Can the First Amendment Survive?

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1984, the year that George Orwell's Big Brother was supposed to have arrived upon the scene,¹ is about to slip into history. Have the values which, according to the Orwell scenario, Big Brother was going to obliterate — individuality (or self-expression) and democracy (or self-government) — in fact been destroyed, or seriously crippled, or have they defied his predictions and survived unimpaired? Are freedom of speech and of the press, which are the means by which those values are implemented and which were therefore placed by our Founding Fathers at the core of the rights to be protected by the Constitution — are those First Amendment freedoms still viable in the world we inhabit today?

I would like to suggest as an answer to those questions that the First Amendment is alive but not entirely well; that the meaningful exercise of free speech and a free press in our country is under pressure from forces that are anti-individual and counter-democratic; and that unless ways can be found to bring those phenomena under our control the world that George Orwell anticipated will arrive, albeit perhaps a generation or so later than he foresaw.

Let me identify those forces for you and describe how I believe they are eroding our traditional freedoms of expression, thereby undermining individual liberty and the processes of self-government. As I see it they are five in number: (1) technological developments in our media of communication — computers, satellites, videodisks, videotex, and the like; (2) the ever increasing concentration and centralization of economic power in giant corporations; (3) the demands of national security in an age of Great Power nuclear weapons and Third World revolutionary turmoil; (4) the seemingly inevitable dominance of the executive branch of our federal government over an enfeebled Congress and deferential Supreme Court; and (5) the growing penetration of religious dogmatism into the country's political life.

How do these phenomena impact on individuality and democratic decision-making and on the free, diverse and robust marketplace of ideas which is their prerequisite?

Let us look first at the advances in communication technology which, with the wondrous new possibilities they seem to have opened, one might reasonably have assumed would expand rather than restrict the marketplace of ideas. After all, cable television provides a rich abundance of channels beyond those available on over-the-air broadcasting, computers and microchips and videotapes make possible the storage of incredibly more information and its transmission at
unbelievably faster speeds than one could even have imagined a generation ago, and satellites have rendered obsolete the barriers to communication that may have been posed by oceans, mountains, deserts, forests and man-made national political boundaries. But has more diversity of subject matter and viewpoint emerged from all this wonderful new gaudy or are we just getting more and more of less and less?

There is no short and simple answer to that question for in some ways there is more diversity available and in other ways there is not. If you have cable in your home and are a sports, news or soft pornography buff, you can satisfy that special interest to a much greater extent than you could have a decade ago. If you are a nut about scuba diving, or helicopters, or railroads, or solar heating, or organic farming, or the intimate lives of movie stars, or gay sexual practices, there is a magazine to which you can subscribe. If you want to fly from Chicago to New York or from Atlanta to Tokyo a computer will tell you in an instant the various possible ways of doing so that it previously might have taken you a week, if ever, to find out about. If you want to see your favorite old movie you do not have to wait for its arrival, if ever, at a revival movie house; you can run it on your own TV set and on your own schedule. So far so good. But do you know more than you would have a generation ago about pockets of hunger in the United States or what it is like to grow up in a public housing project in an urban ghetto? Did you hear during the recent presidential campaign any points of view about nuclear arms control or the federal deficit other than those expressed by Mr. Reagan and Mr. Mondale? How much do you know about what is going on in Nicaragua or in Iran (since the American hostages came home), in Cuba and on our very doorstep, or for that matter among the farm hands in our own Rio Grande Valley or steel workers in Youngstown, Ohio. If you have nothing better to do on a weekday morning, like going to work or studying, you might have your horizons expanded on a variety of social issues by tuning in Phil Donahue, or Ted Koppel on Nightline before you go to bed; and if you don't mind mixing ideas with your dinner, along with a substantial amount of boredom, you might gain a few valuable insights about your world from the MacNeil-Lehrer Newshour on the Public Broadcasting System. But you are not likely to be exposed in most of these places to the views of Michael Harrington, the leader of the Democratic Socialists of America and perhaps the most thoughtful and articulate exponent of an alternative economic vision for this country and I do not recall ever hearing anyone on any of our mass media of communication advocating the total abolition not only of nuclear weapons but nuclear power plants as well, or presenting the case (for which I think a plausible argument can be made) for the unilateral dismantling of nuclear weapons by the United
States, or reviving Franklin D. Roosevelt's proposal to place a maximum on individual incomes or to adopt confiscatory inheritance taxes. And when is the last time you heard a serious argument for national health insurance in the United States — certainly not a very far out idea as far as the rest of the worlds goes? So with all our cables and all our computers and microchips and videotapes and videotex, we may have enhanced the ability of people to pursue their special interests in greater depth and to ever increasing degrees of sophistication, but as citizens of a supposedly democratic society we can hardly be said to be more informed and sophisticated voters. To what extent these new technologies are inherently conducive to that result (because of their economics), and to what extent it is due to their discretionary use by human beings, I am frankly unsure. What I am sure of is that I am not encouraged by what we have seen so far, and that the second set of forces I wish to discuss, and to which I now turn our attention, may have a great deal to do with that.

