What Butler Did

Michael Plaxton

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/sclr

This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License.

Citation Information
http://digitalcommons.osgoode.yorku.ca/sclr/vol57/iss1/14

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference by an authorized editor of Osgoode Digital Commons.
What Butler Did

Michael Plaxton*

I. INTRODUCTION: THE OBJECTIFICATION FAMILY

When Parliament amended the Criminal Code\(^1\) in 1983, replacing the language of rape with that of sexual assault, it was first and foremost to underscore the fact that non-consensual sexual touching is not a crime of sex, but a crime of violence.\(^2\) By treating this behaviour as a species of assault, rather than an innocent male lapse of self-control, Parliament hoped to transform social attitudes to women, women’s bodies and their sexual autonomy.\(^3\) In R. v. Ewanchuk,\(^4\) Major J. made a number of remarks tending to emphasize what sexual assault has in common with other forms of assault:

Society is committed to protecting the personal integrity, both physical and psychological, of every individual. Having control over who touches one’s body, and how, lies at the core of human dignity and autonomy. The inclusion of assault and sexual assault in the Code expresses society’s determination to protect the security of the person from any non-consensual contact or threats of force. The common law has recognized for centuries that the individual’s right to physical integrity is a fundamental principle ... It follows that any intentional but unwanted touching is criminal.\(^5\)

At the same time, it has always been clear that sexual assault is a unique form of violence, and does not target precisely the same wrongs as other assault offences. Justice Cory acknowledged the offence’s unique nature in R. v. Osolin, observing that it assaults human dignity

---

* College of Law, University of Saskatchewan. I am grateful to Carissima Mathen and two anonymous reviewers for their comments and suggestions. The usual disclaimer applies.
\(^1\) R.S.C. 1985, c. C-46.
\(^2\) See Susan Brownmiller, Against Our Will: Men, Women, and Rape (New York: Bantam, 1975); Christine Boyle, Sexual Assault (Toronto: Carswell, 1984).
\(^5\) Id., at para. 28.
and denies gender equality. The evidentiary reforms to the law of sexual assault, the Supreme Court agreed in Seaboyer, reflected the need to combat gender myths and stereotypes. In Ewanchuk, the Court narrowed the defence of honest but mistaken belief in consent in recognition of widespread myths and stereotypes about women — namely, that they are “passive, disposed submissively to surrender to the sexual advances of active men”. The ruling implicitly recognizes the wrongfulness of presuming that a woman is ready and willing to satisfy one’s own sexual desires — of treating her as a sexual object. This theme was further pursued in A. (J.). There, the majority noted that the consent provisions in section 273 of the Criminal Code exist in part to prevent sexual exploitation, and that consent must be voluntary and revocable at all times during the sexual activity.

The offence of sexual assault is directed at violence, then, but it is directed at something else as well: objectification. I may assault a person — for example, by engaging him in a bar-room fistfight — without treating him as an object in anything like the way that non-consensual sexual touching would. For that reason, we can and do distinguish between common assault and sexual assault. But the fact that sexual assault targets objectifying behaviour is important not just because it drives a wedge between it and other kinds of assault: it also establishes a familial tie with a range of offences that do not target assault at all. In particular, it establishes a genetic link with provisions criminalizing public indecency and the publication of obscene materials.

Thinking about sexual assault as part of a family of objectification-targeting offences leads us to consider with fresh eyes two important Supreme Court of Canada decisions: R. v. Butler, the landmark ruling interpreting the Criminal Code’s obscenity provisions; and R. v. Labaye, which interpreted the offence of keeping a common bawdy-

---

6 Osolin, supra, note 3, at para. 165.
8 See David Archard, Sexual Consent (Boulder, CO: Westview, 1998), at 131, cited with approval by L’Heureux-Dubé J. in Ewanchuk, supra, note 4, at para. 82.
11 See Criminal Code, ss. 173, 163(8).
house for the practice of acts of indecency. In both cases, the Court placed the concept of harm at the heart of its analysis. In Butler, the Court held that section 163 of the Criminal Code targets pornographic materials that harm society. The degrading or dehumanizing nature of such materials was not treated as significant in and of itself, but only insofar as it gave rise to the inference that they would meet that test of harmfulness. Likewise, a majority of the Court in Labaye held that the offence of criminal indecency requires proof that the conduct in question causes harm of a nature contrary to “norms which our society has recognized in its Constitution or similar fundamental laws”. Furthermore, “the harm must not only detract from proper societal functioning, but must be incompatible with it”.

