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The Tradition of the Victim in Griersonian Documentary

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You know, this film [Children at School] was made in 1937. The other thing is that this film shows up the appalling conditions in the schools in Britain in 1937, which are identical with the ones which came out on the television the night before last: overcrowded classes, schoolrooms falling down, and so on. It's the same story. That is really terrible, isn't it?

Interview with Basil Wright, 1974

A. J. Liebling once remarked that it was difficult for the cub reporter to remember that his or her great story was somebody else's disastrous fire. Much the same could be said of the impulse to social amelioration, which is a central element in Grierson's rhetoric and which, therefore, has become over this past half-century a major part of the great documentary tradition. Documentary found its subject in the first decade of sound, and by the late thirties the now-familiar parade of those of the disadvantaged whose deviance was sufficiently interesting to attract and hold our attention had been established. It was not yet dominant, and the war was to distract from its importance, but it was there. Each successive generation of socially concerned filmmakers since the war has found in housing and education, labor and nutrition, health and welfare, an unflagging source material. For the most prestigious publicly funded documentarist as well as the least effective of local news teams, the victim of society is ready and waiting to be the media's "victim" too.

This "victim," however, does not figure much in the theoretical or public discussion of documentary. There, an agenda has been set which concentrates

on issues of transparency and narratology, on the morality of mediation and reconstruction, on the development of style and the effects of new equipment. The people whose cooperation is crucial to documentarists have as little place in that discussion as they do (usually) in the making of the films and tapes in which they star. Indeed, documentarists by and large take an aggrieved view of this issue, should it be raised. As Frederick Wiseman said: "Sometimes after films are completed people feel retrospectively that they had a right of censorship, but there are never any written documents to support that view. I couldn't make a film which gave somebody else the right to control the final print."¹ Wiseman's attitude is, I would argue, the typical one. Interference of any kind is a clear breach of the filmmaker's freedom of speech and, as such, is to be resisted. But given the "tradition of the victim," the filmmaker's freedoms often seem like nothing so much as abridgements of the rights of his or her subjects, rights which, for all that they are less well defined, are nevertheless of importance in a free society.

The persistence of the social problems that these texts are, at a fundamental level, supposed to be ameliorating is never discussed. But if it is the case that housing problems are unaffected by fifty years of documentary effort, what justification can there be for continuing to make such films and tapes? Grierson's purpose was clearly enunciated: "To command, and cumulatively command, the mind of a generation. . . . The documentary film was conceived and developed as an instrument of public use."² There was nothing, though, in this ambition to be the propagandists for a better and more just society (shared by the entire documentary movement) that would inevitably lead to the constant, repetitive, and ultimately pointless exposure of the same set of social problems on the televisions of the West night after night—the assumption here being that Grierson's practice directly influenced contemporary filmmakers in many countries, including the United States, and that benchmarks were thereby established for all subsequent work both in film and in television for the entire English-speaking world and beyond.

II

Between 1929 and 1937, Grierson synthesized two distinct elements. First, he focused the general social concern of his time into a program of state-supported filmmaking. Such were conditions during the Great Depression that even on the right in Britain the need for measures of state intervention in many fields was accepted. Indeed, the generation of young Conservatives whose political philosophy was formed at this time were exactly those postwar leaders who agreed to the welfare state and thereby established the consensus which is only now being destroyed. I mention this simply because it is easy to treat the group around Grierson as dilettantes. (Wright speaks of his "slight private

income";³ Rotha writes of his parents as "far from well-off," who, nevertheless, managed to send him to thirteen private schools in as many years;⁴ Watt states: "I came from a normal middle-class background. My father was a member of Parliament."⁵ To modern eyes, the films they made, virtually all of them stilted and condescending, tend to reinforce the unfortunate impression that, as a group, they were nothing but poseurs, clutching their double firsts from Cambridge. There is no reason, though, to doubt the sincerity of their impulse to "get the British workmen on the screen" or indeed to help the working class in other ways.⁶ "To start with we were left wing to a man. Not many of us were communists, but we were all socialists."⁷ Grierson's first job, lecturing on philosophy at the Durham University outpost in Newcastle-upon-Tyne, allowed him time to work, and work seriously, in that city's slums.⁸

In its day, the social attitude of Grierson's colleagues was genuine and to be expected, and their achievement on the screen was not inconsiderable. Grierson claims that "the workers' portraits in *Industrial Britain* were cheered in the West End of London. The strange fact was that the West End had never seen workmen's portraits before—certainly not on the screen."⁹ The films "were revolutionary because they were putting on the screen for the first time in British films—and very nearly in world films—a workingman's face and a workingman's hands and the way the worker lived and worked. It's very hard with television nowadays and everything, to realise how revolutionary this was, that British films, as such, were photographed plays, that any working class people in British films were the comics."¹⁰ This emerging iconography, a contrast to the parade of Noel Coward servants that was the norm, did not, at first, concentrate on the lower classes as victims.

