak of what rights are *appropriate* to beings who are ends-in-themselves. An instrumental justification of rights, by contrast, will turn on facts about interests and consequences. An instrumental theory will evaluate a right by investigating what interests will be affected by that right’s ascription, and how the ascription of that right will affect the distribution of those interests within a specific causal environment.²⁷

The contrast in justificatory style is stark in the case of free speech. As we have seen, a status approach will ground speech rights directly in the sovereign reason of speakers and listeners with minds of their own. An instrumental inquiry into speech rights, by contrast, will be more complex. An instrumental theorist will first seek to catalogue the many particular interests that will be at stake for the speech in question. For example, a speaker may have interests in influencing the votes, or the purchases, or the cultural attitudes of his fellow citizens. Audiences will have interests in greater access to information and opinions, but also interests in being protected against deceptive and offensive expression. Third parties will have interests in peace and quiet, but also in healthier political and economic systems. Moreover, an instrumental approach will be concerned not only with the content and strengths of these interests, but also in understanding how they may push in different directions in particular contexts. For example, an advertiser's desire to sell cars may conflict with audience interests in truthful expression and with third-parties' preferences for fewer garish billboards. Finally, an instrumental approach will take into account what is known about the institutional context in which legal rights will be enacted. For example, an instrumental approach will take into account the facts that government officials are especially prone to use their power to silence the speech of their political opponents, and that vaguer and more punitive laws restricting speech will have a chilling effect on people's willingness to express themselves.

Hustler Magazine v. Falwell is a typical legal case in which the decision turned on instrumental reasoning. In this case the televangelist Jerry Falwell sued *Hustler* magazine for the intentional infliction of emotional distress arising out of a *Hustler* ad parody suggesting that Falwell's first sexual experience was a drunken encounter in an outhouse with his own mother. In their decision the justices of the U.S. Supreme Court acknowledged that *Hustler's* interest in ridiculing Falwell was relatively trivial, and that Falwell's emotional distress was significant. Yet the Court ruled unanimously for *Hustler*, on two main grounds. First they found that while *Hustler's* parody was itself speech of slight worth, there was no plausible criterion that juries could use reliably to separate this crude lampooning from the more general category of political cartoons and caricature. Second, they found that political cartoons and caricature were important contributions to the "robust" and "uninhibited" debate on public issues that is "essential to the common quest for truth and the vitality of society as a whole."²⁸

The justices here came to their decision by weighing the conflicting interests of *Hustler*, Falwell and the general public within the context of a particular causal environment. They kept a close eye on institutional capacities (like the ability of juries to discriminate worthless from worthwhile satire), and on indirect effects (like the indirect effects of caricature on the public good). They found that the broad societal interests in truth and social vitality outweighed the harm to public figures like Falwell. While the justices did not explicitly commit to a particular distributive goal such as fairness or maximization, the instrumentalities of ascribing the relevant speech right were decisive in their reasoning.

Comparison of the Two Approaches

Having outlined the major differences between the intrinsic and the instrumental approaches to rights, we are now in a position to compare the two approaches in more detail. If rights have intrinsic value, we should expect our understanding of speech rights to turn on:

- (1) The nature of persons in relation to the speech; and
- (2) The direct harms that the speech may inflict on audiences.

Alternatively, if rights have instrumental value we should expect our beliefs about speech rights to be sensitive to:

- (3) Facts about the wider causal environment in which the rights are ascribed, including the indirect effects of the rights and how institutions would enforce the rights; and
- (4) The benefits and burdens of the speech for speakers, audiences, and third parties.

These specific comparisons will reveal that both of the approaches have weak points. However, a repeated theme throughout the comparisons to come will be that the status approach lacks the resources to make the kinds of distinctions that we clearly do make in our reasoning about rights. The status approach, though resonant with our deep intuitions about human dignity, often appears unable to match the subtlety of our reasoning about rights. The instrumental approach, on the other hand, can capture this subtlety.

The *Hustler* case just mentioned gives an initial indication of the kind of difficulty that the status approach faces. The justices in the *Hustler* case ruled that Falwell would have to bear the emotional distress caused by *Hustler*'s speech for the sake of the broader political benefits engendered by caricature of public figures. In the Court's reasoning it was crucial that Falwell was a public figure. Had *Hustler* targeted a random private citizen instead of a famous televangelist there is no question that *Hustler* would have lost its case. Attacking private citizens in print does not after all further "robust political debate." Moreover, this seems correct—it seems appropriate to distinguish the rights to caricature public figures from the right to caricature private citizens because caricaturing public figures can promote wider societal interests in a way that caricaturing private citizens cannot.

