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Robert Jensen

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PERSPECTIVES

Pornography and Affirmative Conceptions of Freedom

Robert Jensen

ABSTRACT. Discussions of freedom of speech and press typically define freedom in the negative: freedom from control, regulation, censorship. The pornography debate typically focuses on whether intervention violates someone's freedom to produce, sell, or consume pornography. I argue that the negative definition is inadequate for theorizing freedom of expression and that affirmative notions are more promising. If pornography can curb some women's expressive freedom, then legal approaches cannot be framed simply as restriction on the freedom of pornographers but become a balancing of two different types of freedoms. Controls on pornography can be an attempt to establish conditions that make the exercise of the freedom meaningful.

After what happened all those years ago, I wonder if I'll ever live free again.

That sentence, written by an anonymous rape victim at the University of Texas and posted on a "survivors' wall," is difficult to

Robert Jensen is affiliated with the University of Texas at Austin. A version of this paper was presented to the International Communication Association conference, May 1993.

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ignore as I write and think about freedom of expression and pornography. I am struck by the word “live.” She chose not to say that she wondered whether she would ever *be* free, but whether she could *live* free. On the surface, she is free: a citizen of what we call a free country, with at least some freedom to move and work where she pleases, with the freedom to express herself in whatever way she chooses (and can afford). But can she live her freedom? What do those freedoms mean to her, when she is uncertain whether she ever will be able to live free again?

What follows is an attempt to expand the way we talk about freedom of expression. Beneath the rather abstract way in which I discuss these issues are real women living in a rape culture, women who are survivors of rape, incest, battering, prostitution, pornography. They struggle not only to be free, but to live free, and it is crucial that philosophical discussions do not stray too far from their lives.

INTRODUCTION

Discussions of freedom of speech and press in traditional U.S. media studies typically define freedom in the negative: freedom from control, regulation, censorship. The debate over pornography typically focuses on whether government-sanctioned intervention against pornography is a violation of someone’s freedom to produce, sell, or consume pornography. Given that dominant definition of freedom and the premium placed on freedom in the United States, it is not surprising that freedom *for* pornography is so often seen as the more important value.

I argue that the negative definition is inadequate for theorizing freedom of expression in contemporary U.S. culture. After a discussion of the nature of freedom, affirmative notions of freedom of expression will be examined in relation to pornography. Because pornography can curb some women’s expressive freedom, legal approaches to stemming the harm of pornography should be framed not as an attempt to restrict the freedom of one group (pornographers) but as a balancing of two different types of freedoms.

This framing also rejects the idea that the pornography debate pits a concern about equality (for women) against liberty claims (of

pornographers and pornography consumers). While the goal of equality underlies the feminist anti-pornography critique, the pornography issue is more accurately seen as a question of competing conceptions of freedom, not as equality versus freedom (see also, West 1992).

The contentious debate within feminism over pornography makes it risky, especially for a man, to speak about “women” as a category or as a unified group. This paper is grounded in a radical feminist critique, which I find to be the most compelling account of pornography and sexuality. That critique suggests that pornography sexualizes male dominance and female submission. It views pornography as a kind of sexist hate literature, the expression of a male sexuality rooted in the subordination of women, which requires sexual violence to produce the material and promotes sexual violence against women (Cole 1989; Dworkin 1981; Jeffreys 1990; MacKinnon 1987). An anti-pornography civil rights ordinance pursued in the 1980s in several cities identified pornography as “a practice of sex discrimination” and a “systematic practice of exploitation and subordination based on sex that differentially harms and disadvantages women” (Dworkin and MacKinnon 1988, 138-142). The ordinance met with varied success in several cities but has been rejected by the federal courts. This paper will move beyond a discussion of the particulars of the anti-pornography ordinance and show how the debate over pornography can expand interpretations of the First Amendment.

Whether pornography has detrimental effects on women and their ability to live their freedom is a much-debated question, and it is not my intention to pretend those effects are widely agreed upon. In other work (Jensen 1992), I have made claims about harm based on a review of relevant social science literature, interviews with sex offenders and self-identified pornography consumers, and autobiographical work. Those harms can be summarized briefly as (1) the harm to women in the production of pornography; (2) the harm to women who are sexually assaulted by men who use pornography; and (3) the harm to all women living in a culture in which pornography reinforces and sexualizes women’s subordinate status (see also, Itzin 1992; Russell 1993). These claims do not hinge on establishing a direct causal link between pornography and sexual violence.