Regardless of one's political or economic persuasion, and whether one views the phenomenon with satisfaction, alarm or indifference, there is no denying the fact that fewer and fewer people and institutions are coming into control of more and more of the material resources of our society. Little companies get bought out by bigger ones, and the big ones merge with one another to become even greater giants. Family farms give way to agribusiness; the local hotel becomes a Hilton or Westin; about the only hamburger you can buy is a McDonald's, a Burger King, or a Wendy's; and you never know when you pick a product off the grocery store shelf if the money is going to Nestles.

But more pertinent to our interests here, two newspaper towns become one newspaper towns, and where a second paper still exists it may have been taken over, as in our nation's capitol, by the Reverend Moon. While Rupert Murdoch gobbles up everything from the Village Voice and Chicago Sun-Times to the no longer good, gray London Times, the Gannett publishing enterise becomes one of the largest corporations in America. Senator Helms and Governor Hunt spend more money than anyone has ever dreamed of doing to vie (or should I say buy) for North Carolina's seat in the U.S. Senate — an institution whose percentage of millionaires among its members is of significant size and growing. Local cable television operators are by and large subsidiaries of large national companies, and who can afford to put a satellite in orbit besides the likes of AT&T or the U.S. government? Not even a much smaller government can afford to do it.

Now, you may well ask, does it necessarily flow from all this that the messages and viewpoints received by the public from media of communication which are owned by relatively few, and to which it is enormously expensive to gain access, will thus be narrowly restricted?
And I think the answer to that question is obviously "Yes" unless it should happen to be economically profitable to broaden the spectrum — like catering to the pocketbooks of those who want X-rated cable — or so long as what is disseminated poses no serious political, economic, or social threat to those who are in control. How serious that threat has to be is, of course, a subjective judgment which will be made differently by some power holders than others — but remember that Doonesbury disappeared from the comic pages of several newspapers around the country just prior to our recent election because of what it was saying about Mr. Reagan's civil rights record.

Thus far I have been asking you to look with me at the media and channels of communication — their technology and their management. But in order to serve the interests of a free society a system of communication must have meaningful and relevant information to transmit, and in the kind of world in which we live more and more that means information generated and held by the various agencies of our government. For how can we as citizens make intelligent judgments about arms control unless we understand the armaments in question? How can we know if nuclear energy makes sense without understanding its benefits, cost, hazards and alternatives? How can we deal with issues affecting the environment if we do not know how clean or dirty the air and rivers are and how toxic waste is or is not being disposed of? How can we decide what, if any, revamping is needed in social security or medicare without the relevant facts and figures? How can we stop the CIA from planting mines in Nicaraguan waters or putting assassination manuals in the hands of Nicaraguan rebels if we do not even know it has been going on? Yet the government — sometimes legitimately but more often not so — will tell us that our national security requires that vast amounts of information be kept secret; that potentially hostile governments will be aided if certain information gets out (although often it is information, like the bombing of Cambodia in the late 1960s, which the enemy knows full well but about which only the American people are kept in the dark); that terrorism must be guarded against (as indeed it must be) whether at a nuclear power plant or a U.S. embassy; that we must protect the lives of Americans in Grenada or Iran, or oil shipping in the Persian Gulf, or the survival of a government in El Salvador, or the success of a coup in Chile, even if that means secret rescue operations which might precipitate wider military conflict or even a world war.