On the contrary, the second element influencing the movement ensured that this would not be the case. Robert Flaherty's powerful example moved the desire to document the realities of working life into the realm of the poetic. Flaherty was responsible for *Industrial Britain*, although the film was finished by Grierson (and ruined by the distributor who added the "West End" voice and overblown commentary). Grierson's group admired Flaherty's approach enormously. Their primary aesthetic influence was the Soviet silent cinema, which meshed well with their socialist rhetoric, but they were also susceptible to Flaherty's poeticism, despite the fact that it eschewed the social responsibilities they embraced. Grierson was dismissive of what he called Flaherty's emphasis of "man against the sky," preferring films "of industrial and social function, where man is more likely to be in the bowels of the earth."¹¹ "There wasn't any serious attempt at characterisation of the kind you find in Flaherty because we regarded this as a bit romantic. We were all pretty serious-minded chaps then, you know, and we believed, like the Russians, that you should use individuals in your film in a not exactly dehumanized way but a sort of symbolic way."¹² Edgar Anstey encapsulates the group's view; but despite this collectivist tendency, for the Grierson group Flaherty's insistence on using the individual

as the centerpiece of his narratives was to prove as seductive as the poeticism of his camera style. Flaherty's contribution to the notion of the documentary (the individual as subject, and the romantic style) when mixed with Grierson's (social concern and propaganda) leads directly to privileging "victims" as subject matter. For the working class can be heroes only in the abstract sense that Anstey describes: "The early school of documentary was divorced from people. It showed people in a problem, but you never got to know them, and you never felt they were talking to each other. You never heard how they felt and thought and spoke to each other, relaxed. You were looking from a high point of view at them."¹³ Examining the individual worker, given the predilections of these filmmakers, meant moving from the heroic to the alienated. Hence victims, and the emergence of a subschool of filmmakers who "wanted to lay on what the problems were for Britain so that we should see and learn and do something about it. But you don't do something unless you feel some sort of empathy and concern with the problem, and the cold commentary voice doesn't really excite you very much."¹⁴ The competition between Grierson's line and the splinter group was short-lived. Grierson's attempt to reconstruct the landscape of industrial Britain in terms of Flaherty's exoticism (and Eisenstein's editing methods) withered on the vine.

We worked together [explains Grierson] and produced a kind of film that gave great promise of very high development of the poetic documentary. But for some reason or another, there has been no great development of that in recent times. I think it's partly because we ourselves got caught up in social propaganda. We ourselves got caught up in the problems of housing and health, the question of pollution (we were on to that long ago). We got on to the social problems of the world, and we ourselves deviated from the poetic line.¹⁵

Grierson is being a little self-serving here, for the group as a whole did not get "on to the social problems of the time"; in fact, it split apart on the issue. Arthur Calder-Marshall, ever the most perceptive of Grierson's contemporary critics, summed up the problem. Commenting on the failure of the GPO film unit to document the unrest of postal workers, he wrote: "Mr. Grierson is not paid to tell the truth but to make more people use the parcel post. Mr. Grierson may like to talk about social education surplused in self-importance and social benignity. Other people may like hearing him. But even if it sounds like a sermon, a sales talk is a sales talk."¹⁶ Grierson's autocratic grip on documentary production in Britain was loosened, and the "serious-minded chaps" established a measure of distance and independence from him. What is more significant is that they also established the way forward, a way that the "poets" themselves came to in a few years.

Paul Rotha, partly because of personality clashes but more on principle, had quit to set up his own unit. Now Anstey and Arthur Elton, although still

disciples, also left. In the films these men made in the mid-thirties can be plotted the shift from worker as hero to worker as victim.

In *Shipyard*, a typical Griersonian project about the building of a ship, Rotha (commissioned by the shipping line and working for a subsidiary of Gaumont-British) injected an understanding of how the shipbuilders would be once more idle when the work was completed. Out of material collected on his journeys to and from the yard, he also made, for the electricity-generating industry, *Face of Britain* which, inter alia, contained the first material on the slums of the industrial heartland. That same year, 1935, Elton was making *Workers and Jobs*, a film with synchronous sound about labor exchanges, for the Ministry of Labour. With Anstey he worked on the crucial *Housing Problems* for the gas industry. This too employed synchronous sound.

In *Housing Problems*, Cockney slum dwellers address the camera directly to explicate the living conditions the film depicts. This was the first time that the working class had been interviewed on film in situ. Giving them a voice by obtaining location sound with the bulky studio optical recording systems of the day was an exercise in technological audacity as great as any in the history of the cinema. Sound had come slowly. In 1934 Grierson was promising, "If we are showing workmen at work, we get the workmen to do their own commentary, with idiom and accent complete. It makes for intimacy and authenticity, and nothing we could do would be half as good."¹⁷ Rotha had used a shipworker to do the commentary on *Shipyard*, but for synchronous sound it was necessary to go into the studio, building sets and duplicating all the procedures of the fiction film. It is no accident that the first of their synchronous-sound productions was *BBC: The Voice of Britain*, for the locations were studios, albeit designed for radio. In *Night Mail*, technological limitations meant all the train interiors being shot on a sound stage. The desire to add the worker's voice to an authentic location image was easier to announce than to achieve.

