

“JACOB’S VOICE, ESAU’S HANDS”:
TRANSPARENCY AS A FIRST AMENDMENT
RIGHT IN AN AGE OF
DECEIT AND IMPERSONATION

*Amit Schejter**

The voice is Jacob’s voice, but the hands are the hands of Esau
—Genesis 27:23

I. INTRODUCTION: THE DIGITAL REVOLUTION

Changes in media technology often require a reevaluation of the underlying assumptions that guide policymakers. A case in point is the electronic media’s move to digital technology. The literature that describes this transition and its policy implications has focused on the more efficient use of the electromagnetic spectrum and the increased interoperability between broadcasting, telecommunications and computers,¹ on new applications, fragmentation of audiences, globalization, the weakening of public service broadcasting,² and on expanding user control amid increasing data collection.³ This Article will illustrate the dangers looming in the manipulative capabilities of these new technologies, their obstructive impact on free speech, and the obstacles they pose to conducting truthful ethical discourse in society

* Ph.D., Rutgers. Assistant professor of communications, College of Communications, Penn State University. The author wishes to thank Matt McAllister, John Christman, Krishna Jayakar, Ming Kuok Lim, Murali Balaji, Moran Yemini and Judy Maltz for their invaluable contribution to the manuscript at different stages of its development.

This study was supported by a Page Legacy Grant awarded by the Arthur W. Page Center for Integrity in Public Communication at the College of Communication at Penn State University.

1. See, e.g., Hernan Galperin, *Can the US Transition to Digital TV Be Fixed? Some Lessons from Two European Union Cases*, 26 TELECOMM. POL’Y 3, 3-4 (2002).

2. Jean K. Chalaby & Glen Segell, *The Broadcasting Media in the Age of Risk: The Advent of Digital Television*, 1 NEW MEDIA & SOC’Y 351, 352-53 (1999).

3. Matt Carlson, *Tapping into TiVo: Digital Video Recorders and the Transition from Schedules to Surveillance in Television*, 8 NEW MEDIA & SOC’Y 97, 97-98 (2006).

resulting in the rise of a new “culture of deceit.” As a result, it will offer a new First Amendment right—the right for transparency.

Indeed, technology alone cannot explain the motivations behind its excessive manipulative use, motivations that are deeply rooted in the rising culture of consumerism and the commercialization of the public sphere;⁴ however, technological change should be seen as a major contributor to the pace in which the offspring of this culture are emerging as these technological capabilities have the ability to disguise content and insert it seamlessly into mediated products under false pretense. This Article argues that while the immediate reaction to the imminent takeover of this culture would be more control of speech, as has already been advocated,⁵ the solution lies in developing a new First Amendment theory, a theory of separation that recognizes a First Amendment right for transparency. The proliferation of a speech culture rooted in dishonesty and deception is clearly a problem and a legal solution is virtually unthinkable under current First Amendment interpretation. From here arises the need for a new First Amendment theory that aims to strike a balance between existing social First Amendment justifications, such as discovering truth and enhancing democracy, and individual justifications centered on decision-making based on individual autonomy.⁶ This theory should be rooted in what may have been seen in the past as the trivial expectation that speech represents the true motivations of the speaker.

This Article will first present empirical data describing the emergence of the new “culture of deceit.” The description will be followed by a theoretical analysis of its normative implications. The theory proposed will import principles of fair competition developed in antitrust law and regulation, and apply them to the First Amendment concept of the “marketplace of ideas,” attempting to bridge the gap between the “economic” and “social” theories of the First Amendment by providing social justifications for what antitrust law views as purely

4. See generally MATTHEW P. MCALLISTER, *THE COMMERCIALIZATION OF AMERICAN CULTURE: NEW ADVERTISING, CONTROL AND DEMOCRACY* (1996) (discussing the influence and implications on society of the rise of advertising and mass media).

5. See, e.g., Jube Shiver Jr., *FCC Asks for Help on Stealth TV Ads*, L.A. TIMES, June 15, 2005, at C3; Anne Marie Squeo, *FCC Issues Rebuke in Political Flap over Video Spots*, WALL ST. J., Apr. 14, 2005, at B8; Sharon Waxman, *Hollywood Unions Object to Product Placement on TV*, N.Y. TIMES, Nov. 14, 2005, at C3; John Eggerton, *FCC Issues Payola Fact Sheet*, BROADCASTING & CABLE, June 15, 2005, <http://www.broadcastingcable.com/article/CA608608.html?display=Breaking+News>; Tessa Wegert, *Product Placement in Peril?*, CLICKZ, Oct. 16, 2003, http://www.clickz.com/experts/media/media_buy/article.php/3091761.

6. See Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23, 26-27 (2001).

economic considerations.⁷ The first step taken in antitrust procedures when attempting to assess whether or not a corporation has demonstrated anticompetitive behavior is to define the “product market” in which it operates.⁸ The theoretical analysis offered here proposes using the same logic and applying it to “speech products.” “Speech products,” according to this theory, would be classified according to the particular “speaker’s” loyalty, adopting Clifford Christians’s⁹ adaptation of Ralph Potter’s¹⁰ theory of social ethics to media ethics. The assumption of this theory being that each “speech product” presents itself to audiences as aligned with one dominant loyalty, that these loyalties are not interchangeable, and thus messages motivated by competing loyalties should not remain so. Therefore, ethics and ethical discourse would become the criteria for assessing whether or not freedom of expression has been abused. Applying this theoretical approach to today’s media, this Article argues, would create a marketplace based on a “culture of transparency,” which requires the disclosure of loyalties and separation of distinctive forms of speech, rather than on a “culture of deceit,” which relies on muddled up, concealed and contradicting loyalties that seems to be evolving. Thus, transparency becomes both the right of the receiver and an obligation on the sender.

All forms of speech would potentially enjoy equal constitutional protection in this proposed regime, unlike the situation today, but “mixed speech” products, namely those characterized by conflicting loyalties, would need to resolve such conflicts before being assigned to the “market” where they are to be consumed. Instead of generating more regulation, applying this theory would uphold integrity in expression and would help audiences make decisions based on autonomous choice as a result of being better informed about the nature of speech products to which they are exposed.

7. See JOHN H. SHENEFIELD & IRWIN M. STELZER, *THE ANTITRUST LAWS: A PRIMER* 10-13 (4th ed. 2001).

8. *Id.* at 30-31.

9. CLIFFORD G. CHRISTIANS ET AL., *MEDIA ETHICS: CASES AND MORAL REASONING* 3-11 (5th ed. 1998).

10. See Ralph B. Potter, Jr., *The Logic of Moral Argument*, in *TOWARD A DISCIPLINE OF SOCIAL ETHICS: ESSAYS IN HONOR OF WALTER GEORGE MUELDER* 93 (Paul Deats, Jr. ed., 1972).

II. EMPIRICAL EVIDENCE

Long an accepted practice in the movie¹¹ and radio industries,¹² the introduction of product placement—a practice that embeds branded goods seamlessly and without disclosure to audiences into popular entertainment products, overriding entertainment and artistic considerations, in order to encourage their consumption—can be dated to the 1950s on United States television,¹³ although it only started making significant inroads in the late 1980s.¹⁴ Media reports estimate that advertisers paid more than \$300 million to producers and the six “big broadcast” networks during the 2003-2004 television season.¹⁵ During 2004, more than \$438 million was reportedly paid for placements on network television alone.¹⁶ In 2005, paid television placements overall exceeded \$940 million in the United States.¹⁷ About half of all senior marketing executives, according to a recent survey, admit to having paid for a brand placement.¹⁸ Senior executives forecast its use will only grow¹⁹ and some predict that in three to four years, product placement will be evident in 75% of all primetime scripted shows.²⁰ The value of the total product placement industry (broadcasting and film)—which was estimated to be growing at a rate of just over 16%

11. See Jay Newell et al., *Product Placement 1896-1982: The Hidden History in Product Placement*, 50 J. BROADCASTING & ELECTRONIC MEDIA 575 (forthcoming 2007).

12. See Lawrence R. Samuel, *Advertising Disguised as Entertainment*, TELEVISION Q., Winter 2004, at 51, 52.

13. The first major deal involving product placement was the placement of cigarettes in the “I Love Lucy” show. See Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 MINN. J. L. SCI. & TECH. 1, 70 (2004).

14. See Julia Michaels, *Will We Be Seeing J.R. Plugging Goods on ‘Dallas’ Soon? Success of Brazilian Network Is Spurred by Prevalence of Ads in TV Programs*, WALL ST. J., Jan. 4, 1989, at B4.

15. Michael McCarthy, *Also Starring (Your Product Name Here)*, USA TODAY, Aug. 12, 2004, at 1B.

16. See Gail Schiller, *Product Placements in TV, Films Soar, Study Finds*, REUTERS, March 30, 2005, available at <http://www.idtalent.com/branding/press.htm#10>; see generally PQ MEDIA, PRODUCT PLACEMENT SPENDING IN MEDIA 2005: EXECUTIVE SUMMARY (2005), available at <http://www.pqmedia.com/ppsm2005-es.pdf> [hereinafter PQ MEDIA, PRODUCT PLACEMENT].

