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色情管制爭議中的言論自由*

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色情言論的管制與否、如何管制，向來具高度爭議性。本文從維護言論自由作爲重要的公民基本權利的視野，分析、評估兩大類管制色情的理由：一類以色情「對一般人的冒犯性」作爲立論基礎；另一類著重於色情「對脆弱心靈的污染性」，及其所可能造成之種種「傷害」。本文以釋字第 617 號爲例，考察「對一般人的冒犯性」此類管制理由；並評估「色情助長性犯罪」、「保護青少年及兒童」及「色情傷害女性」等幾項主要的傷害說詞。這些討論旨在說明：原則上，除非色情言論侵害了他人之基本權利，或對他人造成相當明確且實質、並具政治道德重要性之傷害，否則政府不應禁止或限制之。再者，即使管制目的具一定正當性，政府基於對言論自由之保障，亦應避免過度管制。本文並對德沃金的兩項相關說法，進行修正與補強。修正之處在於：社會多數不願聽聞色情之「個人偏好」，可能仍不足以構成管制色情的充分理由。補強之處在於：色情言論所具之公共審議旨趣，其冒犯主流之性格，及其增進知識之作用，使我們有必要正視其客觀的存在價值。通過這兩個論點，德沃金的色情權利論說將獲得進一步深化。

關鍵字：色情、管制、言論自由、冒犯性、傷害、德沃金

Freedom of Speech in the Controversy over the Regulation of Pornography

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ABSTRACT

What might be the legitimate reasons for regulating pornography? To what extent should pornography be immune from regulation because it is a form of 'speech' or 'expression'? This paper contends, from the standpoint of safeguarding freedom of speech as an important basic right, that pornography should not be regulated on grounds of its 'offensiveness to the average person' or for any similar reasons. Arguments from mere offensiveness are rejected for being unjustly protective of majority interests. But the case for regulation could be legitimately made, however, if the specific harms allegedly caused by pornography are sufficiently clear, substantial, and important from the point of view of public political morality. This paper examines several major claims about 'harm', regarding, for example, sexual crimes, harms to children, and harms to women. Most of these claims are less than convincing, while others might be taken to justify reasonable forms of regulation. What Ronald Dworkin has called the 'right to pornography' is, on the whole, reconfirmed. Yet Dworkin's partial concession to the offensiveness principle, and his equation of pornography with low-value speech, are found to be unsatisfactory. Revising and improving on Dworkin's approach, this paper contributes to strengthening the free speech justification for a 'right to pornography'.

Key Words: pornography, regulation, freedom of speech, offensiveness, harm, Dworkin