But *Housing Problems* was much more than an early solution to a major technical problem. In making the film, Elton and Anstey had rethought much of the artistic rhetoric that Grierson had imported from Flaherty. Anstey summed it up thus: "Nobody had thought of the idea which we had of letting slum dwellers simply talk for themselves, make their own film. . . . We felt that the camera must remain sort of four feet above the ground and dead on, because it wasn't our film."¹⁸ Because Elton and Anstey eschewed the usual proprietary artistic attitude, the people in *Housing Problems* are all named and allowed the dignity of their best clothes and the luxury of their own words (albeit somewhat stiltedly expressed for the gentlemen of the production unit). Of course, this claim of nonintervention ("it wasn't our film") cannot be taken too seriously, since the interviewees were chosen and coached by the team and the results edited without consultation. But it did represent a new theme

in the group's thinking about the function of the documentary director, one which was unfortunately not to be heard again for three decades.

What was immediately influential was Anstey's view of his interviewees. Instead of heroic representatives of the proletariat, he thought of them as but "poor, suffering characters"—victims. The films were moving in topic from romanticized work through unemployment to the realities of domestic conditions.

In the years to come, Anstey's view of his role—that of enabler rather than creator—and the courtesies he afforded his interviewees would disappear. The victim would stand revealed as the central subject of the documentary, anonymous and pathetic, and the director of victim documentaries would be as much of an "artist" as any other filmmaker.

In the years before the war, Anstey was to make *Enough to Eat*, about malnutrition, and for "March of Time" he was to cover a bitter strike in the Welsh coal fields—far removed from the titanic miner at work who was the earlier icon of the industry. Harry Watt was to do a number of exposés for "March of Time" on the scandal of church tithes and the riches of football pools (a soccer-based commercial lottery) promoters. Basil Wright, the most poetic of them all, made *Children at School*.

It is with some justice that these men claim that all current documentary practice can be traced back to their activities in the thirties. The most potent of their legacies, however, is this tradition of the victim.

Factual television cements the tradition into place. It affords a way of apparently dealing with the world while (as Calder-Marshall said of Grierson's *Drifters*) "running away from its social meaning." For it substitutes empathy for analysis, it privileges effect over cause, and therefore it seldom results in any spin-offs in the real world—that is, actions taken in society as a result of the program to ameliorate the conditions depicted. So although the majority of television documentaries and news features deal with victims, normally as types of deviants, such treatment scarcely diminishes the number of victims left in the world as potential subjects.

Independent documentary production is in like case. The rise of direct cinema produced, by the early sixties, the currently dominant style of "crisis structure" documentary. Robert Drew, whose position in these developments is not unlike Grierson's thirty years before, describes the goal of such work: "What makes us different from other reporting and other documentary filmmaking, is that in each of these stories there is a time when a man comes against moments of tension, and pressure, and revelation, and decision. It's these moments that interest us most. Where we differ from TV and press is that we're predicated on being there when things are happening to people that count."¹⁹ But where the direct-cinema practitioners turned out to be the same was in their choice of the people they would witness in such situations. Of course, they could and did observe presidents and movie tycoons but, as in the thirties, the more fruitful strand turned out to be not the powerful but the

powerless. And more than that, direct cinema gave the victim tradition the technology that allowed a degree of intrusion into ordinary people's lives that was not previously possible.

Direct cinema and *cinéma vérité* were the outcome of a concerted effort, culminating in the late fifties, to develop a particular technology—a lightweight, handholdable, synchronous-sound film camera. The demand for this had developed directly out of the Griersonian experience, where any sort of synchronous shooting required enormous intervention, if not reconstruction, on the part of the filmmakers. In the years after the war it seemed to many that without such portable equipment, documentary film would never deliver on its promise to offer un- (or minimally) mediated pictures of reality. It can be argued that this was entirely the wrong agenda, because reconstruction was not the real issue, since mediation occurs in far subtler and more or less unavoidable ways whatever the techniques used. The argument was nevertheless deployed and the equipment developed.

Television had already begun to use 16mm for news-gathering purposes, forcing the creation of ever more sensitive film stocks. The equipment the industry used for this work formed the basis of the direct-cinema experiments. In turn, the broadcasters took up the adaptations the direct-cinema practitioners made and thereby created a market for the manufacture of custom-designed self-blinded cameras and high-fidelity battery-driven tape recorders. The possibility of events being more important than were the processes of filming them now existed for the first time. No door, especially the door behind which the disadvantaged were to be found, need or could be closed to the filmmakers.

Aesthetic as well as technical trends also favored the victim as subject. It is received opinion that television demands close-ups, but it is no part of professionalization, in my experience, to stress any such thing. The industry tends to avoid the big scene because of the expense such shots involve rather than because they are considered unreadable by the audience, which, palpably, they are not. A number of other factors lead to the close-up—against light backgrounds, receiver tubes (for at least twenty years after the war) tended to overmodulate and reduce all darker areas to silhouette; by moving into the face this could be avoided. The very small eyepieces of 16mm reflex cameras (and, latterly, lightweight video equipment) again encourage the close-up as being more easily focused than longer shots. The prevalence of the 10:1 zoom lens, which can only be properly focused at the long (i.e., close-up) end of its range, has the same effect. All these technological constraints result in the close-up emerging as the dominant shot in the documentary.

(There was an early period when the direct-cinema style encouraged the use of a wide-angle lens to simplify focusing problems. This lens has been largely abandoned because the variable shot size possible with the zoom lens better serves the needs of transparent editing. It also avoids distortions, again

servicing the needs of transparency. And because it is much more difficult to use than a wide-angle, the *mysterium* of the cameraperson's craft is more effectively maintained.)