17. PQ MEDIA, GLOBAL PRODUCT PLACEMENT FORECAST 2006: EXECUTIVE SUMMARY 12 (2006), <http://www.pqmedia.com/execsummary/GlobalProductPlacementForecast2006-ExecutiveSummary.pdf> [hereinafter PQ MEDIA, GLOBAL PRODUCT 2006].

18. Gavin O’Malley, *Survey: 48.9% of Marketing Execs Have Paid for Placement in Content*, June 14, 2006, http://adage.com/print?article_id=109902.

19. *NBC Chief Expects More Advertising Within TV Shows*, Sept. 26, 2006, <http://www.tv.com/story/6474.html?&print=1>.

20. John Consoli, *Product Placement Put in the Game*, MEDIAWEEK, July 26, 2004, http://www.aef.com/industry/news/data/2004/3030/pf_printable?.

a year in 2004²¹—grew by 29.5% during 2005.²² While broadcasting accounted for the bulk of this activity for the first time in 2004, the expenditure in broadcasting nearly doubled the expenditure in film in 2005.²³ Much of this growth has been attributed to the growing penetration of digital video recorders that allow viewers to skip traditional advertising spots.²⁴ This, however, is only part of the picture.²⁵ The impact of product placement in broadcasting goes far beyond the actual growth figures. The product placement industry has redefined broadcasting by creating a new genre of “branded entertainment.”²⁶ This new branch of the entertainment industry has created new “professions,” such as “brand integrators,”²⁷ “branded entertainment research” firms, and “branded entertainment quality measurement” firms whose objective is to create the perfect match between entertainment products and commercial brands and test its efficacy.²⁸ New business ideas inspired by the growth in product placements include companies that provide online marketplaces to introduce marketers to venues where they can promote their products through seamless integration into entertainment products.²⁹ The direct relationship between marketers and program producers has even affected the basic business model of the television industry by introducing “barter” as a means of compensation,³⁰ or by cutting television

21. PQ MEDIA, PRODUCT PLACEMENT, *supra* note 16, at 7.

22. PQ MEDIA, GLOBAL PRODUCT 2006, *supra* note 17, at 13.

23. *Id.* at 11.

24. This rationale is seen in the general media as well as in trade journals. *See, e.g.*, Daren Fonda, *Prime-Time Peddling*, TIME, May 30, 2005, at 50; Matthew Gilbert, *Catching Unsuspecting Viewers in a Time Warp Networks Manipulate Schedules of Show as to Control Channel Switching*, BOSTON GLOBE, Dec. 19, 2004, at N6; Will Shanley, *Ad Trend: Sponsors Buy into Reality TV, Companies Are Spending Big Bucks for Product Placements to Counter Digital Recorders and Changing Viewing Patterns But Risk an Audience Backlash*, DENVER POST, Oct. 17, 2004, at K1.

25. It is important to note though, that prior to the development of digital video recorders, the media industry had recognized that audiences were “skipping” ads. Indeed, the rise of the digital video recorder only made the practice more pronounced. *See* ROBIN ANDERSEN, CONSUMER CULTURE AND TV PROGRAMMING 20 (1995).

26. Evelyn Nussenbaum, *Products Slide Into More TV Shows, With Help from New Middlemen*, N.Y. TIMES, Sept. 6, 2004, at C1.

27. *Id.*

28. *See, e.g.*, PQ Media, *iTVX Team Up for First Global Branded Entertainment Report*, Sept. 27, 2005, <http://www.itvx.com/news/pq%20media.htm>.

29. Gary Gentile, *Product-Placement Marketplace Launches: NextMedium Launches Embed Online Marketplace to Organize Buying, Selling of Product Placements*, May 17, 2006, <http://abcnews.go.com/Technology/wireStory?id=1974290>.

30. *See, e.g.*, Michael McCarthy, *HBO Shows Use Real Brands*, USA TODAY, Dec. 3, 2002, at 3B.

networks out of the business transaction altogether.³¹ Not surprisingly, several websites are dedicated to this blossoming industry,³² one of which presents an annual award for the best product placements.³³

Not only has the digital revolution sparked the proliferation of broadcast product placements, it has also enabled them to be displayed in more innovative ways. The ability to digitally impose visual data over video for example, has led to the digital placement of products in scenes of scripted television programs, such as in the case of boxes of “Club Crackers,” “Cheez-It”s, “StarKist” Tuna, and “Nutri-Grain” bars virtually placed on the set of programs such as *Yes, Dear* and *Listen Up*, although they were not physically on the set when the shows were taped.³⁴ This practice, which has emerged from the digital imposition of billboards in sporting events, has been described in the following way by a leading producer of this technology:

[V]irtual ads are inserted to the pitch in a form of 2D or 3D graphics, animations and videos. The inserted virtual ad remains tied to its exact position on the pitch regardless of the camera movement, and thus creates the illusion that the advertisements are an integral part of the event.³⁵

Digital enhancement has already spread beyond broadcasting. *The New York Times* has reported that it uses “shadow ads,” a technique that embeds a “watermark” depicting commercial logos on pages that carry news, and in particular on pages that carry stock price quotations, where embedded logos of investment brokers are displayed.³⁶

All this has given rise to a communications revolution of sorts. The legitimacy attributed to creating illusion on screen and in print and, in effect, providing viewers with a false impression of the “real” dimensions of live pictures and the real motivations behind the “creative” decisions of producers of television programs and designers

31. See, e.g., Brian Steinberg, *A New Wave of ‘Advertising’ Pays Producer, Not Network*, WALL ST. J., June 20, 2005, at B1.

32. See, e.g., iTVX, *Global Product Placement Trends 2007*, <http://www.itvx.com/> (last visited July 29, 2007); *Product Placement News*, <http://www.productplacement.biz> (last visited July 29, 2007).

33. See BrandChannel.com, *Brandcameo Awards*, http://www.brandchannel.com/features_effect.asp?fa_id=355 (last visited July 29, 2007).

34. Sam Lubell, *Advertising’s Twilight Zone: That Signpost up Ahead May Be a Virtual Product*, N.Y. TIMES, Jan. 2, 2006, at C1.

35. ORAD, *Virtual Advertisement*, <http://www.orad.tv/page.asp?pagenum=101> (last visited July 29, 2007).

36. Byron Calame, *Cracks in the Wall Between Advertising and News*, N.Y. TIMES, Nov. 6, 2005, § 4, at 12.

of news pages, has opened the door to an endless innovative stream of deceptions both on and off media. NBC, for example, did not interrupt a live broadcast of the 2005 Thanksgiving Day parade after two women were injured in an accident involving an M&M balloon that was forced out of the parade.³⁷ Instead, the network weaved into the live broadcast previously recorded footage of the balloon crossing the parade's finish line the year before and did not report the injuries to the live audience.³⁸ Today, technology is used not only to manipulate live news for commercial purposes, but also for political purposes. In May 2006, prompted by a study conducted by the Center for Media and Democracy ("CMD"),³⁹ a public interest group, the Federal Communications Commission ("FCC") launched an investigation into the use of Video News Releases ("VNR") provided by commercial and political stakeholders in news programs without proper disclosure to viewers.⁴⁰ While the CMD study focuses mostly on VNRs produced by corporate public relations firms,⁴¹ the government also uses these prepackaged news segments.⁴² One such government-created VNR, provided by the State Department to news organizations in 2003, depicted an Iraqi-American thanking President George W. Bush upon hearing the news of the fall of Baghdad.⁴³ The State Department is only one among twenty federal agencies that has made and produced such VNRs.⁴⁴ Just as the proliferation of product placement led to the establishment of a whole new line of professional ventures and "professions," so has the VNR business generated a whole new industry that specializes in their production and reaps rewards for their effective undisclosed insertion into television news.⁴⁵ According to one top executive in this industry,

37. Andy Newman, *While Others Reported Accident, NBC Stuck to Sunny Rebroadcast of Last Year's M&M's*, N.Y. TIMES, Nov. 25, 2005, at B2.

38. *Id.*

39. DIANE FARSETTA & DANIEL PRICE, CENTER FOR MEDIA AND DEMOCRACY, FAKE TV NEWS: WIDESPREAD AND UNDISCLOSED (2006), http://www.prwatch.org/pdfs/FakeTVNews_Apr2006Rpt.pdf [hereinafter FAKE TV NEWS].

40. Andrew Buncombe, *American TV Stations in 'Fake News' Inquiry*, INDEPENDENT (London), May 29, 2006, at 19.

41. FAKE TV NEWS, *supra* note 39, at 7.

42. David Barstow & Robin Stein, *Under Bush, a New Age of Prepackaged News*, N.Y. TIMES, Mar. 13, 2005, at 1.

43. *Id.*; Buncombe, *supra* note 40.