While some scholars have read the evidence to support causality (Russell 1988), I conclude that pornography is implicated in the abusive behavior of some men. Rather than talking of it as a cause, we can identify it as one important factor in sexual abuse and misogyny in general. This paper does not contend that all sex abusers use pornography or that all pornography users will become sex abusers. It claims only that for some sex offenders, pornography is an integral part of their abusive behavior.

The point of this paper, however, is to press a theoretical question, not an empirical one. Here I ask readers to play a "believing game" (Elbow 1992) in the interests of a discussion of theory. Those who think that pornography does no serious harm in the world are asked to believe—for the duration of this paper, at least—that it presents very serious threats to women, children, and other vulnerable individuals.

WHAT KIND OF FREEDOM?

Negative freedom is most often described as "freedom from," the absence of external restrictions placed by others. Positive freedom focuses on the "freedom to," the establishment of conditions that make autonomy meaningful. Negative freedom, then, is an "opportunity concept," which requires only the absence of obstacles; the positive view is an "exercise concept" that says one is free only to the extent that one has effectively determined oneself and the shape of one's life.

In his key essay on this issue, Isaiah Berlin suggests that the fundamental sense of freedom comes from the negative question. Although he provides no one consummate definition, he writes:

The fundamental sense of freedom is freedom from chains, from imprisonment, from enslavement by others. The rest is extension of this sense, or else metaphor. To strive to be free is to seek to remove obstacles; to struggle for personal freedom is to seek to curb interference, exploitation, enslavement by men whose ends are theirs, not one's own. (1970, lvi)

Berlin's sense of negative freedom is in sync with contemporary liberal/libertarian approaches to freedom of expression, which fo-

cus on an individual's (or a corporation's) right to speak and publish. From that view, the key concern is preventing restrictions on individual speech by a governmental body. On the question of pornography, this view holds that a government should not impose restrictions or constraints on an individual's creation or use of sexually explicit images or words, with perhaps the exception of child pornography, which by its nature is taken to harm a protected class of individuals (*New York v. Ferber* 1982). Expressions of this libertarian view can be seen in the opinions in obscenity cases—usually in dissent from majority rulings upholding obscenity laws—by Justices Black, Douglas, Brennan, and others (e.g., *Paris Adult Theatre v. Slaton* 1973, 73-114).

A variety of definitions of positive freedom have been offered by philosophers. Berlin's sketch, which is more vague than his discussion of negative freedom, suggests that at the core is "freedom as self-mastery, with its suggestion of a man divided against himself" (134). This conception suggests that the transcendent, ideal self struggles to keep control over the empirical self, which is driven by passion and desire. The collective—be it church, tribe, or state—is justified in using coercion "in the name of some goal (let us say, justice or public health) which they would, if they were more enlightened, themselves pursue, but do not, because they are blind or ignorant or corrupt" (132-133.) This definition borders on caricature, with its untenable assumptions about the self and its assumption that a positive approach to freedom will result in Soviet-style authoritarianism. Advocates of a positive view of freedom must, however, grapple with questions about the self and the proper amount of authority to assign to the collective.

Focusing on how internal constraints can limit a person's freedom, Charles Taylor writes that the positive notion suggests that you are not free "if you are motivated, through fear, inauthentically internalized standards, or false-consciousness, to thwart your self-realization" (1979, 180). Taylor also points out that individuals can have a "quite erroneous appreciation" (190) of a situation and that subjects cannot be the sole and final arbiter of desires and obstacles. It would be folly to argue that individual judgments are never clouded by such internal obstacles, and I do not mean to imply that individuals' self-assessments are always the most compelling ac-

counts of their lives. But one obvious problem with such a discussion of inauthentic desires and false consciousness is that it suggests there is in each person a true consciousness, unmediated by the play of cultural and political power, waiting to be expressed. While acknowledging that individuals' self-assessments can be mistaken, a commitment to any conception of democracy requires that people be the spokespersons for their needs and desires.

So, my focus remains on external constraints, and I am wary of talk of false consciousness but want to go beyond a simplistic negative account of freedom. My goal is to expand the range of what counts as a constraint beyond those imposed by the government or the direct action of one individual against another.