The documentary tradition begins with the individual heroic Inuit, "against the sky" in long shot. Currently it most often displays the private inadequacies of the urban under class, "in the bowels of the earth" in close-up. The line that enabled this to happen can be traced from Flaherty's exotic individuals, through Grierson's romanticized and heroic workers, to Anstey's victims caught in Drew's crisis structures. The line was an easy one to follow because technological developments, journalistic predilections, and ideological imperatives all played a role in facilitating it.

But there is one major concomitant problem involved in the emergence of the victim tradition which has never received the attention it demands. By choosing victims, documentarists abandoned the part supposedly played by those who comment publicly on society (the watchdogs of the guardians of power). Instead, in almost any documentary situation they are always the more powerful partner. The moral and ethical implications of this development are not only ignored, they are dismissed as infringements of filmmakers' freedoms.

III

A monstrous, giant, smouldering slagheap towering over a shabby street of slum houses, hovels fallen into ruin with one lavatory for fifty persons. But inhabited. Rent for a house was 25 shillings per week. All the property belonged to the company that owned the mine. Few men were in work. I watched the rent collectors at their disgusting job; wringing a few shillings from women some of whose men were bloodying hands and shoulders in the earth hundreds of feet below where they stood, or standing on the street corners. From some petty cash I had with me, I paid the rent for some families and bought beer in the pub for some of the miners. It gave me pleasure that the profits of Gaumont-British should be so used. How I justified it in my accounts when I got back to London is neither remembered nor important. So this was Britain in the 1930s.²⁰

Rotha went to the village of East Shotton in Durham because J. B. Priestley had reported on it in a series of newspaper articles (which became the book *English Journey*). This fact describes perfectly the normal relationship between the print and audiovisual media, but I quote the diary because it is one of the few references to a filmmaker's relationship with a subject that I can find in the literature on documentary film. For instance, Joris Ivens, the most overtly political of the great documentarists, in his memoir of four decades of filmmaking (*The Camera and I*) details only one non-unidimensional relationship.²¹ Normally, filmmakers regard contact with their subjects as too uninteresting to report.

In consequence, the literature tends to contain only references to what are considered deviant encounters, usually where the filmmaker has to resort to subterfuge to get the material needed.

While I was waiting outside with the film crew . . . a truck pulled up in front of us and a burly guy clambered out and started yelling, "What the hell are you guys doing here? You're trespassing, and get the hell off my property." This was Chudiak, president of the farmer's co-op, but I didn't know it at the time and had to figure out, first, who is this guy; second, what do I say to prevent the whole show from disappearing then and there; third, how can I prevent him from learning what I'm really doing but still tell him a sufficient amount so that I won't feel forever guilty of having lied; and fourth, how can I keep the trust of the migrants, the crew chief, and gain the confidence of this guy, all at the same time?²²

A filmmaker's lot is clearly not a happy one—but it is, arguably, less unhappy than that of the migrant workers, the subject of the above documentary. Filmmakers do worry about lying—to exploit farmers or the like. This sort of worry can be traced back to the thirties. Watt described conning vicars while making his "March of Time" about church tithes: "Being film people, we'd take advantage. We used to go to sweet vicars living in a twenty-room house and with a congregation of ten, mostly old women. And I'd say, 'What a beautiful house and beautiful church. May I photograph?' Of course, I was showing that he was living in this enormous house and having ten parishioners. The Church was very annoyed about the whole thing, but it was just what 'March of Time' wanted."²³ With all due respect to these filmmakers, such worries are easy. They reveal the filmmaker in a traditional journalistic role as protector of the powerless and fearless confronter of the powerful. The more vexing moral issue is raised not by the need to misrepresent oneself before the farmer but rather by the necessity to remain silent about the reality of the situation in the presence of the migrant workers. It is not the fabrication of intention for the vicar but the easy assumption that the filmmaker and the film production company know better than the Church established what the society best needs. And it is these issues that are not addressed.

The victim tradition makes it all too easy to itemize, almost at random, a wide range of problems.

First, when dealing with the powerless, what does the legally required consent mean? Since for most people the consequences of media exposure are unknown, how can one be expected to evaluate such consequences? For some people, as with the mentally ill in Wiseman's banned *Titicut Follies*, there is a question of whether or not consent can truly be given in any circumstances. The same would apply to the male child prostitutes appearing in the videotape *Third Avenue, Only the Strong Survive*.

In this same text is raised a second question, that of complicity. The crew reconstructed a car heist and then filmed one of the protagonists in prison subsequent to another robbery of the same kind. All films about deviant activities place the filmmakers in, at best, quasi-accessory positions.

Beyond the illegal there is the dangerous. Flaherty paid the men of Aran five pounds to risk their lives by taking a canoe out into a heavy sea. (There is some quite infuriatingly stupid comment about this sequence suggesting that the men were in no danger because of the peculiarities of the waters around Aran. Any who believe this have simply failed to look at the film.) Or there can be more specific danger, as in a student project which took a man recovering from compulsive gambling to the track to see how well he was doing and to provide the film with a climax.