In this brief paper, I want to argue that the focus on harm in Butler and Labaye can distort our thinking about what precisely is wrong with sexual assault. They obscure the message that certain kinds of objectification are per se wrongful, whether or not we can point to any tangible harm. Perhaps more importantly, these cases fail to provide the sort of sophisticated analysis of what makes conduct problematically objectifying in the first place. Even if these shortcomings produce no discernible effect on the way that courts decide particular cases before them, it undermines the educative function of the criminal law. This is especially problematic in the context of sexual assault, where the law must not only reflect social values, but also take a leadership role in transforming them.

This paper is divided into three sections. Part II considers Gardner and Shute’s account of rape as directed against the wrong of objectification — and, specifically, the wrong of treating another as a mere sexual instrument, whether or not any tangible harm flows from it, and the significance of consent to the analysis. Part III considers the Butler decision. We will see that the Supreme Court in Butler focused on the harm caused by the publication of objectifying materials. Furthermore, although the decision was driven by concerns about objectification, the Court failed to articulate just what it is about objectification that makes it morally problematic, and failed to say how we can identify morally troubling depictions of objectification when we see them. This contributed to later confusion concerning the role of consent in the objectification analysis. Finally, Part IV examines the Supreme Court’s majority

\[\text{Id. at para. 29.}\]
\[\text{Id. (original emphasis).}\]
opinion in *Labaye*. We will see that this decision both followed (and arguably extended) the reasoning in *Butler*, placing harm at the centre of the inquiry. More importantly for our purposes here, the majority in *Labaye* failed to raise a number of considerations that should have been relevant to the objectification inquiry and, critically, appeared confused about the significance of consent.

II. OBJECTIFICATION, INSTRUMENTALIZATION AND CONSENT

In their important paper, “The Wrongness of Rape”, John Gardner and Stephen Shute present a thought experiment — what they describe as “the pure case of rape”.\(^\text{16}\) In that thought experiment, they imagine a woman who is penetrated while she is fast asleep or unconscious. She suffers no physical injuries and, because she never learns that she has been assaulted, no psychological injuries either. The offender is killed by a passing bus, making it impossible for anyone ever to discover what he did. Afterwards, the victim lives her life as if nothing had happened — as far as she knows, nothing has happened. It is, for that reason, difficult to say that the victim has sustained, in any straightforward sense, any harm at all. Yet most of us would nonetheless agree that she has been seriously wronged.\(^\text{17}\) That suggests that, although rape is typically accompanied by physical and psychological harms to the victim, those harms are not what make rape wrongful. Even in a situation where there is no physical or psychological harm, rape — and, by extension, sexual assault — intuitively strikes us as a profound moral wrong. Sexual assault is not wrong because its victims are frequently traumatized by it; when, in the real world, they are traumatized by it, it is because of the wrong done to them.

What makes rape wrongful, according to Gardner and Shute, is the fact that it treats the victim as a mere instrument — a thing to be used.\(^\text{18}\) In focusing on instrumentalization, they were following the lead of Martha Nussbaum, whose analysis of objectification remains the most sophisticated treatment of the subject.\(^\text{19}\) Nussbaum argued that objectifi-
cation can take a number of forms. It may entail treating another person as an inert thing; as non-autonomous; as fungible with other people, or with inanimate objects; as violable; as lacking subjectivity; or as property or a commodity that can be owned. Frequently, objectification in one sense will entail it in some — though by no means all — other senses as well. Importantly, though, Nussbaum makes a compelling case that objectification in none of these senses is inherently morally problematic. Indeed, she argues persuasively that in some contexts objectification can be benign and even positive. It is when objectification takes the form of instrumentalization that we will be most ready to conclude that it is pernicious. This is not to say, however, that we should ignore the other ways in which conduct can objectify: instrumentalizing conduct will invariably be objectifying in several or all of the senses Nussbaum catalogues. When we see one form of objectification, we should be alert to the possibility that we are in treacherous moral waters.

As the above suggests, the objectification inquiry is highly context-driven. The significance of context, moreover, does not end once we conclude that conduct is instrumentalizing. Even instrumentalizing conduct can be rendered morally unproblematic in the presence of consent. Thus, Nussbaum refers to the use she might make of her partner as a pillow — instrumentalizing behaviour that is made untroubling by her partner’s consent. Moreover, even if consent does not have that effect, our respect for sexual autonomy will often lead us to allow consenting adults to engage in problematically objectifying behaviour. The consent that a streetwalker gives to her john does not remove the moral qualms we may have about their “transaction” — this strikes us as objectifying in deeply troubling ways — but our respect for the prostitute’s sexual autonomy arguably gives us a good reason to permit it nevertheless.