So the instrumental reasoning of the justices in this case seems apt. Yet it appears difficult for a status-based account of rights to reach the right result. How could a status-based account distinguish the rights to caricature public figures from the right to caricature private citizens? What separates public and private figures as targets of speech will not be found within the nature of persons as rational beings. Nor are public figures any more or less likely to be harmed by wounding speech. It seems that only the instrumental approach has the resources to distinguish public from private individuals as targets of speech. This gives the instrumental approach the edge in this initial comparison.²⁹ It also foreshadows the kind of result that we will find throughout the specific comparisons to come: the status approach often seems unable to

make the kinds of distinctions that we routinely make when we reason about which specific speech rights we should ascribe.

Rights and the Content of Speech

We are looking to run “controlled experiments” on cases in which the intrinsic and the instrumental views give different results. We need to find cases in which the nature of persons and direct harms remain constant, but in which the causal environment and indirect effects are allowed to vary.

We focus first on the content neutrality of Nagel’s status-based account of speech rights. Recall that on Nagel’s view speech rights flow immediately from the nature of persons as reasoners, and not from the interests that people may have in speaking on particular topics or in listening to others speak on particular topics. We can test this feature of the status-based approach by examining whether our reasoning about speech is in fact content-neutral in specific, uncontroversial cases.

Consider the following three cases, each of which asks us to compare two billboards. In each case, the question is whether we think that there are more reasons for permitting one billboard than the other, or whether we think that the two billboards should be equally permissible.

(i) Billboard 1 displays in large letters the word “F***,” while Billboard 2 displays in large letters the motto “F*** George W. Bush.”

(ii) Billboard 3 displays a picture of a vivisected human corpse, while Billboard 4 displays the same picture with the caption: “Global Capitalism”.

(iii) Billboard 5 displays a photo of a platter of filth, while Billboard 6 displays the same photo with the logo of a tabloid newspaper in the background.

A status-based approach would deem the two billboards to be equally permissible in each case. This is a result of the content-neutrality of the status approach. The speakers who design the billboards and the audiences who see them remain beings with “minds of their own” regardless of the content of the speech involved. Nor can direct harms distinguish the two billboards, since the two billboards are equally disgusting or equally offensive in each case. While we do not know whether a status-based approach will endorse or deny the rights to put up any of the billboards, we do know that in each of the three examples a status-based approach will say that speakers have just as much right to erect the first billboard as the second.

An instrumental approach will distinguish the billboards in each case, because the two billboards will affect interests differently. Speakers have different interests in shocking audiences for the sake of it, and in shocking audiences for the sake of spreading a political message. Audiences can be benefited or harmed by exposure to unwanted political messages, especially if these messages prompt them to reconsider their stands on important issues. And third parties who never see the billboards can be affected—positively or negatively—by the debates that the billboards stimulate. A given instrumental theory may accept one billboard and reject the other in a particular case, or it may accept both or reject both in all three cases. But all instrumental theories will say that the reasons bearing on the permissibility of the two billboards differ significantly within each comparison.

These examples speak strongly, I believe, in favor of the instrumental approach. We do tend to think that there are different reasons bearing on the acceptability of the billboards in each case, because of the different interests involved. And we tend to think this even if we believe that ultimately neither (or both) billboards should be permitted. Our reasoning about these cases, and about similar cases we can construct, does appear to track a wide range of speaker, audience, and third-party interests rather than simply the nature of persons and direct harms.³⁰ The content-neutrality of the status approach appears to be a liability here, because our reasoning about speech rights in specific cases is not neutral in this way.

Rights and Indirect Effects

The second test case focuses on the second striking feature of Nagel's status-based justification of speech-rights. This is Nagel's insistence that (below the threshold of catastrophe) speech rights may only be limited for the sake of preventing direct harms inflicted by speakers on audiences. Speech may not be restrained out of concern for its indirect effects—out of concern that it will convince an audience to act in ways that are harmful to others.

The status-based account of free speech taken by Nagel and Kamm is essentially libertarianism for expression. The idea of inviolability invoked by Nagel and Kamm descends ultimately from Kant; but its immediate ancestry is within the neo-Kantian theory of Robert Nozick. In Nozick's terms, status-based speech rights are "side-constraints" grounded in the dignity of the individual, which rights are limited only by the dignity-based rights of others against attack. Just as Nozick advocated strong property rights limited by a restriction against battery, so Nagel advocates strong speech rights qualified by a restriction against assaultive speech.³¹

The instrumental approach, on the other hand, yields what Nozick called end-state or patterned views.³² An instrumental approach to rights will aim to bring about a particular distribution (end-state, pattern) of interests, and will ascribe whatever rights are necessary to achieve this distribution. For example, Rawls's justice as fairness will ascribe property rights to individuals, but Rawls's property rights will be qualified so as to allow whatever taxation is necessary to give effect to the difference principle.