The example of prostitution is helpful here. Libertarians and some liberals, taking a negative conception of freedom, generally argue that a woman (or a man) should be free to choose to sell her body for money without interference from the government and that a customer should be free to buy those services. The absence of an obstacle, in this case a law outlawing prostitution, is the key. But, as some feminists have pointed out, prostitution takes place in a patriarchal society that defines such uses of women for sex as natural and acceptable, and in which prostitution is sometimes one of the few ways a woman can survive economically. Women's "freedom" to engage in prostitution exists within a system that distributes power and resources unequally. The freedom to choose to be a prostitute is an empty freedom.

Individual women who work as prostitutes have a variety of reasons for doing so (Bell 1987). However, many, if not most, prostitutes have been victims of incest or other forms of sexual abuse as children, learning from an early age that men can use them for sex and often internalizing that view of their value in the world (Baldwin 1989). In the case of any individual woman, however, I would not lecture her about false consciousness and her inability to freely choose. I acknowledge that she made choices in her specific situation that I cannot simply trump with a political argument, no matter how compelling I believe that argument to be. I believe that remaining in prostitution is not in the best interests of any person, that it is a "quite erroneous appreciation" of one's situation, yet I do not support criminalizing prostitution. I do support, however,

criminalizing customers' solicitation of prostitutes. I believe we can use the political analysis to label men who use prostitutes as abusers who help maintain patriarchy and hold those men accountable. I do not accuse the men involved of having false consciousness but contend that their actions harm women (and children and vulnerable men who work as prostitutes). I am willing to suppress the men's "freedom" to buy prostitutes in the interests of protecting individuals at risk and challenging patriarchy.

The distinction between arresting both prostitutes and johns versus arresting only johns may seem irrelevant. If enforced successfully, the result of either strategy would be the end of the prostitution industry. But one method punishes both the powerful and the powerless, while the other focuses only on those who have power and abuse it. The goal is not to convince the prostitute that she suffers false consciousness, but to hold abusers accountable. From a negative view, both parties should be free to enter into whatever contract they choose. From a positive view, the focus is on establishing the conditions in society that give individuals more choices and greater control over their own lives, that make freedom more meaningful.

The positive view of freedom I adopt follows David Miller's (1983) analysis of economic relationships between workers and a capitalist class, and several of his propositions about constraints on freedom can be applied to expression. For Miller, constraints: (1) need not be deliberately imposed; (2) can be the product of collective action as easily as of individual action; (3) do not have to literally prevent action; and (4) do not have to involve a threat of punishment, so that financial and other obstacles can count as constraints.

Miller stresses that judgments about freedom cannot be wholly value neutral because they depend on ascriptions of moral responsibility for barriers to action, "which depend in turn on the view taken of the obligations owed by one man [or woman] to another" (67). Miller contends that moral responsibility, as opposed to causal responsibility, is the appropriate criterion for distinguishing between constraints and other hindrances to action. His view is of limited obligation and limited responsibility; people are obligated to further the common good but not to do everything possible to

promote another's welfare. Using an economic example, Miller argues that a monopoly business person who raises the price of heating oil to an unfairly high level is morally responsible for interfering with customers' freedom. Miller's sketch takes note of the importance of looking beyond individual action and taking into account existing systems and the distribution of wealth and power that results.

FREEDOM OF EXPRESSION

Although there is wide disagreement among media practitioners, scholars and jurists about the nature of freedom of expression, increasingly the long-prevailing negative interpretation—freedom of expression as the freedom from government restriction—is open to question. First Amendment scholar Thomas Emerson (1981), for example, argues that distortions in the system of free expression have not been solved by the negative approach. Emerson and others suggest that a First Amendment concerned only with limiting state action is no longer enough to safeguard expression:

As we move inevitably toward some form of social control over our destinies, the need to maintain a high degree of laissez-faire in the system of freedom of expression, when laissez-faire is diminishing or disappearing in the economic sphere, poses a critical dilemma. Unless we are able to resolve that dilemma, the system of freedom of expression as we hitherto have conceived it cannot continue to exist. (796)

Although it is with reluctance, Emerson suggests that the United States must risk abandoning rigid adherence to the traditional conception of the First Amendment if freedom of expression is to survive. His prescriptions are far from radical, but he suggests that:

[G]rave distortions in the system cannot be eased or eliminated without measures that go beyond the traditional safeguards to protect expression against governmental interference, as crucial as those safeguards continue to be. (848)

While many First Amendment advocates continue to emphasize the importance of limiting state action, affirmative interpretations rooted in the positive model of freedom are now part of the debate. Although the courts are slow to accept such changes, discussion of a right to access and of more active government promotion of expression are common. Jerome Barron (1973) argues for a right of access that he believes could be safely constructed within the constitutional system of free expression. At a minimum, he argues, that right should include a non-discriminatory right to buy editorial advertising space and a right of reply for public figures and public officials defamed in newspapers.