A more unexpected problem arises when the subject desires media exposure, as in a BBC documentary about an exhibitionist transsexual shot in the most voyeuristic manner consistent with public exhibition. In another British television film, *Sixty Seconds of Hatred*, a man's murder of his wife was examined. I screened the movie, on the eve of transmission, with the murderer and the teenage son of the marriage, who was a child when the crime was committed. There was no doubt that the man was eager to relive the incident, but beyond a careful decision not to include the son in the film, nobody had further considered what such a public retelling of the tale might do to the boy.

These are not, in my view, abstract concerns affecting only the subjects of documentaries. The problems also redound to the filmmakers. In a British television documentary, *Goodbye, Longfellow Road*, the film crew documented a woman's descent into pneumonia. The crew interviewed the doctor as he was rushing her stretcher to the ambulance and ascertained that it was indeed the result of living in a hovel that had caused her condition. As a television producer, I would find it extremely difficult to comfort myself with the thought that I had contributed to the public's right to know when I could have, for a pittance, provided my victim with a roof, however temporary. Of course, I would have needed another subject for my film.

Other problems arise from the fact that these texts have extended, perhaps nearly indefinite, lives. Paul, the failed salesman in the Maysles film of that name, is constantly exposed as such wherever documentary film classes are taught or Maysles retrospectives are held. The anonymous midwestern boy who spews his heart up as a result of a drug overdose in Wiseman's *Hospital*, spews away every time the film is screened. Should it be played in the community where he is now, one hopes, a stable and respectable citizen, there is nothing he can do about it. For the film is not a lie, it is not maliciously designed to bring him into either hatred, ridicule, or contempt, and therefore he has no action for libel. And the film was taken with his consent, presumably obtained subsequent to his recovery.

And this consent is, indeed, all that the law requires. The question must be asked, is it enough?

IV

In 1909 two steamships collided in Long Island Sound. On board one of them, a radio operator, John R. Binns, successfully (and for the first time anywhere) used his machine to call for help. As a result of his CDQ, only six of the seventeen hundred passengers on board drowned. Binns was a hero. The Vitagraph Company, after the fashion of the day, made a "documentary" about the incident, entirely reconstructed and using an actor to impersonate Binns. Binns the actor was shown as lounging about and winking at the passengers at the moment of the collision. Binns the hero sued—not only for libel but also for invasion of privacy. He won on both counts. But the privacy decision was to prove exceptional.²⁴

The courts over the years, according to the account given by Pember in *Privacy and the Press*, were to take the basic view that any filmed event, if not reconstructed, was protected by the First Amendment.²⁵

The only line of exceptions to this arose, both for films and for the press, out of a series of decisions about the unauthorized use of images in advertisements, the earliest being heard in the English Court of Chancery in 1888. By 1903, New York State had a privacy statute on the books that was specifically limited to such unauthorized uses for advertising or "trade purposes." The courts were to be very restrictive in defining "trade purposes," and again and again privacy actions failed if the commerce involved was simply the commerce of the news business, whatever the medium. In such cases the conflict is seen as being between the public's right to know and the private citizen's right to privacy—and the former normally prevails.

The courts were happy to distinguish between advertising and news, and the above exceptions were based on that distinction. For despite the terminology used, the cases turn on some sense of property, on the idea that another should not profit *directly* from the use of one's image. Other arguments have been advanced suggesting that persons should be protected from exploitation by the news media because they are private individuals. These have been, by and large, as unsuccessful as the attempts to extend the concept of commercial exploitation. The idea of the "public man" goes back to 1893 and was extended in the twenties.²⁶ The right to privacy was then defined as "the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity. In short, it is the right to be left alone. . . . There are times, however, when one, whether willing or not, becomes an actor in an occurrence of public or general interest. When this takes place he emerges from his seclusion, and it is not an invasion of his right of privacy to publish his photograph with an

account of such occurrence."²⁷ One can become an "involuntary public figure" by giving birth to a child at twelve years of age, being held hostage by a gunman, or having one's skirts blown above one's head in public.²⁸ And becoming an "involuntary public figure" was no temporary thing. A boy prodigy could not prevent the press pursuing him and removing the cloak of obscurity he had sought.²⁹ Neither, since the common law has never acknowledged distress as a ground of action, could parents prevent the publication of pictures of the dead bodies of their children.³⁰ Nor can the victims of rape, for the same reason, keep their names from the media, unless statute orders otherwise (which it does in some states).

Images of people in public domain, even if engaged in deviant (but not illegal) activities, are protected as newsworthy too. A couple embracing in a public place claimed that a photographer—in this case Cartier Bresson—had invaded their privacy. They lost.³¹ Places of public access offer limited protection. In Wisconsin, in an admittedly obscure and extreme case, a tavern owner was permitted to photograph a woman in the toilet of his premises and show the picture at the bar.³²

Many other examples could be given of the zealotry with which the courts have guarded press rights, and the courts have not been loath to extend these protections from the press, first to newsreels and latterly to television. An innocent man filmed while being thrust against a wall in an hotel and questioned by police officers was held to have no action against the television station using those images, even though his innocence was in no way reported.³³ Newsworthiness encompassed all the previous excesses of the press. A newsreel company was entitled to film fat women in a private weight-reduction class. The judgment states: "While it may be difficult in some instances to find the point at which public interest ends, it seems reasonably clear that pictures of a group of corpulent women attempting to reduce with the aid of some rather novel and unique apparatus does not cross the border line, at least as long as a large portion of the female sex continues its present concern about any increase in poundage."³⁴