The two approaches to rights obviously disagree on the reasons for ascribing rights. What sets them apart in practical terms, however, are the reasons that they acknowledge for *restricting*

rights. A status-based approach may restrict a right if A's exercise of that right would directly harm B. These are cases where the sovereignty of A—for example in amplifying his speech—intrudes too far on the inviolability of B—for example by having his eardrums shattered. An instrumental approach may of course also restrict a right out of concern for direct harms, because direct harms damage audiences' interests. Yet an instrumental approach may in addition restrict a right if its exercise, though innocuous on any particular occasion, leads to a distribution of interests that is objectionable on other grounds. This disagreement over the relevance of patterns defined one dimension of the debate over Nozick's Wilt Chamberlain example. In this example, Nozick argued against restricting property rights by stressing the harmless freedom exercised in each act of property transfer. Nozick's critics objected that although any given transfer of strong property rights may be free, the patterns of holdings generated by the exercise of such rights will eventually generate unfairness, especially for the descendents of current transferors.³³ Insofar as strong property rights engender unfair patterns, an instrumental view may require that strong property rights be qualified.

Speech is more difficult territory than property for distinguishing the intrinsic and instrumental views. This is because the indirect effects of strong speech rights are mostly appealing. Strong speech rights generate healthier democratic institutions, spur cultural progress, and create an environment conducive to Millian individual flourishing. The desirability of the patterns engendered by the exercise of strong speech rights will push an instrumental approach toward the same strong rights favored by a status-based approach.

Where the two approaches do diverge is over cases of indirect harms: cases where A's speech convinces B to hold beliefs that make it more likely that B will harm C. As mentioned above Nagel does not wish to restrict sexist or racist expression, even when this expression could convince audiences that women or minorities are inferior and so make it more likely that audiences will go on to harm minorities or women. Pornography is a specific case of this sort. The status-based and the instrumental approaches agree that the right to promulgate pornography can be qualified to prevent direct harms, such as the harm of being confronted with revolting images on newsstands. The controversy concerns whether the right to promulgate pornography can also be qualified for the sake of limiting indirect harms: harms inflicted by pornography consumers on third parties.

One familiar instrumental argument concerning pornography runs as follows. We can predict that most pornography will portray women as subordinate to men, that the consumption of this pornography will lead to a greater prevalence of negative attitudes towards women, and that these attitudes will lead to greater discrimination against women, or even to greater risks of physical attacks against women. The controversy over this instrumental argument tends to revolve around the empirical questions—whether consumption of pornography does in fact lead to greater incidence of discrimination and attack. Some studies say yes, others say that the thesis is not proven.³⁴

However, our question is not empirical but philosophical. We need to judge not the *truth* but the *relevance* of the empirical claims being made. Nagel's status-based approach rules the empirical questions out of court. On Nagel's view speech may be restricted to prevent speakers from harming audiences directly, but not to protect third parties against what audiences may be more inclined to do after they hear the speech. Only direct effects are relevant. On an

instrumental view, however, the indirect effects of speech are crucial for deciding whether speech rights should be qualified. Our philosophical question is whether harmful indirect effects would be grounds for restricting the right to promulgate pornography *were the causal links conclusively established*. If one believes that there would be a reason to limit speech rights could it be proved beyond doubt that promulgating pornography leads to significantly greater risks of harm to women, then one is taking an instrumental approach to rights.

A recent Supreme Court case allows us to focus the question even more tightly. In *Ashcroft v. Free Speech Coalition* the Court considered the permissibility of “virtual” child pornography: that is, of obscene materials depicting totally “computer-generated” minors. What is helpful about considering virtual child pornography is that it eliminates the distracting question of whether real children are injured or coerced in the making of the pornography—in virtual porn, they are not. The case thus allows us to isolate the role of indirect effects in our reasoning about speech. Our question is: If it could be established beyond doubt that consumption of virtual child pornography makes a significant number of adults much more likely to abuse children sexually, would that in itself be a reason to restrict the promulgation of virtual child pornography? If one answers affirmatively, then one is favoring an instrumental view of rights on this issue.³⁵

I believe that we do consider these kinds of indirect effects to be relevant. We do believe that harms to women are a relevant consideration when we reason about the permissibility of promulgating pornography. We do believe that harms to children are a relevant consideration when we reason about whether to restrict the dissemination of virtual child pornography. Since only the instrumental approach has the resources to explain why we take indirect harms into account, the instrumental approach appears to be stronger in these cases.

Rights and Institutions

The third comparison examines the relevance of the larger causal environment to our reasoning about rights. The test case here will touch on content-neutrality and indirect harms, but it will focus primarily on the divergence between the two approaches concerning the effects of entrenching rights in the law. Recall that on Nagel’s status view, we know that individuals have strong rights before we look at legal institutions, and our task is to make institutions fit the rights that are set by the nature of persons. On an instrumental approach, by contrast, the touchstones for whether to entrench a right in the law are the effects of entrenching the right on people’s interests. The status-based approach, unlike the instrumental approach, does not allow facts about the wider effects of institutionalizing a right to affect the shape of the right that should be codified.