This affirmative view of freedom of expression suggests that if freedom is to flourish, a society must ensure that the conditions exist to allow individuals to take advantage of their freedom. As Emerson and Barron note, in some cases that freedom may need to be aided by assuring that a channel exists for an individual to communicate; the absence of state restrictions is not enough to make good on the promise of freedom.

While I will continue to use the negative/positive framework, it is important to acknowledge that on an issue such as access, some critical legal theory suggests that the negative/positive dichotomy may be an inadequate way to frame the issue when it relies on a shaky public/private distinction. Because governmental bodies establish and enforce certain criminal and civil laws protecting private property, the state is already an actor in such matters; a newspaper or television station exists because the government enforces those laws. From this view, a refusal of the government to mandate access is not neutral and is not simply the honoring of a negative right. Likewise, mandated access would not be the imposition of a new positive right. As J.M. Balkin puts it, if access is “essentially a division of power between speech rights of individuals and property rights of other individuals, then the issue of affirmative versus negative rights vanishes” (1990, 403; see also, Sunstein 1992).

An affirmative view of freedom also can be applied to the debate over pornography. Here, the issue is not how to create channels to ensure that a means of effective communication is available to all. Instead, the problem is how existing images that saturate the culture play a part in limiting women’s freedom—both freedom of expres-

sion and, more generally, the freedom to walk safely in a world free of sex discrimination and sex-based violence. From this perspective, pornography cannot be viewed only as a question of freedom of expression of its producers and consumers; pornography is detrimental to women's freedom because it is an important part of a system of power that denies to women the conditions necessary for the meaningful exercise of freedom. Again, if the focus is on creating the conditions to allow individuals to take advantage of their freedom, the curtailment of the right to make or view misogynist pornography can be justified by the promotion of freedom for all women.

Such an affirmative reading of the First Amendment applied to pornography, however, has met with little support from scholars interested in freedom of expression. For example, Emerson, who supports an affirmative interpretation of the First Amendment, opposes the feminist civil-rights approach to pornography. Like the judges who struck down the ordinance, Emerson endorses the content-neutrality doctrine and is unwilling to recast pornography as a "discriminatory practice," a shift he contends is "no more than a play on words" (1984, 137).

Emerson agrees that some people in society do not have a way to be heard, but he suggests the answer lies in providing access to modes of expression, the "more speech" answer. That view harkens back to an early First Amendment supporter, Justice Louis Brandeis, who suggested the remedy for harms is "more speech, not enforced silence" (*Whitney v. California* 1927, 377). But from the feminist perspective, "more speech" is a problematical remedy in combating pornography.

SILENCE

[S]everal centuries of the silencing of women are a palpable presence in our lives—the silence we have inherited has become part of us. It covers the space in which we live; it is a blank screen, and onto this screen a fantasy which does not belong to women is projected: the silence of women is the very surface on which pornography is played. (Griffin 1981, 201)

In the feminist anti-pornography critique, the concern is not with the “enforced silence” that might be imposed on pornographers through regulation but with the silencing of women by pornography. If truth—no matter how one conceptualizes it—is to win out, it must be voiced, and pornography often silences those voices. A story helps illustrate this.

After an educational program on pornography that included slides of sexually explicit material, a woman in the audience tried to explain how the images made her feel. She mentioned the pictures of women who had been gagged. “I felt choked,” she began to tell the group, but that was as far as she got. Her voiced weakened, her hands went to her throat as if to explain what was happening: the pornography on the screen had silenced her as effectively as the gag had silenced the women in the pictures. At least for that moment, she could not speak. Later, like many women who have seen that show, she said the pictures made her feel as if she had been raped. Her initial anger was mediated by the fear that she would be accused of overreacting. But most of all, she said, she felt choked, like the women in the pictures: “None of the women could scream. There was no room for it.”