44. Barstow & Stein, *supra* note 42; Buncombe, *supra* note 40; FAKE TV NEWS, *supra* note 39, at 10.

45. See, e.g., DS Simon Productions Inc., Video News Releases, <http://www.dssimon.com/vnr.php> (last visited July 29, 2007). Several such awards went to a public relations VNR promoting the arrival in the United States of a new book in the popular *Harry Potter* series. DS Simon Productions Inc., Awards for Harry Potter Arrives in the U.S.,

less than five percent of VNRs are identified as such by the stations airing them.⁴⁶ In August 2006, the FCC approached seventy-seven television stations inquiring about their use of VNRs,⁴⁷ among them stations in Boston⁴⁸ and Baton Rouge.⁴⁹

Undisclosed sponsorship by both commercial and political entities is not limited exclusively to digitally disguised fare. Local television stations increasingly approach branded entertainment agencies and offer to integrate their clients' products into news programs in exchange for monetary compensation.⁵⁰ At least two television stations in Washington, D.C. were found to be providing favorable news coverage of corporations that in return sponsored the stations' charitable campaigns, among them food and toy drives.⁵¹ The Education Department was caught paying a columnist to promote the "No Child Left Behind" law,⁵² part of \$1.6 billion spent by seven federal departments on public relations, advertising, and media from 2003-2005.⁵³ Indeed, providing journalists and others with financial incentives is also a practice employed in the corporate world.⁵⁴ Corporations often pay "experts" to appear on television shows as objective analysts and promote their products while not revealing their ties.⁵⁵ This apparently common undertaking has evolved into a new experimental type of television show dubbed the "advertainment," in which guests pay to be

http://www.dssimon.com/Awards/Harry_Potter_Pop-up.html (last visited July 29, 2007). It was aired, undisclosed, 1168 times over 368 stations to a total unsuspecting audience of nearly 68 million viewers. Marketing Kit, DS Simon Productions Inc., The Basics About DS Simon, http://solis2.365media.com/UploadedFiles/P159/D881/marketing_kit_2006_B38BF4B0-F0D6-47D0-9EDE-77571085A519.pdf (last visited July 29, 2007).

46. *On the Media: The Nightly News Sell* (radio broadcast Oct. 24, 2003), available at http://www.onthemedialog.org/transcripts/transcripts_102403_news.html.

47. See Todd Shields, *Feds Probe "Fake News" at 77 Stations*, MEDIAWEEK, Aug. 14, 2006, http://www.mediaweek.com/mw/news/networktv/article_display.jsp?vnu_content_id=1002986110.

48. See Donna Goodison, *FCC Queries WHDH, Other Stations, On 'Fake News' Story*, BOSTON HERALD, Aug. 16, 2006, at 35.

49. See *BR Station Among 77 Queried About Video News Releases*, ADVOCATE (Baton Rouge), Aug. 16, 2006, at C3.

50. Gail Schiller, *In Risky Move, Newscasts Adopt Product Placements*, HOLLYWOOD REPORTER, Mar. 16, 2006, available at <http://www.freepress.net/news/14432>.

51. Paul Farhi, *FCC Commissioner: TV Charity Drives Could Mean Payola*, WASH. POST, Dec. 23, 2005, at C1.

52. Christopher Cooper & Brian Steinberg, *Bush Draws Fire over Fee Paid to Columnist to Promote Policy*, WALL ST. J., Jan. 10, 2005, at B3.

53. Christopher Lee, *Update: Prepackaged News*, WASH. POST, Feb. 14, 2006, at A13.

54. See, e.g., Eamon Javers, *A Columnist Backed by Monsanto*, BUSINESSWEEK ONLINE, Jan. 13, 2006, www.businessweek.com/bwdaily/dnflash/jan2006/nf20060113_2851_db035.htm.

55. Howard Kurtz, *Firms Paid TV's Tech Gurus to Promote Their Products*, WASH. POST, Apr. 20, 2005, at C1; James Bandler, *Advice for Sale: How Companies Pay TV Experts for On-Air Product Mentions*, WALL ST. J., Apr. 19, 2005, at A1.

interviewed.⁵⁶ While paid “experts” are disguised as objective commentators, commercial interests, and in particular brand-promotion motivated interests, have been deeply involved in creating scripted television programs.⁵⁷ This trend began on “reality shows,” a prominent example being ABC’s *Extreme Makeover: Home Edition*, where Sears, Roebuck & Co. showcases its branded products as the props.⁵⁸ It later took the form of direct involvement in scripted prime time shows in which characters mention, use and display products,⁵⁹ where the scripts are being designed to introduce products (rather than the products serving as mere props that support the script),⁶⁰ with extreme examples being episodes that center around the production of an advertisement that is then aired during the commercial break in the scripted program.⁶¹ In what can only be explained as a natural outgrowth of the ongoing on-screen mix of commercial, political, news and entertainment content, a fall 2005 episode of *The West Wing*, a program broadcast on NBC, included a televised debate between actors who were portraying fictitious politicians.⁶² During this “debate,” to create the impression that these were real politicians, the “NBC Live” logo was imprinted on the screen just as it is during live broadcasts of news events.⁶³ The practice of concealed promotion in media products has become so mainstream that a Beverly Hills boutique sued a gossip magazine for ignoring it while covering the buying habits of the rich and famous.⁶⁴

The above-described “culture of deceit” that serves both commercial and political interests has spilled over beyond the electronic and print news media as well as beyond the United States. Product placements and branded forms of entertainment can now be spotted on

56. Marisa Helms, *Launch of Advertainment Assailed by Twin Cities Critics*, MINN. PUB. RADIO, Dec. 13, 2005, http://news.minnesota.publicradio.org/features/2005/12/14_helmsmadvertainment/.

57. See, e.g., Stuart Elliot, *On ABC, Sears Pays to Be Star of New Series*, N.Y. TIMES, Dec. 3, 2003, at C1.

58. *Id.*

59. Lorne Manly, *When the Ad Turns into the Story Line: On Television, Brands Go from Props to Stars*, N.Y. TIMES, Oct. 2, 2005, § 3, at 1.

60. Gary Levin, *The Newest Characters on TV Shows: Product Plugs*, USA TODAY, Sept. 20, 2006, at 1A.

61. Theresa Howard, *Product Placement in TV Shows Moves out of Background*, USA TODAY, Oct. 15, 2004, at 3B.

62. Lisa De Moraes, *‘West Wing’ Candidates to Face Off in Live Debate*, WASH. POST, Oct. 15, 2005, at C01, available at <http://www.washingtonpost.com/wpdyn/content/article/2005/10/14/AR2005101401982.html>.

63. *Id.*

64. *Beverly Hills Boutique Sues Us Weekly*, MSNBC.COM, Sept. 13, 2006, <http://www.msnbc.msn.com/id/14807020/>.

school buses,⁶⁵ in schools,⁶⁶ in books,⁶⁷ in college textbooks,⁶⁸ in comics,⁶⁹ in video games,⁷⁰ on tables, fruit, urinals, turnstiles, supermarket floors, basketball backboards,⁷¹ and in Broadway shows.⁷² In a circumvented way, however, the “excess success” of this practice of disguising content has caused the original technology that created this imbalance to become part of the ploy itself. TiVO, the leading brand among digital video recorders,⁷³ is now devising ways to expose consumers who skip ads to ads more targeted to their interests,⁷⁴ while tracking their patterns of purchasing products.⁷⁵

At first glance, all these developments may seem coincidental. Higher digital video recorder penetration rate and the ability of audiences to skip advertising that lead to the proliferation of “product placement” in advertising-based television; the development of digitally created “product placements” that update old films and television programs with contemporary products; the positioning of digitally created commercial logos during sports broadcasts, which create the illusion of bi- or tri-dimensional fixtures in the stadium; and the production of commercial or governmental VNRs with the “look and feel” of professionally produced news segments as well as stories aimed at the printed press, that integrate seamlessly into news programs and newspapers in the United States and overseas.

This Article argues, however, that indeed there is a link, one that threatens to undermine the freedom of speech that is so fundamental to

65. Caroline E. Meyer, *The Next Niche: School Bus Ads: Mass. Firm's Radio Program Promises Sales with Safer Ride*, WASH. POST, June 4, 2006, at F1.

66. Meredith Deliso, *Consumer Groups Lobby to Remove Ads from Schools*, ADVERTISING AGE, Sept. 20, 2006, <http://www.commercialalert.org/news/archive/2006/09/consumer-groups-lobby-to-remove-ads-from-schools>.

67. Gregory M. Lamb, *Product Placement Pushes into Print*, CHRISTIAN SCI. MONITOR, Sept. 29, 2005, at 12.

68. Justin Pope, *Textbooks Are Free, But They Carry Ads*, L.A. TIMES, Sept. 5, 2006, at C2.

69. Kortney Stringer, *Comic Books Draw in Ads: Product Placement Expands to New Territory*, DETROIT FREE PRESS, June 19, 2006.

70. Jo Twist, *Ads in Video Games Set to Rise*, BBC NEWS, <http://news.bbc.co.uk/2/hi/technology/3727044.stm> (last visited July 29, 2007).

71. Jeff Gammage, *Businesses Find New Places to Put Their Brands On*, MERCURY NEWS (San Jose), July 16, 2006.

72. See Lamb, *supra* note 67.

73. Press Release, TiVo, Inc., *TiVo Launches Audience Research and Measurement (ARM) Division* (July 26, 2006), http://www.tivo.com/cms_static/press_99.html; Carlson, *supra* note 3, at 98, 102.

74. Kara Kridler, *If You Have Power to Skip TV Ads, Will You Seek Them Out?*, DAILY RECORD (Balt., Md.), Dec. 2, 2005; see also Carlson, *supra* note 3, at 106, 110-11.

