québécois last fall. Recall how clearly Bouchard stated his sovereigntist commitment in the French and English debates. These statements did not prevent him from winning with the support of many federalist voters. These two campaigns, and perhaps the 1992 referendum campaign as well, suggest that sovereigntists can announce, and even promote, their option at little cost, at least until the final decision comes in sight. The next Quebec election should provide a further instance of the same pattern: a battle between sovereigntists and federalists over plain economic and good government issues.

But where do such strategies leave sovereigntists in the event of a referendum? At this time, in Quebec, separation is obviously harder to sell than sovereignty, a more positive concept that also suggests that ties with Canada would be maintained. Two interpretations of the new sovereigntist discourse seem possible. Either both Lucien Bouchard and Jacques Parizeau were careless and made a mistake, or they took a risk and acted strategically. Given the consistency with which Quebec sovereigntists have avoided, and even denounced, the separatist term in the past, the second interpretation appears more convincing. Bouchard and Parizeau may have had something like the following reasoning: first, in the short run, there are low electoral costs associated with the promotion of sovereignty, even in separatist terms; second, in a referendum on sovereignty, separatism will come out in any case, as a denunciation; third, in the meantime, it may be best to seize the bull by the horns and de-dramatize the idea of separation. This gamble carries some risks, but may well be rewarded. Because sovereignty and separation describe essentially the same thing, differences in perception could disappear once sovereigntists start using the terms indifferently.

As debates surrounding political correctness suggest, naming and renaming is central to contemporary politics. In Quebec, support for sovereignty is broadly diffused, and associated mostly with perceptions of identity. With such symbolic foundations, sovereigntists may be wise to try to take the lead and define the linguistic battleground while doing so entails little costs.

The Economics of Elections

Meanwhile, Daniel Johnson and the Quebec Liberals are working hard on their conversion from fiscal conservatives to a version of Jean Chrétien's Liberals, for whom jobs have become a priority. Last week, Quebec's new finance minister, André Bourbeau, explained that the budget deficit, which a year ago Daniel Johnson himself deemed intolerable, could now be tolerated. "Savage deficit reductions," explained the minister, would "handicap the economic recovery."

While economic studies give no support for the idea of stimulating the economy *after* a recovery has started, electoral studies indicate that good economic conditions and, in particular, improvements in the unemployment rate help a government get re-elected. The author of the pioneering work on the question, however, added a cautionary advice. In his book *The Political Control of the Economy*, Edward Tufte concluded, with Nixon in mind, I believe, that "sleazier efforts at manipulating economic policy for short run advantage cannot survive public scrutiny." Five days after his "savage deficit reductions" declaration, and in the wake of outraged editorials that only stopped short of calling for his resignation, Bourbeau explained that he did not mean to say, after all, that the deficit was tolerable.

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LEGAL REPORT

Justice, Democracy, and the Press

by Jamie Cameron

Censors and Sensibilities

Last summer a court order issued in Ontario barred publication of virtually all details surrounding the sex murders of two Ontario women. The ban was imposed during proceedings to consider the plea and sentence of Karla Homolka, one of two individuals charged with the offences. Following a joint submission by prosecution and defence lawyers, she was convicted of manslaughter and received a 12-year sentence.

She is expected to testify against the other accused, Paul Bernardo/Teale, her estranged husband. At her hearing, his lawyer opposed the ban, claiming that it would prejudice Teale's right to a fair trial.

For months, an order that was unenforceable in the United States was observed. However, once "A Current Affair" broke the silence, the print and broadcast media climbed on the bandwagon. Cars and trucks carrying "illegal" newspapers were stopped at the Canada-U.S. border. So that freedom could "ring out for all our brothers and sisters to the north," a Buffalo disc jockey used a loudspeaker to blast details of the slayings across the Peace Bridge at Niagara Falls.

A new trade war had erupted between Canada and the United

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States. This time the issue was "free trade in ideas," not softwood lumber.

The war quickly transcended "A Current Affair" to reach the upper echelons of the American press. Commenting on this "bizarre episode," the *New York Times* pontificated that "[t]wo centuries of strife over freedom of the press have taught that gags ... are instruments of tyranny." Meanwhile, the *Washington Post* denounced the border incidents as "international censorship."

Canadians who were divided on the ban remained recalcitrant in the face of such lectures on the virtues of a free press. The self-righteous tone of American editorials and media "feeding frenzy" offended Canadian sensibilities. Many asked, what self-respecting news organization would violate a court order? The answer was obvious: all those whose object was to "sell more newspapers [or] glue more ghouls to their television sets." Profit, not principle, was truly at stake.

Though the furor has subsided, it remains puzzling how an incident that was widely regarded as a crass exploitation of the public's lurid interest in sex and crime could be defended as a matter of high principle.

Watchdogs of Democracy

News organizations profited from the decision to violate the court order. At the same time, however, the ban offended a fundamental principle of democratic accountability. As the *Washington Post* explained, "Courts are public institutions, and their work is the public['s] business." One day that business might be a horrible murder, but the next, it could be "public corruption, corporate shenanigans, tax scandals, the sins of a rogue government agency, or the personal depravity of a government leader." On that view, it is a "bad idea" to give judges anywhere the power to decide which cases and proceedings can be publicly discussed.

In the United States the press are regarded as the "watchdogs" of democracy. That is, in part, because, under the American Constitution, "[t]he people, not the government, possess the absolute sovereignty": the people are the governors and not the governed. Restrictions on the press interfere with the people's access to information and debate that is needed to inform the vital exercise of self-government. A free press ensures that "the censorial power is in the people over the Government, and not in the Government over the people."