In that situation, she had been silenced only momentarily and was able to articulate her feelings and concerns in the supportive atmosphere of a feminist philosophy class. But later in the discussion, the same woman told of an incident in high school when some of the boys in her circle of friends rented a pornographic movie. The woman said she sat in a corner during the viewing of it, surrounded by boys, feeling frozen, unable to move, “forced to smile.” She said she sat through it, trying to meet the boys’ expectations by saying, “I like it.” Any other response by her had been silenced.

That incident from her past is a concrete example of how the speech of one group (pornographers) can silence another (women). As Andrea Dworkin puts it, “Subordination can create a silence quieter than death”:

The women flattened out on the page are deathly still, except for *hurt me*. *Hurt me* is not women’s speech. It is the speech imposed on women by pimps to cover the awful, condemning silence. . . . The silence of the women not in the picture, outside

the pages, hurt but silent, used but silent, is staggering in how deep and wide it goes. . . . It is a silence over centuries; an exile into speechlessness. One is shut up by the inferiority and the abuse. One is shut up by the threat and the injury. (1988, 268)

Dworkin's writing stresses pornography's place in a system of power relationships in which the sexual abuse of women is routine. Her's is a structural critique; in every case with every woman, silence does not win out, of course. Although she often has had trouble finding a publisher in the United States, Dworkin's work is testimony to the fact that the voices of women—even radical women—can be heard. These arguments about the silencing of women are not proposed simplistically, as if male power were an unassailable, monolithic force. But the fact that women do not always accept these limitations does not mean that the patriarchy does not strive to silence the powerless and does not succeed in many cases. This may not happen to all women, but it can, and does, happen to some women, both those used in pornography and those who feel the effects of pornography.

THE POWER OF PORNOGRAPHY

Another aspect of pornography confounds and complicates the "more speech" argument. Such a solution is based on the assumption that in the often-heralded marketplace of ideas, truth wins out. Whether or not that view is realistic in any realm, it leaves much to be desired when dealing with pornography's construction of sexuality and power. As Elizabeth Janeway (1971) points out, the lies of pornography have become a type of social mythology, a system of beliefs so embedded in people's worldview that dislodging them is extraordinarily difficult. She writes:

For it is the nature of myth to be both true and false, false in fact, but true to human yearning and human fears and thus, at all times, a powerful shaping force. (26)

In the case of pornography, Janeway suggests that the purpose of portraying women as secretly wanting rape and sexual abuse is to

absolve men of their guilt; the most exaggerated desires of men are legitimated because the victims willingly choose their fate. Such portrayals become ingrained, for with social mythology a lie can be proved “false a hundred times, and it will still endure because it is true as an expression of feeling” (28).

Catharine MacKinnon argues that those myths are even more difficult to refute because pornography is “a specific and compelling behavioral stimulus, conditioner, and reinforcer” that “makes orgasm a response to bigotry” (1987, 200). “Try arguing with an orgasm sometime,” MacKinnon writes. “You will find you are no match for the sexual access and power the materials provide” (1993, 17).

An historical analogy about the relationship of lies and justifications for violence is useful here. Dworkin has compared pornography’s effect on women to the effect of Nazi propaganda on Jews:

[T]he character of the pornography and its relationship to actual violence against women, if it’s analogous to anything, is analogous to the way anti-Semitic literature blanketed [Nazi] Germany and enabled what occurred to be justified, encouraged it, incited it, promoted it. And, in my opinion, ultimately was the link that made it all possible. And I think that pornography has that character. (1982, 26)

With that analogy in mind, David Riesman’s work from the 1940s—written against the backdrop of Nazi Germany’s use of propaganda on the way to power—is valuable. He distrusted the assumption that a libel destroys itself, that “the extravagance of the defendant’s statements—or his obvious misanthropy—will discredit him” (1942, 770). In a statement that can be applied to pornography, he suggests:

[W]here the defendant is engaged in exploiting the anxieties or the sadism of his audience, and can count on built-in prejudice, he may increase his credibility as he increases the scope and violence of his lies. The more daring the lie, the more simple it is to comprehend, the more satisfying as an “explanation” and the more impressive the speaker. (770)