75. Katy Bachman, *TiVo to Track Consumer Behavior*, MEDIAWEEK, Sept. 20, 2006, http://www.mediaweek.com/mw/news/recent_display.jsp?vnu_content_id=1003154177.

our political and social system. Therefore, it needs to be addressed. But, while the knee-jerk reaction to this threat would be more stringent regulation, as has already been advocated,⁷⁶ the contention here is that the solution lies in developing a new First Amendment theory, one of separation for the sake of invoking the right for transparency.

III. THEORIES OF SEPARATION

Media law scholar Jerome Barron recognized the “banality” of the marketplace metaphor used to justify media regulation and called for its “burial,” while advocating a new First Amendment right, the right of access.⁷⁷ The transition of the electronic media to digital technology, and in particular the rise of the new “culture of deceit,” may provide justification for a revival of the “marketplace” metaphor by bridging between what Philip M. Napoli identified as its “economic” roots and its “democratic” roots,⁷⁸ in order to create another right for audiences—the right to transparency. The right to transparency, this Article contends, can only be achieved through separation between discrete “media products.” The “marketplace” metaphor may serve this new right well, if reformulated to adopt rules of fairness and disclosure derived from its “democratic” goal, which transcend its “banal” economic interpretation.

A. Bridging the “Economic” and “Democratic” Roots of the “Marketplace Metaphor”

Napoli creates a useful dichotomy between “economic” and “democratic” interpretations to the “marketplace of ideas” metaphor.⁷⁹ The “democratic” understanding of the metaphor is crystallized in the idea that a free exchange of ideas is linked directly with the attainment of political truth, and with the effective functioning of democracy.⁸⁰ The use of the “marketplace” as the descriptor of the forum for idea exchange, however, led to the development of a more concrete identicalness between the marketplace of ideas and all other marketplaces.⁸¹ Bruce M. Owen simply stated he takes the market notion

76. See *supra* note 5.

77. Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1647-50 (1967).

78. Philip M. Napoli, *The Marketplace of Ideas Metaphor in Communications Regulation*, J. COMM., Autumn 1999, at 151, 152-57.

79. See *id.*

80. *Id.* at 153-54.

81. See, e.g., R.H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384, 389 (1974).

“literally,”⁸² and the FCC adopted this concept as a policy and ruled,⁸³ with the Supreme Court’s consent,⁸⁴ that consistent with the Communications Act and the First Amendment, the marketplace should be left alone to determine the program format of broadcast stations.⁸⁵ In fact, the understanding that the marketplace of ideas is and should be treated like any other product market was the ideological force driving the FCC in the 1980s.⁸⁶

However, approaching the media as a business, and therefore, assuming market forces will ensure that all “needs” are met, is wrong, argues Jay Blumler, citing the impact of new technologies on social processes as an issue to be considered when designing policy.⁸⁷ Indeed, this view is echoed by Robert M. Entman and Steven S. Wildman, who find that promoting economic efficiency and social values at the same time under the umbrella of the metaphor of the “marketplace of ideas,” results in bad policy and bad policy analysis.⁸⁸ At minimum, they say, a new metaphor is required whose contradictions are less apparent.⁸⁹ These critiques of the “marketplace” metaphor come with growing acceptance of the idea that justice and fairness play a role in economics, both with regard to evenhandedness in the distribution of wealth and to neutrality in the procedures leading to the distributive decision.⁹⁰ The conclusion being that if the “marketplace of ideas” was governed as any marketplace, it would be only natural for it to adopt rules that maintain fairness. In fact, introducing rules of fairness to this marketplace may help bridge the “democratic” and “economic” interpretations of the metaphor, and democratic decision-making would naturally result. In short, using the “marketplace” metaphor, even in the economic sense,

82. BRUCE M. OWEN, *ECONOMICS AND FREEDOM OF EXPRESSION: MEDIA STRUCTURE AND THE FIRST AMENDMENT* 5 (1975).

83. *Changes in the Entertainment Formats of Broadcast Stations*, 60 F.C.C.2d 858, 863-65 (1976).

84. *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 604 (1981) (upholding the FCC’s Policy Statement).

85. *Id.* at 603-04.

86. See Napoli, *supra* note 78, at 155 (discussing the early 1980s FCC Chairman’s approach to communications regulations).

87. JAY G. BLUMLER, *THE ROLE OF PUBLIC POLICY IN THE NEW TELEVISION MARKETPLACE* 29-31 (1989).

88. Robert M. Entman & Steven S. Wildman, *Reconciling Economic and Non-Economic Perspectives on Media Policy: Transcending the “Marketplace of Ideas”*, J. COMM., Winter 1992, at 5, 6.

89. *Id.* at 17.

90. See generally James Konow, *Which Is the Fairest One of All? A Positive Analysis of Justice Theories*, 41 J. ECON. LITERATURE 1188 (2003) (analyzing various economic theories in reference to differing preferences for justice and fairness).

would not spell chaos, since chaos is not the optimal prescription for a functioning marketplace. A key tool for ensuring the market is functioning both fairly and efficiently would be adopting the guiding principles of the branch of law developed to deal with just this matter, namely antitrust law.

B. Operating a Fair Marketplace

The first step to assuring that a market is operating fairly under antitrust law is to define the boundaries of the relevant product market.⁹¹ To do so, the unique attributes of the product must be identified. In the economic framework that guides this process, what must be assessed is the ability of a manufacturer of a product to raise its price without losing market share to a competing product.⁹² The relevant product market is the smallest group of products that satisfies this test,⁹³ which in essence is a test of “reasonable interchangeability.”⁹⁴ Can one product take the place of the other in the eyes of a potential consumer barred from acquiring the initial product due to its high price? This analysis, and antitrust regulations in general, are designed to ensure fair competition, on the one hand, but minimal government intervention, on the other, the assumption being that once domination is avoided in narrowly defined product markets they will proceed to behave “normally,” since competitive markets allocate production most efficiently,⁹⁵ and the “transfer of wealth from buyers to sellers or a misallocation of resources” will be avoided.⁹⁶

Normal markets, however, have been seen traditionally as motivated by profit and profit alone. In the words of Adam Smith, “[i]t is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest.”⁹⁷ The market’s definition of reward, claims Michael Walzer, simply “can’t be right” because reward cannot hang on economic considerations or on the

91. SHENEFIELD & STELZER, *supra* note 7, at 30.

92. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 1.11, at 6 (rev. ed. 1997) [hereinafter HORIZONTAL MERGER GUIDELINES].

93. Robert B. Ekelund, Jr. et al., *Is Radio Advertising a Distinct Local Market? An Empirical Analysis*, 14 REV. INDUS. ORG. 239, 242 (1999).

94. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

95. William MacLeod, *The Relevant Product Market After Brown Shoe: A Framework of Analysis for Clayton and Sherman Act Cases*, 12 LOY. U. CHI. L.J. 321, 326 (1981).

96. See HORIZONTAL MERGER GUIDELINES, *supra* note 92, § 0.1, at 2-3.

97. ADAM SMITH, THE WEALTH OF NATIONS 30 (Electric Book Co. 2001) (1776).

state of the economy.⁹⁸ Recent economic research has found, in fact, that triggered by potential consumer⁹⁹ and wage earner¹⁰⁰ retribution, firms may choose action that is not focused on immediate profit-seeking alone.¹⁰¹ Ernst Fehr and Klaus Schmidt demonstrate that there are circumstances where the fact that a market is populated by players they define as “inequity averse”—people who resist inequitable outcomes—creates incentives for selfish players operating in the same market to contribute to the public good.¹⁰² Much the same can be said of the goals of antitrust regulation, which are not limited to promoting fairness in each of the distinct product markets.¹⁰³ In fact, the separation of goods to distinct product markets also enhances the ability to control the power of dominant players and prevent it from spilling into and affecting other markets.¹⁰⁴ It allows for “power in one locus [to] be checked by power in another”¹⁰⁵ and to encounter “the concern over undue political influence that accompanies economic power.”¹⁰⁶ Thus, the goals of antitrust law are not limited to the creation of a competitive market for the sake of reaching a competitive price structure alone, but also for the sake of containing the power of emerging monopolies within the markets in which they operate.¹⁰⁷

C. Adopting a Theory of Separation

The act of identifying the identity of “products” for the sake of defining “markets” requires full transparency regarding the functionality of the product. Separation of markets therefore is a natural evolution of transparency. Separation of products in itself serves two goals: It generates fair competition among them, and it allows blocking

98. MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 108 (1983).

99. See Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 728 (1986).

100. See Carl M. Campbell III & Kunal S. Kamani, *The Reasons for Wage Rigidity: Evidence from a Survey of Firms*, 112 Q. J. ECON. 759, 761 (1997).

101. *Id.* at 759; Kahneman et al., *supra* note 99, at 728.

102. Ernst Fehr & Klaus M. Schmidt, *A Theory of Fairness, Competition, and Cooperation*, 114 Q. J. ECON. 817, 819 (1999).

103. See Lawrence Anthony Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214, 1218, 1221, 1223-24 (1977); see also Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 382-84 (1965) (pointing out the indirect benefits of antitrust regulation).

104. See Sullivan, *supra* note 103, at 1223-24.

105. *Id.* at 1223.