To whatever extent you may be saying to yourself that all of this is necessary in the modern world — and you may be right, although I would argue to the contrary — then I would say to you that you are opting for George Orwell's vision of the future rather than that of Thomas Jefferson, James Madison, and their colleagues.

It was also Jefferson, Madison and their friends who established as
another safeguard for individual liberty and democratic decision-making besides the First Amendment's freedom of expression and separation of church and state, the separation of powers among three co-equal branches of government — executive, legislative, and judicial. Knowing that power tends to corrupt and absolutely power absolutely, they wrote a constitution of checks and balances, giving, for example, to the executive the responsibility for commanding the armed forces but to Congress the sole power to declare war; to the executive the power to implement national policies but to Congress the power to grant or deny the money with which to do it. And although they may or may not have intended it this way, the Supreme Court soon assumed the power, which has been accepted ever since, to declare actions of both the President and the Congress to be unconstitutional and thus null and void. From this arrangement emerged a system of free speech and a free press unparalleled anywhere or anytime in the history of the world for its diversity and vigor. When presidents have decided to withhold information demanded by committees of Congress they have more often than not ultimately thrown in the towel, or at least most of it, after some face-saving device has been worked out. When Congress, and more often state legislatures, have passed laws clearly abridging freedom of expression, the Supreme Court has not hesitated to strike them down, as it has also when the executive branch of government has blatantly intruded on the rights of free speech or a free press.

But not all intrusions on freedom of expression by the executive and legislative branches of our government are so clear and blatant, and it is in the gray areas that a Supreme Court which is vigilant on these matters, such as that led by Chief Justice Charles Evans Hughes in the 1930s and Chief Justice Earl Warren in the 1960s (both, incidentally, Republicans appointed by Republican presidents), can immensely strengthen the First Amendment, and that a Court whose tendency is to defer to the judgments of the President and the Congress, such as has happened with increasing frequency in the present Court under Chief Justice Warren Burger, can seriously weaken it. (This will almost certainly occur even more often after Ronald Reagan, a very different kind of Republican president from previous ones, has named more of his ideological soul-mates to the Court).

I made mention earlier of the fact that the authors of our Constitution and Bill of Rights built two safeguards for liberty into the First Amendment, one dealing with freedom of speech and of the press and the other regarding the free exercise of religion with its corollary prohibition against the establishment of any religion by the government. Although these various clauses of the First Amendment are usually thought of separately — whether in books on law and political
science, in court cases or in common parlance — they are in fact parts of an integral whole, thoroughly interdependent upon one another.

The free exercise of religion, for example, is but one kind of freedom of expression — one, to be sure, which the Founding Fathers felt to be so critical to a free society (their having been motivated in coming to this land primarily to escape religious persecution) that they singled it out for special mention and protection. Furthermore, it is human freedom of conscience, which so often has a religious base, that leads to the diversity of ideas which the First Amendment is all about, and if conscience becomes enfeebled or dies through the atrophy of religious and moral impulses so does the speech which is its expression.

Likewise the prohibition against any establishment of religion by the government was by no means an anti-religious conception but rather was designed to reinforce the free exercise of religion, for pluralism could only thrive if the power of the state was not invoked to favor one religious or moral doctrine over another, giving the stamp of official approval to some points of view and branding others as beyond the pale.

This is all quite clear and simple in theory but reality is much more complex, and we have moved into a period of time in our history when there is much confusion and conflict over these concepts. The vision of our Founding Fathers is now seriously threatened by religious dogmatists who believe they have an inside track to God and are not hesitant about trying to use the vehicles of government to impose their view of The Truth on everyone else.

These religious dogmatists fail to understand that there is a difference between citizens and politicians who, inevitably and quite properly influenced by their religious or moral convictions, attempt through the power and processes of free speech to persuade others of the correctness or desirability of their beliefs — which is well within the ground rules of a democratic system — and those who try, through the force of law and the authority of government, to coerce others into conformity on matters where, like abortion and homosexuality and unlike illiteracy and murder, there is no societal consensus.

These zealots seem unable to appreciate the distinction between children in a public school engaging in silent individual prayer, or even spontaneous vocal group prayer during their lunch hour — again well within the ground rules of a democratic society — and teachers, or other adults acting with the explicit or implicit aura of school sponsorship, leading so-called “voluntary” group prayers or conducting other religious activities in a school building where students are present only by virtue of the state's compulsory education law and are subject to all of the social pressures attendant upon that situation.