So far in our comparisons, the intrinsic view of rights has appeared to be implausibly narrow. I believe that this trend continues here. Our reasoning about legal rights does in fact respond to facts about political institutions and political power. One area where this is apparent is in how we treat the rights to political and to commercial speech.

It is an interesting and important part of our settled understanding of the legal right to free speech that speakers in the political arena should remain legally free to lie, but that speakers in

the marketplace should face a legal ban on making knowingly false statements. Campaigning politicians, for example, may intentionally misrepresent their records with no fear of legal prosecution. Yet advertisers who intentionally misrepresent their products should find themselves in the dock.

Why do we draw this distinction between political and commercial speech? A status approach to speech rights will have difficulty explaining the distinction. The major handicap of a status approach is that it has disabled itself from tying the permissibility of speech to the content of speech (political vs. commercial). Nor is there any hope of making the distinction with the “direct harm” qualification, since there is no reason to think that false commercial speech will be any more directly harmful (ear-shattering, insulting, etc.) than false political speech. Indeed, the political/commercial distinction will elude a status approach even if we loosen up considerably on the kinds of harms that it can count as reasons to restrict speech. On the one hand, the harms of false commercial speech are usually trivial—as when a corporation lies about which soft drink is best selling. On the other hand, false speech in the political realm can be quite damaging both emotionally and to reputation. (Consider, for instance, the false statements made by Senator McCarthy, and by either Clarence Thomas or Anita Hill.) Moreover, our laws hold that virtually no false political speech should be legally prosecutable, no matter how harmful—while all false commercial speech should be legally prosecutable, no matter how harmless. Any simple harm-based qualification to the general right to free speech will draw the line in the wrong place.

An instrumental approach, by contrast, presents clear rationales for distinguishing between false political and false commercial speech. An instrumental approach will acknowledge that false political speech can harm. Yet it will also register that democratic processes are less stable where political speech can be prosecuted on the ground that it is false. This is partly because government officials, even well-intentioned ones, have a tendency to use their power to prosecute the political speech of their opponents. A right to prosecute political speech deemed by officials to be untruthful would encourage this tendency, and the mere possibility of prosecution would have a chilling effect on the potential speech of the government’s opponents.³⁶ Moreover, it is difficult to imagine a workable constitutional design wherein officials from one branch of government have the right to prosecute the allegedly false political statements of officials from another branch in any but the most extraordinary circumstances. A right permitting false political speech therefore has important stabilizing influences in a democratic system. It is not hard to see why such a right would be endorsed by instrumental theories ranging from utilitarianism to justice as fairness.

The consequences of ascribing a right permitting false commercial speech, however, would be quite different. False advertising has obvious costs, since it can confuse and even endanger those who rely upon it when making purchases. Perhaps more importantly, false commercial speech can create an atmosphere of “buyer beware” that dampens general economic activity.³⁷ Yet in contrast to the political case, officials can be given the power to “weed out” false commercial speech without unduly endangering the larger system. Government officials have less incentive to abuse the power to prosecute false commercial speech than they do to prosecute false political speech, and for this reason commercial speech is less likely to be chilled by this power. Moreover, since “the truth of commercial speech... may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary... and since

advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely.”³⁸

Our understanding of the relative benefits and dangers of empowering officials to regulate political and commercial speech is, I take it, distilled from the history of struggles over speech rights in liberal societies. All instrumental views will point to these benefits and dangers when explaining why they ascribe broader rights to political than to commercial speakers.³⁹ A status-based approach, on the other hand, has neither the space to acknowledge these facts about official power nor the resources to reach the relevant distinctions by another route. This looks to be a significant deficiency in the status approach. By insisting on the pre-institutional purity of speech rights, the status approach disables itself from responding to concerns about institutions and power that are integral to our reasoning about rights.

Status-based Strategies of Response

While status-based rights may be stronger than utilitarian rights, our test cases have made status-based reasoning look implausibly rigid and under-resourced when compared to instrumental reasoning more broadly understood. It is of course open to the status approach to retreat from rights at Nagel’s level of specificity, and to claim that status explains only why an abstract right to free speech must be ascribed. Status, it might be said, justifies the broad “manifesto” right to free speech but must bow to instrumental considerations when it comes to specifics. Nagel would strongly resist this retreat, and one can see why. For instrumental views like utilitarianism and justice as fairness can easily account for the importance of a manifesto right to free speech. The status-based approach only becomes distinct as a competitor to the instrumental approach when it comes to cases—and indeed it is at this level that Nagel advertised his approach as superior. This however is what we have not found.