106. MacLeod, *supra* note 95, at 326.

107. See *id.* at 326-27.

advantages achieved in one product market from distorting other product markets.¹⁰⁸ The art of separating distinct “spheres” or “loci” is a liberal idea.¹⁰⁹ Separating church from state and church from university were mechanisms created for the sake of maintaining independence in each of these “spheres.”¹¹⁰ The separation of power between the distinct branches of government was created in order to ensure they do not encroach on each other’s territory in order to ensure their proper functionality.¹¹¹ It is also an idea that can sit well with Marxist analyses of society, as the Marxist “vision of individual and collective self-determination requires . . . the existence of a *protected space*” from the power wealth may have on the making of meaningful choices.¹¹² Such a space “can only exist if wealth and power are walled in and limited.”¹¹³

Separation is not only a condition for freedom of choice, but also a condition for equality.¹¹⁴ When success in one “sphere” cannot be transferred to other “spheres,” it is barred from contributing to the distortion of relations of power in those other “spheres.”¹¹⁵ Maintaining boundaries can also be seen as a requirement for efficient social planning.¹¹⁶ The safeguarding and development of “borders” across social “spheres” is in itself a useful exercise, and as the historical record suggests, in societies with fewer boundaries, the existing boundaries are not guarded as successfully, allowing those in positions of power in certain “spheres” to migrate to other “spheres.”¹¹⁷

Hence, separation among “spheres” for the sake of diluting power creates a more just society. Separation, however, can be misused to serve those pursuing the acquisition of power.¹¹⁸ This happens when segregationist ideologies, designed to exclude and weaken individuals and groups by forbidding them access to empowering resources, are adopted.¹¹⁹ The most notable instance was the notorious ideology of the

108. See *id.* at 326; Sullivan, *supra* note 103, at 1223.

109. Michael Walzer, *Liberalism and the Art of Separation*, 12 POL. THEORY 315, 315 (1984).

110. See *id.* at 315-16.

111. See generally JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 1965).

112. Walzer, *supra* note 109, at 319.

113. *Id.*

114. *Id.* at 320.

115. *Id.* at 321.

116. Konow, *supra* note 90, at 1225.

117. Michael Walzer, *Response*, in PLURALISM, JUSTICE, & EQUALITY 281, 288 (David Miller & Michael Walzer eds., 1995).

118. See, e.g., Dmitri Melhorn, *A Requiem for Blockbusting: Law, Economics, and Race-based Real Estate Speculation*, 67 FORDHAM L. REV. 1145, 1147-50 (1998) (documenting the history of racial segregation policies adopted in real estate).

119. See *id.*

“separate but equal” doctrine that guided public policy in the United States for most of the twentieth century and was only abandoned when its oppressive nature could not be further disguised.¹²⁰ It can be said that the harm caused by this form of separation is a result of the fact that separation here has been achieved using force against the weak and separated communities. Using force for the sake of separation can also be harmful when trying to create a comprehensive egalitarian culture.¹²¹ Maintaining social strata and unyielding boundaries can, instead of blocking the import of distortions acquired in separate “spheres,” maintain distortions that are the outcome of the existence of separate “spheres.”¹²² The removal of boundaries for the sake of creating a unified culture is, therefore, useful, important and empowering, as long as the “unifying culture” is not guided by an interpretation serving a dominant group.¹²³ Hence, certain basic rules must be maintained, as the creation of a true egalitarian sphere for discourse requires full disclosure of the motivations of those taking part in the discourse. This type of egalitarian sphere has been defined elsewhere as the “public sphere,”¹²⁴ a locale in which public opinion is formed and to which access is granted to all citizens,¹²⁵ that is distinct from the state¹²⁶ and is “governed neither by the intimacy of the family, the authority of the state, nor the exchange of the market,”¹²⁷ which allows for the evolution of undistorted

120. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

121. See, e.g., Denise C. Morgan, *Anti-Subordination Analysis After United States v. Virginia: Evaluating the Constitutionality of K-12 Single-Sex Public Schools*, 1999 U. CHI. LEGAL F. 381, 450 (suggesting that separation in public schools via single-sex schools directly conflicts with the egalitarian principles of justice).

122. See, e.g., Kevin Brown, *Do African-Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education*, 78 IOWA L. REV. 813, 843 (1993) (“Utilizing the cultural frame of reference of the dominant group can be threatening to the involuntary minority’s identity and security, as well as the group’s solidarity. As a result, involuntary minorities are less likely to interpret differences between them and dominant group members as differences to overcome; rather, they are differences of identity to be maintained.”).

123. *Id.* at 846.

124. Not to be mistaken with other uses of the term, such as its distinction from the “private sphere,” see Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, SOCIAL TEXT, 1990, at 56, 56-57, and from “the public” when meaning “individuals who assemble,” see JÜRGEN HABERMAS, *The Public Sphere*, in JÜRGEN HABERMAS ON SOCIETY AND POLITICS: A READER 231 (Steven Seidman ed., 1989).

125. See HABERMAS, *supra* note 124, at 236.

126. Fraser, *supra* note 124, at 57.

127. John Durham Peters, *Distrust of Representation: Habermas on the Public Sphere*, 15 MEDIA, CULTURE & SOC’Y 541, 542 (1993).

communication among its participants.¹²⁸ This can be achieved only through a dialogue that is devoid of forms of domination. A model for the establishment of this type of dialogue was developed by the German philosopher Jürgen Habermas, who argued for the protection of the “public sphere” from the influence of political power and money,¹²⁹ a goal others have seen can be implemented by pointing out “how the reliance on market success that structures the United States media system cuts off the public deliberation that is needed in a democracy to bring about the consent of the governed.”¹³⁰ In order to reach rational agreement in such a social setting, it makes sense to take Habermas’s theory of the “ideal speech situation” one step further. An ideal speech situation is one in which any attempt to reach a consensus based on undistorted communications is protected against constraints caused by extraneous motives and loyalties brought to the table by the discussants, motives that might otherwise be perceived as perfectly rational in their own right, but have no place in the specific “public,” “sphere,” or “locale” in which a distinctively defined communication is taking place.¹³¹

The social role of separation therefore facilitates the realization of multiple goals: fairness, equality, and dilution of excess power. Separation enables the creation of transparency that contributes to an honest exchange of communications, and separation through concrete and strict definitions allows for the development of undistorted competition.¹³² Hence, separation is a mechanism that can be seen as the basis of both the social goals of the “marketplace,” the reaching of decisions by individuals based on a transparent process of fact-finding and deliberation, and the economic goals of the marketplace, basing it on a truly honest competitive ground. Maintaining separate “spheres” not only serves fairness within and between “spheres,” as mentioned, but it also serves the public by allowing, through transparency, a knowledgeable autonomous evaluation of their worth to the consumer.¹³³

128. Margaret Canovan, *A Case of Distorted Communication: A Note on Habermas and Arendt*, 11 POL. THEORY 105, 105 (1983).

129. Karin Wahl-Jorgensen & Hernan Galperin, *Discourse Ethics and the Regulation of Media: The Case of the U.S. Newspaper*, 24 J. COMM. INQUIRY 19, 23-24 (2000).

130. *Id.* at 23.

131. See Nigel Blake, *Ideal Speech Conditions, Modern Discourse and Education*, 29 J. PHIL. EDUC. 355, 356-57 (1995).

132. Tal Z. Zarsky, *Thinking Outside the Box: Considering Transparency, Anonymity, and Pseudonymity as Overall Solutions to the Problems of Information Privacy in the Internet Society*, 58 U. MIAMI L. REV. 991, 1012 (2004).

133. Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 899 (2006).

In other words, this “theory of transparency” not only strikes a balance between “economic” and “democratic” First Amendment justifications, it also balances both these “social” rationalizations and individual justifications for the First Amendment centered on decision-making based on individual autonomy. Indeed, the distinction among “products” enhances personal autonomy, since the ability to make a rational choice is concomitant with personal autonomy.¹³⁴ And separation is not possible without a clear identification of the differences among the separated entities; hence transparency through disclosure is the *sine qua non* of effective separation.

D. Rejecting a Hierarchy of Forms of Speech

One mechanism used specifically in American jurisprudence to dilute the power of corporate speech is to award commercial expression a lower status than other forms of speech. The Supreme Court ruled early on that the constitutional guards for free speech do not apply in the United States to “purely commercial advertising.”¹³⁵ Some years later, the Court refined its commercial speech doctrine, stating that truthful commercial speech does enjoy constitutional safeguards, albeit limited ones, and that its regulation is justified when promoting a substantial government interest directly and not extensively.¹³⁶ Awarding commercial speech a lesser level of protection has been justified by the understanding that “commercial speech is not a manifestation of individual freedom or choice”¹³⁷ or to use our previous classification, that it plays only a partial role in the democratic function (or justification) of the “marketplace of ideas.”¹³⁸ This is a dangerous proposition, as it allows other forms of speech to be included under the same limited category, a concern raised in the court’s deliberations.¹³⁹ At the same time, when the commercial aspect of the speech is not its dominant feature, the expression obtains a *carte blanche*, unless of course it is a form of “unprotected speech” altogether, such as obscenity.¹⁴⁰ This too, seems to be an unwarranted consequence, as there

134. Meir Dan-Cohen, *Conceptions of Choice and Conceptions of Autonomy*, 102 ETHICS 221, 221 (1992).

135. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942).

136. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564, 566 (1980).

137. C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1, 3 (1976).

138. *See id.*

139. *Central Hudson*, 447 U.S. at 579 (Stevens, J., concurring).

140. *Cf. id.* at 561-63 (majority opinion) (noting that commercial speech is afforded less protection than other forms of speech under the First Amendment).

may be locations where commercial speech should not be present, for example, locations designated as “public spheres.” The relative level of protection of speech from government regulation allows suppression of speech, while the relative location of distinct speech products does not allow suppression of speech itself, but only its appropriate compartmentalization. Thus, for example, separation of forms of speech is needed to protect art “from the new power that arises within civil society itself, the power of wealth,” but only in order to allow artistic speech to compete with other forms of art on its merit and not through its transformation as a result of the interference of corporate power.¹⁴¹

The next challenge is to decide on an agreed-upon mechanism for establishing the difference between “speech products” circulating in the “marketplace of ideas” and to define the “mini-markets” of speech. For this, we turn to the ethical analysis of speech.

IV. THE CRITERION FOR SEPARATION: LOYALTY

In order to be able to distinguish between different types of speech we must first discern what makes some forms of speech different from others. The legal differentiation between forms of speech can only serve here as an indicator, albeit a useful one. While some commentators rightfully claim that First Amendment jurisprudence as it stands today is so wide that “[w]hen everyone can speak, and everything can be said, speech has ceased to be special,”¹⁴² it still distinguishes between protected speech, unprotected speech¹⁴³ and speech that is deserving only of a limited amount of protection.¹⁴⁴ While historically, the

141. Walzer, *supra* note 109, at 318, 323.

142. G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 302 (1996).

143. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (“[T]he right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”).

144. *Central Hudson*, 447 U.S. at 566 (“In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.”).

distinction between protected and unprotected speech has been the distinction between speech that promotes public discourse and speech that promotes private interests, that is no longer the case with the introduction of limited First Amendment protection to commercial speech and with the classification of different levels of libel.¹⁴⁵ For our purposes as well, differentiation along these lines would be insufficient, especially since the aim is not to censor any of the emerging forms of speech belonging to the “culture of deceit,” but rather to eliminate the potential for creation of deceitful products. Another mechanism for defining this difference would be to identify what is “wrong” with these forms of expression that has drawn our attention in the first place.

Why should viewers, for example, expect that if the M&M balloon is forced out of the televised Thanksgiving Day parade, the live broadcast would show that rather than last year’s balloon crossing the finish line? Why should viewers expect that if two actors portraying politicians participate in a debate as part of a scripted drama that the logo on the TV screen would be the one designated for entertainment programs rather than that reserved for live news coverage? And why should viewers be taken aback when sighting a box of a new brand of crackers on the set of an old television show? Although nothing illegal has been done in any of these cases, the simple answer is that viewers should be able to perceive when things that should stay separate are being mixed, whether it be advertising with news reporting, entertainment with news or commercial interests with artistic decision making. Having already established the need to distinguish between these conflicting “spheres,” the conflict lies in a very basic notion, the notion of loyalty. Television viewers watching a parade expect to see a live parade and to be notified of an accident that takes place while they are watching what they perceive to be news.¹⁴⁶ They believe the broadcaster is loyal to them and will put their interests ahead of any other, when it comes to the truthfulness of the report.¹⁴⁷ Television viewers confronting a “Live News” logo on the screen believe they are watching a live newscast.¹⁴⁸ They trust the broadcaster to use a “live

145. For an explication of this argument, see generally White, *supra* note 142, at 357-60.

146. See Newman, *supra* note 37.

147. Cf. Editorial, *What Local TV Does Best*, ELECTRONIC MEDIA, May 10, 1999, at 10 (explaining that local television stations are adept at informing viewers about crises and oftentimes do so more effectively than other mediums).

148. Cf. C.A. Tuggle, *Wagging the Dog: Technology and Local TV News*, COLUM. JOURNALISM REV., Mar.-Apr. 2001, at 57 (“Indeed, there are times, viewers tell us, that live reporting enhances coverage of the story, giving them insight and context they would not get from another type of report. However, they also agree, overwhelmingly, that there are times when live

news” logo only for the purpose of distinguishing live news from other programming.¹⁴⁹ Consumers of scripted television programs are taught to think that the set of the program is designed with artistic considerations in mind and that when a program indicates it is a rerun of an old show, it is indeed that and not a rewrite meant to promote current advertising interests.¹⁵⁰ That is because the assumption is that even on television, creative talent make the artistic decisions.¹⁵¹ When all these assumptions prove false, that means the viewers have been betrayed.

Indeed, loyalty is one of the key considerations in ethical decision-making. Ethical reasoning is often subject to controversy.¹⁵² But identifying sources of disagreement regarding the desirable course of action in policymaking can facilitate the process.¹⁵³ At least four fundamental issues are subject to disagreement: the empirical reading of the facts; the non-empirical, definitional, framing of the facts; the traditional, systematic underlying value system by which moral dilemmas are assessed; and the divergent definition of the basic loyalties between the disagreeing sides.¹⁵⁴ This model for ethical decision-making, known as “The Potter Box,” focuses on competing loyalties as its decisive factor.¹⁵⁵ As such, “The Potter Box” has become a central tool in the pedagogy of media ethics¹⁵⁶ as well, and as is evident in the cases presented thus far, it is a potentially useful instrument in helping sort out the differences and the potential for substitutability among “speech products” in the “marketplace of ideas.” The assumption is that each “speech product” that presents itself to audiences is aligned with one dominant loyalty, and should not be tainted by messages motivated by a competing loyalty. Ethics and ethical discourse should, therefore, become the criteria for assessing whether “speech products” are

reports are meaningless. One viewer characterized this as a bait-and-switch tactic. He looks at the screen thinking ‘live’ indicates important news. Yet, he is often disappointed to find no ‘real news’ at all.”).

149. See Fair & Accuracy in Reporting, *View from America: Fake Ads Ruin Credibility of CBS News*, MOSCOW TIMES, Jan. 22, 2000, § 1881.

150. Cf. MCALLISTER, *supra* note 4, at 110-11, 124 (noting examples of product placement designed to please advertisers rather than for artistic reasons).

151. See *id.*

152. Potter, *supra* note 10, at 107-08.

153. *Id.* at 108.

154. *Id.* at 108-09.

155. There are competing versions as to the source of this name. See Nick Backus & Claire Ferraris, *Theory Meets Practice: Using the Potter Box to Teach Business Communication Ethics*, 2004 ASS’N FOR BUS. COMM. ANN. CONVENTION PROC. 222, 224. <http://www.businesscommunication.org/conventions/Proceedings/2004/PDFs/21ABC04.PDF>.

156. See generally CHRISTIANS ET AL., *supra* note 9, at x-xi (suggesting the use of the Potter Box as an analytical tool for all the cases in the text).

distorting “speech markets” and whether they are strengthening the dominance of certain types of speech obtained through the abuse of “market power.”

V. UTILIZING PROFESSIONAL CODES OF ETHICS

One method for identifying what loyalties characterize which products could be to examine ethical codes adopted by practitioners of different professions engaged in creating media products. While such an examination would require an entire study in itself, this Article would not be complete without at least a sampling to prove the methodology’s utility. The issue of loyalty is central in ethical analyses and international comparisons of journalists’ ethics highlight interesting cross-cultural differences. Journalists in China, Hong Kong, and Taiwan, for example, have been found to be receptive to receiving “freebies” from subjects whom they cover.¹⁵⁷ Chinese journalists in particular find themselves more often than not “compelled[] to submitting themselves to two masters,” be it corporate sponsors, advertisers or the government, in addition to their newspaper.¹⁵⁸ Some Islamic countries demand religious loyalty of journalists in their ethical codes.¹⁵⁹ All of these requirements are unheard of in Western media systems.¹⁶⁰

Just as dramatic, albeit somewhat more subtle, differences exist among the various media professions. For example, the Global Protocol on Public Relations, published by the Global Alliance for Public Relations and Communication Management, states under the heading “Loyalty,” that “[w]e will insist that members are faithful to those they represent, while honoring their obligations to serve the interests of society and support the right of free expression.”¹⁶¹ This hierarchy of loyalties is reflected in the Public Relations Society of America’s Code

157. Ven-hwei Lo et al., *Ethical Attitudes and Perceived Practice: A Comparative Study of Journalists in China, Hong Kong and Taiwan*, 15 ASIAN J. COMM. 154, 158-59, 168 (2005).

158. *Id.* at 165.

159. See Kai Hafez, *Journalism Ethics Revisited: A Comparison of Ethics Codes in Europe, North Africa, the Middle East, and Muslim Asia*, 19 POL. COMM. 225, 244 (2002).

160. Indeed, regarding the receiving of “freebies,” studies have determined that sports journalists at some media outlets, on occasion, operate by norms not acceptable in other departments of the newspaper. See Marie Hardin, *Survey Finds Boosterism, Freebies Remain Problem for Newspaper Sports Departments*, NEWSPAPER RES. J., Winter 2005, at 66, 66-67.