All aspects of the law were transferred wholesale to the new media. In *Cohn v. Cox Broadcasting*, the Supreme Court, in 1975, refused to acknowledge any concept of media amplification. Since the name of the rape victim in that case had appeared in the public record, the company was free to broadcast it.³⁵

Consent, equally, has never been developed as a concept, except that it was deemed to be unobtainable from minors. In *Commonwealth of Massachusetts v. Wiseman* it was further held that consent was not obtained from the participants in the film *Titicut Follies*. Of the sixty-two mental patients seen in the film, most were not competent to sign releases, and only twelve such forms were completed.³⁶ (The need for written consent had been established in a case in which CBS was successfully sued by a person who was represented in a

dramatic reconstruction of a real-life incident, which had been made with consent and advice but without written permission.)³⁷ Wiseman's account of the *Titicut Follies* case is in rather different terms: "I had permission from the superintendent. I had permission from the commissioner of correction. I had an advisory opinion from the attorney general of Massachusetts, and I had the strong support of the then lieutenant governor. However, some of these men turned against me when the film was finished, with most of the trouble starting two or three months after the superintendent and the attorney general had seen the film."³⁸

Wiseman in this interview claims that "this was the first time in American constitutional history . . . whereby publication of any sort which has not been judged to be obscene has been banned from public viewing." This is not wholly accurate; rather, it was the first time that an injunction was obtained on the grounds of failure to obtain consent *outside of advertising*. The case, although therefore important, still does not acknowledge the existence of a right of privacy in any well-defined way. It joins *Birtens v. Vitagraph Co.* as one of the few precedents that go against the interests of the press, almost all of which turn on consent issues.

The fact is—as those hostile to the idea of a tort for invasion of privacy maintain—there is no basis for such an action in the common law. It was in the *Harvard Law Review* of December 15, 1890, that two young Boston lawyers, Warren and Brandeis (later to become a Supreme Court justice), first enunciated the right of privacy.³⁹ Arguing on the basis of mainly English precedent, they suggested that an action might lie, specifically to prevent what they saw as the gossiping excesses of the Boston press of the day. They relied on the old doctrine of ancient lights (whereby one cannot make a window to overlook one's neighbor, unless proof of a previous window could be brought) and analogy with copyright law. They suggested that the common law acknowledged a right to an "inviolable personality" and afforded as much protection of that right as it did of inviolable property. They used a range of authorities to support this contention, including a case in which the publisher of the private drawings of Queen Victoria and Prince Albert had been restrained. (The royal case, which anyway could have turned on copyright and general notions of property, is dubious, since Victoria—despite the Magna Carta and the English civil war, which took away the power of the monarchy—had a way with the courts. The logical absurdity of the verdict of "guilty but insane" arose in another case entirely because of Victoria's objections that any who tried to kill her, however deranged, had to be guilty.)

But despite the best efforts of Warren and Brandeis, the English common law will not sustain a right to privacy or the concept of an "inviolable personality." The textbook on torts I was assigned as a law student waxes positively amused at the thought.

A much discussed point is whether the law of torts recognises a "right of privacy." There may be circumstances where invasions of privacy will not constitute defamation or any other tort already discussed. For example, the jilted lover who makes his former sweetheart a present of a bathing costume which dissolves in chlorinated water; the farmer who offends the old spinsters across the road by encouraging his beasts to mate on Sunday mornings in a paddock in full view of the old ladies; the hotel manager who rushes into the plaintiffs' bedroom and says: "Get out of here—this is a respectable hotel" (and the plaintiffs are man and wife); the newspaper which, on the eve of an election, rakes up the forgotten past of one of the candidates; . . . the newspaper reporters who, regrettably, sometimes stop at no invasion of privacy in order to "get a story." No English decision has yet recognised that infringement of privacy is a tort unless it comes within one of the existing heads of liability.⁴⁰

It seems to me that this whole area has passed beyond the "regret" of lawyers. In Britain the right to privacy does not exist. In the United States, except against the government and in the case of unauthorized advertising, it is extremely unclear. One cannot but agree with New York Supreme Court Justice Sheintag, who stated nearly half a century ago: "A free press is so intimately bound up with fundamental democratic institutions that, if the right of privacy is to be extended to cover news items and articles of general public interest, educational and informative in character, it should be the result of clear legislative policy."⁴¹

The legislation has never been forthcoming, and in the intervening decades the waters have been considerably muddied. Most important, the courts have been slow to understand the implications of new technologies. In 1927, in *Olmstead v. United States*, the Supreme Court held that wiretapping by the government did not infringe the Fourth Amendment's prohibition against "the right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." This was because no things were seized, only conversations overheard. It took exactly forty years for the court to reverse itself.⁴²

The line from *Olmstead v. United States* to the Privacy Act of 1974 (which protects citizens from the misuse of government data about them) has important repercussions on the string of press victories documented above. For now, with the emergence of computer databases and the convergence of media, there is considerable and widespread concern about abuses to the right of privacy which the new technological configuration could entail. While tyranny has functioned all too well without the computer, most seem to feel it could function very much better with it, and throughout the West, legislation is being put in place to combat that possibility. It is likely that in democratic societies such concern might also express itself in a more aggressive establishment of the tort of invasion of privacy than has hitherto been possible. It could also be the case that such extensions would begin to breach the protections of the

First Amendment and that, in the wash of the mounting concern about information in general, important media freedoms could be jeopardized.