An alternative strategy for a status approach would be to try to generate resources that would allow it to mimic the kinds of instrumental reasoning that we have found in the test cases. A status approach might try, that is, to elaborate the theory of the nature of persons and the nature of speech so as to be able to distinguish public figures from private citizens, so as to take into account indirect harms to children, so as to distinguish political from commercial speech, and so on. A status theorist who opts for this strategy will have a lot of work to do, and previous attempts to make this strategy work have not proved successful.⁴⁰ Moreover the more a status approach elaborates a theory of the nature of persons so as to get the right results, the less likely it is that such a theory will be acceptable as a basis for public policy in a pluralistic liberal society.⁴¹

Furthermore this “mimicking” strategy is inherently risky, because it threatens the status-based approach as a distinct enterprise. The status-based approach to rights is significant because the patterns of reasoning it recommends are so dissimilar to those recommended by an instrumental approach—indeed, this dissimilarity is one of the main advantages cited by Nagel, Kamm and Quinn. A revised status-based approach that tried to mimic instrumental reasoning would lose this distinctiveness. A revised status approach would be in danger of appearing as merely a “metaphysical” echo of the fact that certain rights have proved themselves very effective instruments for promoting what are obviously important human interests. It would

appear merely to be retelling the instrumental story in a different language, and in the less illuminating language of “fittingness” and “appropriateness” at that.

A more promising strategy of reply for the intrinsic view would be to stick to its guns and counterattack. A status theorist might argue that the instrumental view promises more than it can deliver, and this in two ways. First, the instrumental approach maintains that we must look to the effects of ascribing rights—but do we really have enough information about what those effects are to ascribe rights with confidence? Do we really, for example, know what the effects would be of enacting laws that treat public figures and private individuals the same as targets of satire? If we do not, then we cannot complete an instrumental justification for these speech rights with any confidence. Second, a defender of the intrinsic approach might object that the instrumental emphasis on weighing the interests of all parties affected by the ascription of a right is more a liability than an advantage. For weighing individual interests against each other requires a defensible scheme for making interpersonal comparisons of interests. And it has proved rather difficult, the status theorist might say, to explain how such a scheme of interpersonal comparison of interests might work.

This second challenge to the instrumental approach is more serious than the first. The best that a status theorist could hope from the first challenge is to elicit the concession that while we do reason about rights instrumentally, we often do so on the basis of incomplete evidence about consequences. This is a concession that any honest proponent of an instrumental approach should be willing to make, yet it does not show the superiority of the intrinsic approach.

The status theorist’s second challenge is more serious because all instrumental approaches do face the challenge of interpersonal comparisons. Yet the status theorist cannot use this as an objection to the instrumental approach, because the status-based approach faces an exact analogue of this challenge, as well as a serious related problem that the instrumental approach does not share.

It is true that an instrumental approach will have to explain why we should think, for example, that in a particular case the interest of speakers in speaking is more weighty than the interests of audiences who might be adversely affected by this speech. Yet an intrinsic approach faces an exactly analogous problem of explaining why the sovereignty of the speaker should outweigh the inviolability of the audience in such a case. When the irresistible force of sovereignty meets the immovable object of inviolability, something’s got to give—but which? For example, Nagel says that a man working in an office must have the right to express his sexual desires to an unwilling female coworker, even if he expresses himself in an offensive way. Nagel says that the female coworker’s inviolability must yield here because “adults should be able to take care of themselves.”⁴² The question is how confident a status theorist can be that the line should be drawn exactly there, and in fact whether the status theorist can show that his answer to this question does not simply reflect an implicit interpersonal comparison of interests at stake in this kind of speech.

Moreover, we must not forget that the status approach does not wholly ignore interests and the consequences of ascribing rights. Recall that Nagel concedes that if respecting a right would have consequences that are above some threshold level of badness, then the right no longer holds. It is permissible to murder or torture an innocent person to avert a catastrophe, or to

restrict speech to do so. This “threshold” qualification allows the intrinsic approach to avoid an implausible absolutism about rights. Yet it also requires the intrinsic approach to explain how the *status* of one person is to be weighed against the *interests* of many others. This kind of interpersonal comparison is a comparison not within the discrete categories of status or of interests, but a comparison across these two philosophically distant categories. It will be at least as difficult for the status theorist to explain such trans-categorical trade-offs between status and interests as it will for an instrumental theorist to weigh interests against each other.

Reconciliation

We have found the instrumental thesis about the value of rights to be generally more satisfactory than the intrinsic thesis. Although the status-based approach begins with an attractive picture of human dignity, it has not proved to be sensitive to the factors that guide our reasoning about specific rights like rights to free speech. Nor have the status-based strategies for responding to these difficulties appeared promising.