161. Global Alliance for Public Relations and Communication Management, Global Protocol on Public Relations Protocol—Summer 2002, <http://www.globalpr.org/knowledge/ethics/protocol.asp> (last visited July 29, 2007).

of Ethics as well.¹⁶² The American Association of National Advertisers explains that “advertising and America are inextricably intertwined in ways that positively impact the interests of consumers, businesses and our nation as a whole.”¹⁶³ A similar hierarchy appears in the standards of practice published by the American Association of Advertising Agencies that hold that the first “responsibility of advertising agencies is to be a constructive force in business” and that “advertising agencies must recognize an obligation, not only to their clients, but to the public.”¹⁶⁴ On the other hand, Article I of the Statement of Principles of the American Society of Newspaper Editors states that “[t]he primary purpose of gathering and distributing news and opinion is to serve the general welfare by informing the people and enabling them to make judgments on the issues of the time”;¹⁶⁵ the Society of Professional Journalists’ Code of Ethics states that “[j]ournalists should be free of obligation to any interest other than the public’s right to know”;¹⁶⁶ the Radio-Television News Directors Association & Foundation Code of Ethics states that “[p]rofessional electronic journalists should recognize that their first obligation is to the public”;¹⁶⁷ the Code of Ethics of the Society of American Business Editors and Writers stipulates that “[a] business, financial and economics writer should . . . [r]ecognize the trust, confidence and responsibility placed in him or her by the publication’s readers and do nothing to abuse this obligation”;¹⁶⁸ and most notable and relevant to this study, the National Press Photographers Association states in its Code of Ethics that “[p]hotojournalists operate as trustees of the public,”¹⁶⁹ and incorporated into its bylaws in 1995 a statement entitled “Digital Manipulation Code of Ethics,” which

162. See Public Relations Society of America, Public Relations Society of America Member Code of Ethics 2000, http://www.prsa.org/aboutUs/ethics/preamble_en.html (last visited July 29, 2007).

163. Association of National Advertisers, Inc., *The Role of Advertising in America* (2007), http://www.ana.net/govt/what/role_of_advertising.cfm (last visited July 29, 2007).

164. American Association of Advertising Agencies, *Standards of Practice of the American Association of Advertising Agencies* (Sept. 18, 1990), <http://www.aaaa.org/EWEB/upload/inside/standards.pdf>.

165. American Society of Newspaper Editors, *ASNE Statement of Principles* (Nov. 29, 2006), <http://www.asne.org/kiosk/archive/principl.htm>.

166. Society of Professional Journalists, *Code of Ethics* (1996), <http://www.spj.org/pdf/ethicscode.pdf>.

167. Radio-Television News Directors Association & Foundation, *Code of Ethics and Professional Conduct* (Sept. 14, 2000), <http://www.rtnda.org/ethics/coe.html>.

168. American Society of Newspaper Editors, *Code of Ethics: Society of American Business Editors and Writers* (Dec. 9, 2002), <http://www.asne.org/index.cfm?ID=4221>.

169. National Press Photographers Association, *NPPA Code of Ethics*, http://www.nppa.org/professional_development/business_practices/ethics.html (last visited Mar. 13, 2007).

stipulates that since the guiding principle of the journalistic profession is accuracy “it is wrong to alter the content of a photograph in any way that deceives the public.”¹⁷⁰

Clearly, journalists, public relations professionals, advertisers, and advertising agencies all profess loyalty to the truth. However, as this selection of statements by their representative professional associations demonstrates, their loyalties are not ranked in the same order. Consequently, they produce “different” products, which are not interchangeable. Indeed, their uniqueness stems from the fact that their creators have distinct loyalties. More important, however, is the fact that by maintaining their distinction, their consumers—the general public—is better off.

VI. PRACTICAL IMPLICATIONS

The American legal system has dealt with the apparent impact of commercial considerations on news and entertainment content by regulating undisclosed commercial messages in broadcasting ever since the Radio Act of 1927.¹⁷¹ The Communications Act of 1934 stipulates that all matter broadcast by a broadcasting station for which any type of monetary (or other) compensation is provided must be identified as such.¹⁷² When a broadcast station airs any matter in return for compensation, it must identify the sponsor at the time of the broadcast.¹⁷³ These regulations have led many companies to supply producers with products free of charge, under the assumption that in this way they are bypassing the rule¹⁷⁴—an interpretation supported by the language of FCC regulations.¹⁷⁵ Disclosure, while maintaining the inclusion of commercially or politically motivated speech in creative or news content, does not alleviate the problem as it has been defined here,

170. National Press Photographers Association, Digital Manipulation Code of Ethics, http://nppa.org/professional_development/business_practices/digialethics.html (last visited July 29, 2007).

171. Richard Kielbowicz & Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927-1963*, 56 FED. COMM. L.J. 329, 331, 333 (2004).

172. 47 U.S.C. § 317 (2000). Section 508 of the Act requires those providing and those receiving compensation to notify the station. 47 U.S.C. § 508 (2000).

173. 47 C.F.R. § 73.1212 (2005).

174. Rosemary J. Avery & Rosellina Ferraro, *Verisimilitude or Advertising? Brand Appearances on Prime-Time Television*, 34 J. CONSUMER AFF. 217, 218 (2000).

175. See Matthew Savare, *Where Madison Avenue Meets Hollywood and Vine: The Business, Legal, and Creative Ramifications of Product Placements*, 11 UCLA ENT. L. REV. 331, 361 nn.204-05 (2004).

since it does not support the creation of “safe harbors” or “spheres” that are not dominated by commercial and political interests. The need for such independent “spheres” has been reflected in public opinion polls as well. A recent survey found that while public broadcasting was the most trusted source of news in America, advertising executives were the least trusted.¹⁷⁶ This does not imply that “news” and “art” are privileged forms of speech, necessarily, only that they are different. Applying the “culture of transparency” standard devised here requires a different practical approach to overcome the “culture of deceit” than the one of “disclose and forget.” Under this new model, all forms of speech would enjoy equal constitutional protection, unlike the situation today, so long as they remain separate. But since “mixed speech” products, namely those characterized by conflicting loyalties, would need to resolve such conflicts before being assigned to the “market” where they are to be consumed, the method of disclosure used today would be insufficient. How would this distinction work in practice?

Potential conflicts between business and editorial interests that have been identified have also been dealt with over time in various ways, such as establishing barriers between the editorial and business operations of media, in particular, newsrooms.¹⁷⁷ These barriers, as noted, however, are beginning to collapse. Live broadcasts delivered by “journalists” succumb to commercial needs, and the newsroom itself is being used to promote the attractiveness of entertainment products.¹⁷⁸ An extreme solution would be banning news on channels that carry entertainment programs, banning advertising on news programs, or a clear transparent division between the news production and the marketing teams, such that will not allow the news production teams to make commercial considerations of any kind in the process of producing the news. From a practical point of view, this would require a structural separation between the news division and the sales and entertainment divisions of broadcasters (as opposed to the current internal bureaucratic divisions, which are not transparent). Another solution would be identifying news programs broadcast on commercial channels as such, the same way that broadcasters identify the ratings of programs inappropriate for children today, by imposing a logo on the screen. Consumers tuned into news broadcasts on a commercial station and notified of its inherent bias to

176. John Eggerton, *Survey Says: Noncom News Most Trusted*, BROADCASTING & CABLE, Nov. 10, 2005, <http://www.broadcastingcable.com/article/CA6282871.html?display=Breaking+News&referral=SUPP>.

177. For an array of examples, see CHRISTIANS ET AL., *supra* note 9, at 31-51.

178. See Buncombe, *supra* note 40.

advertisers could then make their own choices. The difference between this proposal and current disclosure requirements is that under this model it is not the particular commercial relationship that is disclosed (often at the end of a program in a manner that gains very little attention), but the classification of the program that is announced. While this is not the ideal way to attract more viewers, it must be said that viewers who watch commercial news programs have been led to do so through deceptive means, as it is not news they are watching, but commercially motivated programs that use news as their editorial matter. Indeed, banning commercial broadcasters from broadcasting news programs may seem to be a harsh measure, but as research proves, given the choice, local stations, in particular commercial stations owned by networks, tend to minimize their news programming.¹⁷⁹ Apparently the production of news is not seen as central to their line of business.

The restraint and transformation of corporate power should not be limited exclusively to news. If we wish artistic “products” to compete with other artistic “products” on the basis of merit, there need to be “spheres” in which they can operate regardless of commercial considerations. Just as in the example of newsrooms, creative talent should also have the opportunity to operate in a sphere that is not dominated by commercial or political forces affecting and distorting original artistic expression. Unlike the case of news, however, there is no documented research indicating popular demand for such products.¹⁸⁰ The principles of such a differentiation should be drawn along similar lines.

Beyond the imperfect example of public broadcasting, are there any other working models of attempts at separation? One example is *Consumer Reports* magazine. *Consumer Reports* provides an important service when it grades and compares similar products.¹⁸¹ *Consumer Reports* is fully funded by its readers through subscriptions and newsstand sales.¹⁸² Had *Consumer Reports* received any advertising revenue, it would immediately lose its position among its readers as a

179. Michael Yan & Philip M. Napoli, Market Structure, Station Ownership, and Local Public Affairs Programming on Local Broadcast Television, 1, 11, 14-16 (Oct. 2004), http://web.si.umich.edu/tprc/papers/2004/374/tprc2004_yan.pdf.