The people's sovereignty is also protected by the constitutionalization of limited government, a separation of powers, and checks and balances. Thus it follows from "we the people" that the institutions of government are artifices exercising delegated authority, which, accordingly, is circumscribed by the Constitution. Prospective abuses of authority that might tyrannize the people are further minimized, if not pre-empted, by a separation of powers and elaborate system of checks and balances.

Precisely because it stands between government and the people, the press forms part of this theory of democracy. As an agency that is external to and independent from the state, the press is in a unique position to check the actions of government and provoke the robust and uninhibited debate that is the lifeblood of a democracy. For the people to exercise their prerogative as the governors, the press must be free. And it is powerful because the First Amendment has protected its status as watchdog of democracy.

From "A Current Affair" to the *Washington Post*, the decision to break the Homolka publication ban was not just about profit but also, about a fundamental principle of democratic accountability.

Since the Charter's adoption in 1982, the Canadian press has aspired to a similar role. In court it has been met instead by an epidemic of publication bans and other restrictions.

"Not a Political Decision"

As cars, trucks and computer networks carried contraband reports of the Homolka proceedings into Canada, the premier of Ontario implored: "[The ban] is not a political decision. This is not a decision of government, but of an Ontario judge."

Such a claim might not have been challenged before the Charter, when Canada's judges were viewed as "neutral arbiters." Since 1982, the Charter has unquestionably "politicized" the judiciary and justice system. It has opened judicial decisions to public scrutiny and debate through adjudication on controversial issues like abortion and hate propaganda. It has spurred demands that judicial appointments, which are mainly a matter of executive prerogative, be pried open and democratized. It has brought the press into court to protect its rights of access and publication.

In some cases it has been acknowledged that the justice system is "the public['s] business." Recently, disciplinary proceedings against a provincial court judge, which resulted in a recommendation of removal from office, were televised. On at least two occasions, the Supreme Court of Canada has permitted its proceedings to be broadcast. Yet as the Homolka and a variety of other cases demonstrate, publication bans are issued in Canada with remarkable ease.

Once again, a comparison may be instructive. Under the U.S. Con-

stitution, the judiciary is one of the co-equal branches of government. It is explicitly part of the system of democratic government and, as such, is subject to public scrutiny in a variety of ways: through confirmation hearings, camera access to courtrooms, and the presumption against publication bans, to name just a few.

In Canada, meanwhile, the press has run up against a judiciary that is reluctant to relinquish its protected status as neutral arbiter to the demands of public accountability.

Justice, Democracy, and the Press

Though the court order in Karla Homolka's case is pending in the Ontario Court of Appeal, it is doubtful that the appeal will succeed. It is far from self-evident that the Canadian press should enjoy the same status as its watchdog counterparts in the United States. At the same time, it is worrying that the justice system is so unwilling to see its processes as part of democratic governance in Canada.

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Porn Again: Obscenity Legislation and Freedom of Expression After *Butler*

by Bruce Ryder

The definition of obscenity has long bedevilled Canadian courts. Only recently has the shifting and uncertain line between legal and illegal sexual expression been determined under the guarantee of freedom of expression in section 2(b) of the Charter of Rights. The 1992 Supreme Court of Canada decision has attempted to clarify matters in *R. v. Butler*, yet a number of problem areas continue to exist in the heated battles over freedom of sexual expression. One is the censorship powers of Canada Customs, and another is the recently enacted federal child and youth pornography law.

The Butler Decision

The Charter was largely responsible for the reformulation of the definition of obscenity in *Butler*: there, the Supreme Court involved a feminist morality that it saw as more consonant with Charter values than the previously dominant conservative morality. The purpose of obscenity laws, the court said, is to prevent harm to women and children. On this view, sexually explicit materials coupled with violence or cruelty, or that use children in their production, are presumed to be harmful and thus obscene. In addition, depictions of sex that are degrading or dehumanizing will be found to be obscene if they pose a substantial risk of harm to society. Limited in this way, the court found the obscenity provision of the *Criminal Code* to be a justifiable limitation on freedom of expression.

The *Butler* decision has thus transformed the legal language of the debate regarding freedom of sexual expression in Canada. No longer is the suppression of "dirt for dirt's sake" constitutionally permissible. The question in most contested cases, rather, will be whether the materials are "degrading or dehumanizing" in a manner that poses a substantial risk of harm to society. Some judges have deprived *Butler* of any transformative impact by holding that "dirt for dirt's sake" is per se degrading, dehumanizing and harmful. This view has been expressed, for example, in several cases involving materials depicting gay and lesbian sexuality. However, the dominant view sees *Butler* as a major shift: depictions of consensual adult sexuality are not criminal in the absence of degradation and proof of harm.

In the long run, the *Butler* ruling is likely to alter the Canadian landscape in much the same manner as the First Amendment jurisprudence has since the U.S. Supreme Court's decision in *Roth* (1957). Books, magazines, films, and videos devoted exclusively to the explicit depiction of non-violent, consensual adult sexuality are likely to become far more prevalent. If the Supreme Court's 1964 decision in *Brodie* ("Lady Chatterley's Lover") signalled the triumph of freedom of literary sexual expression in Canadian obscenity law, the *Butler* decision will likely be seen as ushering in an era of free expression for non-violent adult sexual materials that are devoid of artistic pretences. However, imported materials subject to Canada Customs do not enjoy this freedom.

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