Our reasoning about specific rights does, I believe, ordinarily involve evaluating how effective the rights are as instruments for balancing the competing interests of different parties. Some evidence for this can be seen simply in the number of theorists who have converged on instrumental accounts of rights despite the major differences in their broader philosophical approaches.⁴³ Indeed so many prominent theories of rights take an instrumental approach that it is tempting to dismiss status-based accounts as really just a transcendentalized reflection of the fact that certain rights have proved themselves very effective instruments for distributing human good in desirable ways. The importance of these rights may be so obvious to us that their justification may wrongly appear to require no more than the statement that it is “fitting” to ascribe them. This would account for Nagel’s worry, quoted above, that it has proved “extremely difficult” to explain the values that are meant to ground the intrinsic view of rights.

Yet such a dismissal of the intrinsic view would be mistaken. Status-based theories draw their plausibility from insights that we must not ignore. In fact in two important ways the insights of the status-based approach are critical *within* familiar theories of rights that take an instrumental approach. The first way is more practical, the second more profound.

First, there are real interests that correspond to the status-based concepts of status, sovereignty, and inviolability. Any plausible instrumental approach must take these interests into account. For example, the status-based emphasis on sovereignty over one’s own life is an important reminder that freedoms and opportunities will be a crucial element in the instrumental justification of rights like speech rights. Theories that take an instrumental approach to rights must acknowledge that we have interests in having the freedom to make choices, and interests in having opportunities to choose. They must therefore incorporate “translations” of the status-based concept of sovereignty into their metrics of interests. People have interests in opportunities for speaking regardless of whether they speak or not. Moreover theories that take an instrumental approach to rights must also acknowledge that we have “dignitary” interests in our standing relative to others. Instrumental theories must therefore translate the concept of status itself into their categories of human interests. We have interests in being seen as equal in our capacities to speak, for instance, even if we do not exercise these capacities in any significant way.

To a certain extent theories taking an instrumental approach have already incorporated translations of these status-based concepts. Scanlon acknowledges that being in poor circumstances for making choices is a ground for reasonable rejection; Cohen and Arneson have based their egalitarian theories on opportunities; and Rawls's index of primary goods recognizes that citizens have dignitary interests in the social bases of self-respect. By contrast, utilitarian theories have been slow to recognize that these kinds of interests must be part of any plausible metric of utility. This has diminished the plausibility of the utilitarian approach.⁴⁴

The second way in which status-based insights are crucial within theories taking an instrumental approach is more profound. For all of the familiar instrumental theories of rights rest at the deepest level on status-based rights. Consider, for example, the basic right in Dworkin's theory to equal concern and respect. Or consider the fundamental right in justice as fairness to be treated fairly by the institutions of society as a free and equal citizen. Or consider the basic right in Scanlon's contractualism to be treated in accordance with rules that no one can reasonably reject. Unlike the more particular rights to speech, bodily integrity, and so on, instrumental theories cannot explain these foundational rights as instruments for achieving their optimal distributions. Rather, these most fundamental rights are critical for *defining* what each instrumental theory regards as an optimal distribution. Each of these foundational rights presents a certain vision of the moral relation—of the basic status of individuals with respect to each other. Each foundational right thus defines the end toward which all of the other rights in the theory are instruments.⁴⁵

At one point in defending his intrinsic view Nagel says, "I believe that it is most accurate to think of rights as an aspect of *status*—part of what is involved in being a member of the moral community."⁴⁶ For the most fundamental rights in familiar theories of rights, this characterization is correct. Status-based rights define the kinds of moral communities that more specific rights are instruments toward achieving. It is at the deepest level of instrumental theories that status-based rights have their home.

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Notes

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¹ Nagel (2002), p. 87; see Kamm (1992), Kamm, (1995), Kamm, (2002), and Quinn (1993), pp. 149-174. Nagel remarks in passing that the status and instrumental approaches to rights may be "perhaps complementary," and that the instrumental justification of the right to expression is "very strong" but "not the whole story" (pp. 34, 42). Yet he also presents an argument that aims to show that the status-based approach "is more likely to be true" than the instrumental approach. Because Nagel says he "favor[s]" the status-based over the instrumental approach (p. 34), and because all of his arguments champion the status-based approach, I am here treating Nagel as a status-based theorist. However, Nagel's passing remarks may indicate that a more complex position lies behind his arguments Nagel (2002).

² Nagel (2002), p. 34.

³ The status-based approach cannot claim to be a completely general account of rights, but only an account of fundamental rights. Many legal rights, for instance, define institutional roles and procedural rules: e.g., a traffic warden's right to issue tickets, or one corporation's right to sue another for breach of contract. No one would think to justify these kinds of rights by appealing to the intrinsic worth of the rightholders; these rights must be instrumentally justified.