CONCLUSION

These comments are not meant to suggest that reconceptualizing the nature of freedom and incorporating a notion of silencing into First Amendment thinking would be neat, clean, and easy; a positive approach makes it more difficult to deal with questions of freedom of expression. When freedom simply means the absence of government interference, the issues are fairly clear. However, if, as Lisa Heldke suggests, the key question should be “are all members of the group participating at a level that promotes, rather than prohibits, the speech of others?” (1991, 359), we face different, and perhaps more complicated, issues than traditional First Amendment theory poses. But these considerations force us to deal with the realities of power and people’s standing in the world and not rely on “a legal tradition of neutralization through abstraction from the realities of power” (MacKinnon 1989, 195). No analysis of freedom makes sense detached from an analysis of power. As Heldke puts it:

Those members of the community who, because of the construction of that community, are granted illegitimate power over other members must act to understand and to transform the ways that power figures into speaking in the community. On this view, we are responsible for the ways we perpetuate the silencing of others by talking in ways that support systems of domination and subordination, and that preserve illegitimate positions of power. (1991, 363)

An example of how easy it can be to ignore those realities can be seen in a contemporary child pornography case. In his dissent, which argues that the state can criminalize the production and distribution of child pornography but cannot constrain individuals’ right to possess such material in their homes, Justice William Brennan suggests that holding the strict libertarian line on expression may not be easy but is necessary:

When speech is eloquent and the ideas expressed lofty, it is easy to find restrictions on them invalid. But were the First Amendment limited to such discourse, our freedom would be

sterile indeed. Mr. Osborne's pictures may be distasteful, but the Constitution guarantees both his right to possess them privately and his right to avoid punishment under an overbroad law. (*Osborne v. Ohio* 1990, 1717)

Brennan either misses or ignores power relations when he insists on describing photos of nude children as merely "distasteful." Liberal opponents of pornography regulation have long contended that sexually explicit material may be offensive but deserves protection. The point made clear by the feminist critique, however, is that pornography is more than distasteful and offensive: it is oppressive, helping to maintain a system that oppresses a certain class of people. Framed that way, freedom of expression does not automatically equal freedom from government interference to use pornography, and we are faced with the more difficult task of challenging that power, which comes in both governmental and non-governmental actions.

This argument inevitably raises the question of the "slippery slope": accepting an ordinance that may curtail some forms of pornography is said to be a threat to other forms of speech. Two general responses seem clear. First, the legal system already constrains or criminalizes a number of categories of speech, such as blackmail, threats, libel, false advertising, copyright infringement, etc. The laws under which these restrictions are enforced have not led to the widespread suppression of other forms of speech. Second, I acknowledge that the enforcement of an anti-pornography ordinance could endanger forms of expression that even the most radical opponent of pornography would not want suppressed, such as some works by lesbians that deal with sexual themes. Laws are interpreted and enacted by individuals who respond to structural imperatives and constraints, and the patriarchal power at work in the legal system could lead to misogynist applications. That is a risk of putting such an ordinance in place. There are costs, however, to not enacting an ordinance: namely, the cost to women whose injuries are connected to pornography. The balancing of costs and risks is part of legal decision-making.

To return to the affirmative theories of the First Amendment: if the goal of pursuing positive freedom is the creation of the condi-

tions for the meaningful exercise of freedom, is it consistent to support some form of government-mandated access to the media, yet reject limits on pornography? Positive freedom can be used not only to justify the creation of channels of expression, but also to limit expression that is destructive to others' ability to take advantage of their freedom. In both cases, the focus is on the establishment of conditions that make the exercise of the freedom meaningful in the real world where power is at work.

In many acts of communication there are components of freedom and constraint. When mainstream mass news media, for example, consistently ignore certain political points of view deemed too radical, the people who hold those views are constrained from effectively communicating with most of their fellow citizens. But because contemporary First Amendment jurisprudence generally has been concerned only with constraints imposed by the government on individuals and their property, such limitations are not seen as restricting anyone's freedom.

When pornographers construct an image of women that intensifies and heightens the risk of assault and discrimination that women face, and can hamper their expressive freedom, women have been constrained. A positive view of freedom helps focus attention not only on the abstract rights involved, but also on the power at play in the world in which those rights are exercised. It asks not only whether people are free in name, but whether they can live free.

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CASES

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