180. Indeed, the mere fact that there is no popular demand for such programming at present does not mean this lack of demand in itself is not an outcome of the overpowering effect of commercialism on media consumers. See C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY 67 (2001).

181. See Michelle Slatalla, *Turning the Table to Rate the Raters*, N.Y. TIMES, Mar. 23, 2000, at G4.

182. *Id.*

reliable source. How do we know this to be true? Because the faith readers have in *Consumer Reports* emanates from the publication's loyalty to these very readers who finance it.¹⁸³ Hence, even though *Consumer Reports* provides totally commercial information, has no political value and contributes close to nothing to democratic deliberation, and even though it fuels a discourse that takes place in the "market" and is motivated by marketing considerations, since its loyalty to its readers is "bought," and does not stem out of a "higher" ethical calling, its loyalty is its only asset, and is easily recognizable by its readers. It is noteworthy that in the *Consumer Reports* example, very little hinges on the actual level of research conducted by the journal.¹⁸⁴ Rather, it is its total loyalty to its readers (or more precisely, its consumers) that generates the motivation for quality research as well.¹⁸⁵ For the sake of the argument brought forth in this paper, however, this element is only an added "virtue" of the proposed theoretical construct.

The *Consumer Reports* model also demonstrates that identified loyalty, as the basis for a transparent communication, can evolve in a self-regulated market. The dynamic at the base of this relationship is stronger than any dynamic a regulated relationship would have achieved. It is noteworthy that in the regulated environment, the motivation not to deviate from the rules is created by the fear of institutional retribution.¹⁸⁶ In this case, both the consumer and the publication put their trust in a third party, the regulator, even though this party too has its own loyalties and considerations, and its allegiance to its own ideological roots. This, however, does not imply that all relationships can be self-regulated. In fact, there appear to be very few that can.

Another example of a model that works comes from the realm of television—the British experiment with "Channel Four" between 1982 and 1990. During this period, the channel was cross-subsidized by

183. See Mark S. Nadel, *The Consumer Product Selection Process in an Internet Age: Obstacles to Maximum Effectiveness and Policy Options*, 14 HARV. J.L. & TECH. 183, 203 (2000) ("[Buyers] also realize that intermediaries generally serve the party that pays them.").

184. See, e.g., Ian Ayres & F. Clayton Miller, "I'll Sell It to You at Cost": *Legal Methods to Promote Retail Markup Disclosure*, 84 NW. U. L. REV. 1047, 1065 (1990) (discussing the unreliability of third-party services, like *Consumer Reports*, in relation to markup information about automobiles).

185. See Slatalla, *supra* note 181.

186. See, e.g., Charles J. Babbitt et al., *Discretion and the Criminalization of Environmental Law*, 15 DUKE ENVTL. L. & POL'Y F. 1, 21 (2004) (discussing prosecution under the Environmental Protection Act, the author argues that "as discretion blunts the law's expressive detail, it amplifies its volume. The stated enforcement policies stridently command the regulated community to collaborate closely with the government, police itself internally, stray from compliance at its peril and, when it finds itself out of compliance, step forward and confess its sins").

commercial television stations that sold its advertising slots.¹⁸⁷ Here again, success was based on the idea of separation. Avoiding competition over resources among the commercial independent television stations ensured that Channel Four's decision-making was not influenced by commercial considerations, even though advertising was being sold on its programming.¹⁸⁸ This arrangement allowed for the existence of a "public service" remit for programming financed by the commercial sector, and a successful one at that.¹⁸⁹ It is important to note, however, that this goal was achieved not only through the financing scheme, but also through extensive content regulation.¹⁹⁰

The practical implementation of the separation theory does not necessarily mean restrictions on broadcasters, unless one would choose to see the disclosure of "type of broadcast" as a form of restriction it is not meant to be. In fact, it carries some "carrots." If indeed there is agreement that commercial broadcasting is a sphere in which loyalties lie with advertisers, there is no reason to restrict product placements in this sphere whatsoever. In fact, it is not even necessary to disclose the existence of product placement, as some might urge today,¹⁹¹ as long as the program carries the identification of being a commercially motivated program. Being part of the commercial sphere provides commercial forces with complete freedom of commercial expression. This would apply to VNRs as well. While they should be banned from news programs broadcast on non-commercial channels, there is no reason to

187. Georgina Born, *Strategy, Positioning and Projection in Digital Television: Channel Four and the Commercialization of Public Service Broadcasting in the UK*, 25 MEDIA, CULTURE & SOC'Y 773, 778 (2003).

188. *See id.*

189. Colin S. Sparks, *The Future of Public Service Broadcasting in Britain*, 12 CRITICAL STUD. MASS COMM. 325, 326-27 (1995).

190. *Id.* at 327. It should be noted that the "Channel Four" model is based within the British system of broadcasting that is inherently different than the American system. The example brought is not meant to imply that a similar model is possible in the United States, only that the principles offered in this model can be applied in a system where commercial and non-commercial broadcasting operate.

191. "Commercial Alert," a public interest advocate, filed, in September 2003, a petition for declaratory ruling. A Commercial Alert, Complaint, Request for Investigation, and Petition for Rulemaking to Establish Adequate Disclosure of Product Placement on Television, http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6515285793 (last visited July 29, 2007). The petition argues that broadcasters and cable networks are violating section 317 of the Communication Act and provides documentation to prove that point. The FCC failed to rule on the petition, and the FTC dismissed it arguing that "the existing statutory and regulatory framework provides sufficient tools for challenging deceptive practices." Stuart Elliot, *F.T.C. Rejects Rule on Product Placement*, N.Y. TIMES, Feb. 11, 2005, at C5.

prevent them from being broadcast on news shows aired on commercial channels, as long as the news program is properly identified.

Each situation carries with it a set of rules relevant to the particular context. Product placement on advertising-based television is acceptable, whereas product placement on subscription-based (purportedly advertising-free) television would be more questionable. The dilemma here though arises from another context. While subscription based channels belong to the “commercial sphere,” there is a contractual agreement between the channel and the consumer regarding advertising. Advertising-free status achieved through an implicit or explicit agreement needs to be enforced under contract law and is not to be regulated or self-regulated through the proposed framework herein.¹⁹² A somewhat similar logic underlies the analysis of the case of inserting doctored news reports into newspapers and television as part of an “information war” in a foreign territory. Indeed, such action might be deemed acceptable in this analysis, as the context is war, a context that does not lend itself to separation. While propaganda is not news and should be kept out of all news programs, it is a weapon or tool of war, and its use should be analyzed in the context of the rules of war. In this case, it may or may not be found acceptable. This particular analysis, however, cannot provide the tools to make that determination.

The creation of subscription-based commercial free zones, however, raises social concerns as well, as it would seem only those that can buy commercial free time will be able to enjoy it. That is a legitimate concern. The existence of premium commercial free “spheres” should not in anyway be seen as a means for absolving the powers that be from allowing an opportunity for the entire population to attend to commercial free “spheres.” Indeed, the social equality advocated by the theory of separation cannot come at the expense of the existence of a publicly funded program that creates egalitarian communication “spheres” accessible to all.

VII. CONCLUSION

Instead of generating more regulation, applying this theory would uphold integrity in expression and would enhance the ability of audiences to make decisions based on autonomous choice. It would do so by bridging between the economic and democratic goals of the “marketplace of ideas” and applying market rules to this marketplace.

192. See, e.g., Andrea L. Johnson, *Redefining Diversity in Telecommunications: Uniform Regulatory Framework for Mass Communications*, 26 U.C. DAVIS L. REV. 87, 111 (1992).

Perhaps the most apparent characteristic of the mechanism created to ensure smooth market operation is the need to define “mini-markets” for competition, since a market performs more efficiently if the commodities are well specified.¹⁹³ It seems only natural then that if the same principles would be applied to the “marketplace of ideas,” they would improve its performance as well. The definition of the products inadvertently allows for the second characteristic of a well-functioning market to be present—the requirement that both buyers and sellers are fully informed about the characteristics of the products.¹⁹⁴ Since information contributes to the autonomous decision-making power of the consumer, it can be said that the separation of the products contributes to a “morally and politically necessary adaptation to the complexities of modern life.”¹⁹⁵

Indeed it is tempting to adopt an optimistic view of human nature and regard some of the research findings that link fairness and market behavior¹⁹⁶ as a sign that the market will regulate itself. However, the evidence, unfortunately, is to the contrary. As demonstrated herein, we find ourselves drowning today in a cynical culture of deceit. Corporate power needs to be restrained,¹⁹⁷ market power and political power are abused, and freedom of expression is the victim. A new line needs to be drawn¹⁹⁸ and its location cannot be redefined unless non-dominated forms of discourse are used to achieve this goal. By using ethical guidelines to draw boundaries of separation, the unethical aspects of this culture are exposed. Eventually, this may bring about its demise.

193. George J. Stigler, *Perfect Competition, Historically Contemplated*, 65 J. POL. ECON. 1, 6 (1957).

194. *Id.*

195. Walzer, *supra* note 109, at 319.

196. See *supra* notes 99-102 and accompanying text.

197. See Walzer, *supra* note 109, at 319.

198. See *id.* at 328.