⁴ Quinn, p. 170.

⁵ Kamm (2002), pp. 508-509.

⁶ Quinn, p. 173.

⁷ Nagel (2002), p. 36.

⁸ Nagel (2002), p. 39; see also p. 36.

⁹ Nagel (2002), pp. 39-41.

¹⁰ Kamm (2002), p. 486-487. (The word “of” is not italicized in the printed text; comparison with a pre-publication manuscript, and the sense of the passage, show this to be a typographical error.)

¹¹ Nagel (2002), p. 43.

¹² Nagel (2002), p. 43, emphasis added.

¹³ Nagel (2002), p. 44.

¹⁴ Nagel (2002), p. 45.

¹⁵ Nagel (2002), pp. 43-45.

¹⁶ Jeremy Waldron highlights this aspect of *On Liberty* in “Mill and the Value of Moral Distress,” found in Waldron (1993), pp. 115-133.

¹⁷ Hart, pp. 96-98.

¹⁸ My discussions of the instrumental approach to free speech follow Scanlon (1979) and Cohen (1993).

¹⁹ Parfit (1991).

²⁰ Sen (1999), pp. 54-58.

²¹ Posner (1990).

²² Hurka (1993).

²³ Rawls (1971).

²⁴ Scanlon (1998).

²⁵ Dworkin’s theory requires the use of two matrices of advantage for evaluating a potential right, one including external preferences and the other excluding them. To simplify: if in the matrix including external preferences there is more utility in the world where the right does not exist, and if in the matrix excluding external preferences there is more utility in the world where the right does exist, then Dworkin’s theory will say that the right should be ascribed. See Dworkin (1984), pp. 153-167.

²⁶ Rawls (1993), p. 294. The instrumentality of rights within justice as fairness is slightly obscured by rights being both what the parties in the original position select (i.e., rights are part of the first principle of justice) and a measure of individual interests (i.e., rights are part of the index of primary goods). This makes it appear as if rights are ascribed because they are instrumental to producing a distribution of rights. However, Rawls includes rights in the index of primary goods only because rights enable citizens to further their most basic interests in developing and exercising their two moral powers. (To take one example, “The role of [the right to personal property] is to allow a sufficient material basis for a sense of personal independence and self-respect, both of which are essential for the development and exercise of the two moral powers,” p. 298.) Rights in justice as fairness are thus ascribed because they are instrumental to producing a distribution of opportunities for citizens to further their fundamental interests. Nagel (2002) thus errs in attempting to characterize justice as fairness as advancing an intrinsic view of rights (p. 90).

²⁷ Are theories that take an instrumental approach “consequentialist” theories? One reason this question is difficult is the absence of a standard definition for the term “consequentialist.” Many (though not all) instrumental theories fit within Hooker’s characterization: “A theory is consequentialist if and only if it assesses acts and/or rules... in terms solely of the production of agent-neutral value” (Hooker (2000), p. 110). On the other hand, most instrumental approaches are not captured by Scheffler’s remark that, “One thing [that all consequentialist theories share] is a very simple and seductive idea: namely, that so far as morality is concerned, what people ought to do is to minimize evil and maximize good, to try, in other words, to make the world as good a place as possible” (Scheffler (1988), p. 1). Given the absence of a standard definition, we might borrow a phrase from Pogge and say that the instrumental approach is “broadly consequentialist.” See Pogge (1989) pp. 36-47, and Pogge (1995), p. 244.

²⁸ *Hustler Magazine v. Falwell*. 485 U.S. 46 (1988): 55, 53, 51. Cohen discusses *Falwell* in Cohen (1993), pp. 244-245.

²⁹ It not clear whether Nagel (2002) would want to allow this example, nor whether he could bar it. On the one hand, he remarks that wounding speech should be permitted if this involves “criticism of public actors.” (p. 45) On the other hand, it is hard to see how a purely status-based approach could make good on this exception. On the difficulties of status-based approaches to speech in making these kinds of distinctions, see Cohen (1993), p. 221.

³⁰ On this point see also the Supreme Court’s decision in *Cohen v. California*, overturning the 1968 conviction of a young man who wore in the Los Angeles County Courthouse a jacket bearing the motto “F*** the Draft”.

³¹ Nozick, like Nagel, also allows that rights might be excusably infringed to avert “catastrophic moral horror.” So Nozick, like Nagel, allows that there is some threshold of bad consequences above which status-based rights need not be respected. Nozick (1974), p. 30.

³² Nozick (1974) pp. 153-159.

³³ Nozick (1974), pp. 160-164. Nagel’s critique of Nozick is his Nagel (1981).

³⁴ For differing views on the empirical evidence, see the essays in Part II of Zillman and Bryant (1989), Segal (1990), and Strossen (1995).