The situation is not unlike that of the British in Singapore in 1941. Guns facing the sea, the garrison was confident it could not be attacked from the jungle to its rear. Yet that is exactly what the Japanese did, and the British guns were captured cold, pointing the wrong way.

One understands and sympathizes with the emotions stirred by the First Amendment, but it is an eighteenth-century device addressing eighteenth-century situations. Insisting that what was conceived of as a virtual private right should attach to any legal entity in the society however large; insisting that no technological advance in communications has affected the basic essence of privacy and reputation; insisting that these freedoms are so fragile, only a domino-theory approach can protect them—all of these stands must be abandoned if the real dangers of the late twentieth century are to be faced. The point is that the media have traditionally been considered not just as representatives of the general public but as the general public itself. Such a view, while understandable in eighteenth-century terms, fails to distinguish present day realities—where the media are not at all the general public but are instead a special interest dominated by an oligopolistically arranged group of international conglomerates. The commonly held view that the freedoms of expression demanded by such entities must be protected because identical individual freedoms will be at stake if they are not is, I submit, simply false. The individual's right to free speech is now separated from the media's right to the same by an abyss of technology. They can and should be treated differently.

V

Rights are normally accompanied by duties. Press rights are accompanied by minimal duties not to blaspheme, libel, or utter sedition. Desuetude characterizes the first and last of these, and libel is a remedy available only to those with enough resources, emotional and financial, to take on the great corporation, which is, today, the commonest libeler.

For film- and videomakers caught in the Griersonian tradition of seeking social amelioration through the documentation of societies' victims, the law, given the amplification of message possible with current technologies, allows too much latitude. Documentarists, by and large, do not libel and, by and large, do not "steal" images. Yet they are working with people who, in matters of information, are normally their inferiors—who know less than they do about the ramifications of the filmmaking process. It seems appropriate that an additional "duty of care" be required of them. "In order to protect the interests of others against the risks of certain harms, the law prescribes certain standards of conduct to which persons in particular circumstances ought to conform,

and if, from failure to attain those standards, such harm ensues, this is actionable."⁴³ The "harm" resulting from invasion of privacy is not normally considered actionable if it rises out of exercise of press freedom. Nor does an individual have an "inviolable personality" along the lines proposed by Warren and Brandeis. Were this to change, then defining the filmmaker's duty of care to his or her subject would devolve on the concept of consent. Instead of the crude "consent" we now have, more refined consideration would be needed. Such refinements already exist in the medical and social science research procedures developed, mainly without the pressure of law, by many professional bodies. Among the most comprehensive of these was the Nuremberg Code.

The voluntary consent of the human subject is absolutely essential.

This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise the free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. This latter element requires that before acceptance of an affirmative decision by the experimental subject there should be made known to him the nature, duration and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment.⁴⁴

Substitute *film* for *experiment* and *experimental* in the above, and a fair definition of a filmmaker's duty of care results. Filmmakers will argue that this would massively reduce access to subjects. So be it. Since the fifty-year parade of the halt and the lame has patently done more good to the documentarists than it has to the victims, I see no cause to mourn a diminution of these texts. To facilitate the operation of a duty of care, I would suggest that society refine its view of film- and videomaking activities to acknowledge the following:

1. *That different channels of communication have different effects.* The decision in *Massachusetts v. Wiseman* limiting the distribution of *Titicut Follies* to professional audiences is perfectly good from this point of view. It is reasonable to suggest that social value could accrue from a film or tape in specialized circumstances, whereas social damage could result in other, more general situations. Questions of *cui bono* are not inappropriate in this setting, either. Courts should be less hesitant to examine the commerce of the media than they have been hitherto.
2. *That the law distinguishes public and private personae.* At a commonsense level, the distinction between a public figure and a private person is obvious. The law often defines far more complex social phenomena,

and there is no reason why such a distinction could not be made part of the consideration of privacy issues. Public and private personae should be afforded different degrees of protection. At the moment, ordinary people are left naked in the glare of publicity. Conversely, sometimes public figures use the scant protection the law intends for ordinary persons to inhibit or prevent what would be, in their cases, quite proper exposés. (I am conscious that this happens more in Great Britain than the United States.)

3. *That the protection afforded the private domain be extended to private personae in semipublic and public areas.* This would allow a measure of protection to the "bystander." At the moment, acts of the media are like acts of God in that one can be hit by them, as it were, in almost any circumstances. It is difficult to see why this should be considered an essential prerequisite for the freedom of information.
4. *That the effect of media exposure of otherwise permissible actions be assessed.* I have argued that social deviance is an essential element in the victim tradition. Such deviance often crucially depends on domain, so that what is permissible in private becomes deviant, even illegal, in public. The effect of *publication* of permissible actions, where because either the actions are deviant of themselves or the fact of publication renders them deviant, ought to be considered.