The Religious Right also has no compunctions about blurring the
line between door-to-door solicitations by Jehovah’s Witnesses or a mass meeting with the Pope in a public park — not only permitted but affirmatively protected by the First Amendment — and the erection of a Christmas creche on the front lawn of a city hall, perhaps even subsidized financially with tax money paid by Jews, Moslems, agnostics and atheists as well as by Christians.

And sadly the U.S. Supreme Court, which we have looked to historically as a staunch defender of the wall of separation between church and state, can no longer be relied upon to put its finger in the dike as these leaks are sprung. In just the past year and a half a majority of the Court has accepted a practice of the Nebraska legislature which paid the same Presbyterian minister for 18 years to deliver opening prayers at its sessions; has acquiesced in a Minnesota plan of tax deductions for parochial school tuitions; and has voted its approval of the city government’s erection of a Christmas creche in a park in Pawtucket, Rhode Island. Currently on the Court’s docket and presumably to be decided by mid-1985 is a case involving an Alabama law which authorizes an organized moment of silence in the public schools of that state, and a case from Scarsdale, New York, where the city has been challenged for its refusal to permit the erection of a creche in a public park. My prediction is that the rulings in both of these cases will further compromise the separation of church and state.

Although I have chosen as my main purpose here to sensitize you to a problem rather than to offer pat solutions to it, I prefer not to end on an utterly gloomy note. In closing, therefore, let me briefly indicate a few possible steps we may take in the right direction.

With respect to the new communications technologies, I have indicated earlier that there may be nothing inherently speech-restrictive about them, but that if properly managed they could even open up new and unheard of vistas of diversity and robustness of public discourse. That will depend more than anything, I believe, on whether the economic control of those resources can either be widely disbursed or toughly regulated. The only way to do that is by federal legislation designed either to require that ownership of the media be radically decentralized or if that is not feasible, to insure access to the media for those who do not own it and perhaps cannot even pay for access to it.

As for the problem of government secrecy in a nuclear and revolutionary world, I can only urge that we take the old phrase, “Eternal Vigilance is the Price of Liberty,” and re-write it to read, “Eternal Skepticism is the Price of Liberty.” We must start from the premise that information generated and held by the government belongs to the people, not to the bureaucrats who are supposed to be our servants, and that only in the narrowest of circumstances, and with the most overwhelming of justifications, may that information be withheld.
This is certainly not the premise on which those who wield the rubber stamps of "Confidential," "Secret," and "Top Secret" now operate, or have ever operated, and that course has simply got to be reversed. How ironic it is that in a democratic society we should even have needed a Freedom of Information Act which grants our citizens some limited rights of access to government documents. What the First Amendment should have been interpreted to mean, I think, is that our citizenry has those rights unless by specific legislation, with clear and convincing justifications, certain kinds of material are designated as secret.

With regard to a Congress which is often so splintered or whose members are so worried about re-election that they cannot, for example, keep control of the war-making power, or face the President down where he withholds what they have a right to know, we can only hope that they may get their act together more often in the future, as they did this past year in discovering and cutting off funds for the covert war in Nicaragua.

As to the Supreme Court, we can wish good health and four more years of service to Justices Brennan, Marshall and Blackmun, who are already unfortunately 78, 76, and 76 respectively; we can hope that the U.S. Senate will refuse to confirm any outrageous appointments (as they did on two occasions with President Nixon); and we can pray that, as has happened sometimes in the past, justices who have been picked with great care for their ideological predispositions may turn out to be unpredictable when clothed with the independence of lifelong tenure on the bench.

With an independent turn of mind the Court may become less deferential to the executive's claims that national security will be imperilled if information is made available to the public, and it may once again come to realize that breaches in the wall of separation between church and state in the name of religious freedom or moral righteousness are not even in the long-range self interest of their current advocates.

It is these few glimmers of hope that I see for preventing the arrival of 1984 by the year 2001.

NOTES

3 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
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12 Board of Trustees v. McCreary, 84-277.

13 See e.g. F. Rourke, Secrecy and Publicity (Baltimore: Johns Hopkins University Press, 1961).

14 5 U.S.C. 552 (b).