³⁵ Most of the Court's decision in *Ashcroft* concerns unrelated issues of overbreadth of the statute involved. When the Court does discuss indirect effects, its reasoning appears to countenance only restrictions for speech that fulfill the *Brandenburg* criterion of inciting "imminent lawless action." However, the line of precedents it cites stretching back through *Stanley v. Georgia* leaves open the question of whether conclusive evidence of non-"imminent" indirect effects would be considered in later cases.

³⁶ As the Supreme Court wrote in *NY Times Co. v. Sullivan*: "A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable 'self-censorship.'... Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wide of the unlawful zone.' The rule thus dampens the vigor and limits the variety of public debate" (p. 279).

³⁷ J.W. Burns correctly argues that the principal federal law on false advertising (the Lanham Act) makes little sense as a protection for consumers harmed by false or misleading commercial speech. The Act, for example, only gives competitors of the advertiser—not consumers—legal standing to sue. Moreover, it often allows competitors to win a case without showing consumer injury. Further, as Burns says the Act must be grossly inefficient if its purpose is protection from unfair competition, since it encourages expensive litigation about trivial advertising claims that have little possible competitive impact. See Burns (1999). What Burns does not consider is that the Act may be a rather effective means toward a third goal: engendering consumer confidence by maintaining an environment in which advertisers are loathe to make false or misleading statements.

³⁸ Justice Blackmun writing for the majority in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel*, p. 774 n. 24. Those who have disagreed with the Court in *Virginia State Board* about the relative objectivity and durability of commercial speech have questioned the truth of these empirical theses, not the relevance of the empirical questions to the issue of commercial speech. See especially Kozinski and Banner (1990).

³⁹ Rawls, for instance, recommends regulating "dangerous" political and commercial speech differently, because of facts about state power. Officials may be allowed, he says, to penalize commercial speech for the sake of protecting consumers and keeping markets efficient. Yet the price of giving officials power over political speech is too great. "The history of the use by governments of the crime of seditious libel to suppress criticism and dissent and to maintain their power demonstrates the great significance of this particular liberty to any fully adequate scheme of basic liberties. So long as this crime exists the public press and free discussion cannot play their role in informing the electorate. And, plainly, to allow the crime of seditious libel would undermine the wider possibilities of self-government and the several liberties required for its protection.... [The crime of seditious libel] has been tried, so to speak, by the court of history and found wanting." (Rawls (1993), pp. 364, 343).

⁴⁰ See here especially Scanlon's insightful criticisms of Meiklejohn's theory, and of his own earlier status-based theory, in Scanlon (1979), pp. 528-537. Another example of an unsuccessful attempt to give a more flexible status-based account of speech is Strauss (1991). Strauss's "persuasion principle" states that government may not restrict speech on the grounds that it fears that people will be persuaded by it. By this principle, false advertising is not protected speech, because "false statements of fact do not appeal to reason, their use does not constitute persuasion" (p. 339). Yet Strauss does not then explain his position (p. 338) that all political speech, including false political speech, should be protected. Examples of unsuccessful status-based principles like Strauss's could be multiplied.

⁴¹ For instance, Nagel offers some psychological theorizing to support his views on why sexual expression should remain relatively uninhibited by legal restrictions: "What about the range of cases in which sexual expression offends or does harm, from unorthodox sexual practices to private consumption of pornography to the display of nude photos in the workplace to sexual harassment? Here my views are determined by a strong conviction of the personal importance and great variety of sexual feeling and sexual fantasy and of their expression. Sex is the source of the most intense pleasure of which humans are capable and one of the few sources of human ecstasy. It is also the realm of adult life in which the defining and inhibiting structures of civilization are permitted to dissolve and our deepest presocial, animal, and infantile natures can be fully released and expressed, offering a form of physical and emotional completion that is not available elsewhere. The case for toleration and an area of protected privacy in this domain is exceptionally strong" (Nagel (2002), p. 46). Even if Nagel's observations about human psychology are correct, they seem an unlikely foundation for a publicly acceptable justification of the law of free speech.

⁴² Nagel (2002), p. 51.

⁴³ For example, Mill, Rawls, Scanlon, Parfit, Dworkin, Sen, Posner, G.A. Cohen, Arneson, Hurka and also Hare, Hayek, Harsanyi and many others.

⁴⁴ Sen has repeatedly made this kind of criticism, and has worked to develop consequentialism into a more subtle and capacious view. See most recently Sen (2000).

⁴⁵ The only instrumental theory that seems to be an exception to this is a simple (and I believe implausible) teleological utilitarianism, where the imperative to maximize utility is grounded in the bare rationality of acting so as to produce more valuable states of affairs.

⁴⁶ Nagel (2002), p. 33.