Any or all of the above could be fatal to the victim tradition of documentary filmmaking, but I would see that as no loss. Indeed, for the concerns expressed here and for other reasons, I would much prefer a style of documentary along the lines of Rouch's "participatory anthropology"; but the real question is not, what effect would such a proposal have on documentary, but rather, would it abolish essential media freedoms?

The concept of a duty of care in privacy is to be balanced against the established right of the public to know and of the media to publish. These rights would be constrained, just as many rights in other areas are—but not more so. Freedom of comment, the power to investigate the publicly powerful, the right to publish facts would be unimpeded by the sort of development I propose. All that would go is the unfettered media right to exploit those in society least able to defend themselves. By defining what exploitation means, how and where it takes place, and who those defenseless people are, the constraint could be delimited and the functions of the media otherwise maintained.

For many, especially in the United States, such proposals are anathema, yet the changing times demand some fresh response. It is not the case that since the thing works, it should not be fixed. The thing in this case, privacy, works none too well and looks to be getting worse. The media need to establish a distance from the most vexed of the information technology areas, where

controversy is likely to result in a serious curtailment of activity. The media need to reestablish their special position. That can only be achieved by the assumption of suitable late-twentieth-century responsibilities. Otherwise,

limited freedom for any instrumentality of society always threatens the stability of society, and society will react to protect its stability. Totally unfettered media could threaten and in the view of many already do threaten the stability of American life. Americans will react to reestablish and strengthen that stability. The lesson should not be lost on the press, radio and television. . . . The press is never really free unless it accepts a pattern which protects it from the perils of self-destruction.²⁵

Notes

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3. Elizabeth Sussex, *The Rise and Fall of British Documentary* (Berkeley and Los Angeles: University of California Press, 1975), p. 21.
4. Paul Rotha, *Documentary Diary* (New York: Hill and Wang, 1973), p. 1.
5. Sussex, *British Documentary*, p. 29.
6. Rotha, *Documentary Diary*, p. 49.
7. Sussex, *British Documentary*, p. 77.
8. Forsyth Hardy, *John Grierson* (London: Faber, 1979), p. 29.
9. Hardy, ed., *Grierson on Documentary*, p. 77.
10. Sussex, *British Documentary*, p. 76.
11. Hardy, ed., *Grierson on Documentary*, p. 64.
12. Sussex, *British Documentary*, p. 18.
13. *Ibid.*, p. 76.
14. *Ibid.*
15. *Ibid.*, p. 79.
16. Arthur Calder-Marshall, *The Changing Scene* (London: Chapman and Hall, 1937).
17. John Grierson, "The G.P.O. Gets Sound," *Cinema Quarterly* (Summer 1934), quoted in Sussex, *British Documentary*, p. 44.
18. Sussex, *British Documentary*, p. 62.
19. Richard Drew, quoted in Stephen Mamber, *Cinéma Vérité in America* (Cambridge, Mass.: MIT Press, 1974), p. 118.
20. Rotha, *Documentary Diary*, p. 104.
21. Joris Ivens, *The Camera and I* (New York: International Publishers, 1974), pp. 193-204.
22. Rosenthal, *The New Documentary in Action*, p. 108.
23. Sussex, *British Documentary*, p. 89.
24. *Binny v. Viagraph Co.*, 210 N.Y. 51 (1913).
25. Don R. Pember, *Privacy and the Press* (Seattle: University of Washington Press, 1972).
26. *Corliss v. E. W. Waler and Co.*, Fed. Rep. 280 (1894).
27. *Jones v. Herald Post Co.*, 230 Ky. 227 (1929).
28. *Meetze v. AP*, 95 S.E. 2d 606 (1956).
29. *Sidis v. New Yorker*, 133 Fed. 2d 806 (1940).
30. *Kelly v. Post Publishing Co.*, 327 Mass. 275 (1951).
31. *Gill v. Hearst*, 253 Pa. 2d 441 (1953).
32. *Yoeckel v. Samonig*, 272 Wis. 430 (1956).
33. *Jacova v. Southern Radio-TV Co.*, 83 So. 2d 34 (1955).
34. *Sweenek v. Pathe News, Inc.*, 16 F. Supp. 746 (1936), Judge Moscovitz @ p. 747 et seq.

35. G. Snyder, *The Right to Be Left Alone* (New York: Messner, 1976), p. 84.
36. Pember, *Privacy and the Press*, pp. 224ff.
37. *Durgom v. CBS*, 214 N.Y. 2d 1008 (1961).
38. Rosenthal, *The New Documentary in Action*, pp. 68ff.
39. Reprinted in A. Breckenridge, *The Right to Privacy* (Lincoln: University of Nebraska Press, 1970), pp. 132ff.
40. Harry Street, *The Law of Torts* (London: Butterworth, 1959), p. 411.
41. Pember, *Privacy and the Press*, p. 112.
42. Snyder, *The Right to Be Left Alone*, pp. 148ff.
43. Street, *The Law of Torts*, p. 103.
44. Quoted in P. D. Reynolds, *Ethics and Social Science Research* (Englewood Cliffs, N.J.: Prentice-Hall, 1982), p. 143.
45. W. Marnall, *The Right to Know* (New York: Seabury Press, 1973), p. 212.