---

20 Id., at 257.
21 Id., at 274.
22 Id.
23 Id., at 265.
24 Id., at 271.
What is striking about Gardner and Shute’s pure case of rape is that it forces us to ask why we think the presence or absence of consent matters. Consent, we may intuit, can make otherwise wrongful behaviour morally okay, or it can effectively license courses of action that are still wrongful but to which responsible moral agents should be allowed to subject themselves. On either view, the consent inquiry represents the last stage in the moral analysis. Before we get to that point, though, we need to determine whether there is any moral work for consent to do. And Gardner and Shute’s thought experiment reveals that a focus on harm can mislead us.

Why worry about it? So long as we know whether there is consent, one could argue, we seem to have enough information to know whether it is appropriate to impose criminal liability on the objectifying party. Why bother to ask whether the objectification is of one sort rather than another, if questions of liability will get settled at the consent stage of reasoning anyway?

There are a few responses to this objection. First, the nature of the objectification will occasionally determine whether consent should be treated as an answer to the allegations in question. Some forms of instrumentalization may seem to us so profoundly dehumanizing and degrading that we will conclude that one cannot legally consent to them. For example, though without purporting to settle the matter, certain sadomasochistic practices may well reach a degree of violence that we reject them as valid expressions of intimacy. But to know whether there is anything in a given set of sexual practices that is valuable and worth preserving, we first need to carefully scrutinize them. Just asking whether there was consent is not enough.

Second, there is a value in determining just why consent matters in a given case. We have seen that consent may work a kind of “moral magic”, transforming otherwise wrongful courses of action into salutary ones. It may, however, only serve to license acts that, though legally permissible, remain wrongful. The distinction is hardly arid and academic: it is the difference between looking approvingly or fondly upon an intimate practice or behaviour (e.g., the treatment of a lover’s stomach as a pillow) or grudgingly tolerating a practice that we see as essentially pernicious (e.g., prostitution). When we fail to explain with

precision how a given practice instrumentalizes a person, and how consent affects its lawfulness, we wind up lumping all sexual practices together. This risks sending the message that if one instrumentalizing sexual practice deserves praise, then they all do; that if one kind of instrumentalizing sexual expression deserves criticism (if not criminal punishment), then they all must. We should be wary of inadvertently criticizing, and driving people away from, perfectly legitimate displays of intimacy and warmth. Likewise, we should be deeply concerned at the prospect of encouraging, accidentally as it were, sexual practices that strike us as brutal, but which we have led members of the public to conclude are fundamentally indistinguishable from the acts of love often undertaken by loving partners.

The second point ties closely into my third: the purpose of the criminal law is, first and foremost, to educate the public — to guide them away from wrongful courses of action even while it preserves positive social practices. That educative function is largely performed by Parliament — by its determination that some practices are wrongful whereas some are not. But the courts, by determining and articulating which courses of action are sanctionable, may have their own role to play. In explaining why some kinds of behaviour deserve criminal sanction, and some do not, the courts effectively send a message about what tolerance entails in a liberal democratic society; about the extent to which we should permit behaviour that offends our liberal sensibilities, and the point at which our commitment to liberalism requires us to categorically condemn it. In making this observation, I am to a degree taking issue with Meir Dan-Cohen’s thesis that the law should, or anyway does, encourage acoustic separation in the criminal law; that the public need not be informed about decision rules (frequently court-created) setting out the circumstances under which sanctions will be imposed, even if they must be informed about the kinds of conduct prohibited by Parliament. Even acknowledging that there may be important advantages in having the substantive criminal law articulate different, parallel norms to citizens and legal officials — particularly in dissuading members of the public from using decision rules to “game” the law — we should note some of the costs of doing so, particularly where we want the law to take, as it were, a leadership role in changing social attitudes.

III. BUTLER, OBJECTIFICATION AND HARM

In Butler, the Supreme Court was called upon to decide whether section 163(8) of the Criminal Code is consistent with section 2(b) of the Canadian Charter of Rights and Freedoms.30 The impugned provision states: “For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.” The Court paid particular attention to “the undue exploitation of sex”. In determining whether materials are obscene in that sense, the Court appeared to suggest that we should look to community standards of tolerance — the test first enunciated in R. v. Brodie31 and later endorsed in R. v. Towne Cinema Theatres Ltd.32 It acknowledged, though, that uncertainty had accumulated around the community standards test. In Towne Cinema, Dickson C.J.C. remarked that the degrading or dehumanizing nature of materials could be treated as a “principal indicator of ‘undueness’”.33 The question was whether this was an independent and freestanding test of obscenity, or whether the degrading or dehumanizing nature of the materials in question necessarily means that they fall outside community standards of tolerance.34

The Court in Butler adopted the latter understanding. Justice Sopinka, writing for the Court, found that material would offend community standards where it was shown that it predisposed persons to act in an anti-social fashion. He stated:

The courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. Harm in this context means that it predisposes persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse. Anti-social conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning. The stronger the inference of a risk of harm the lesser the likelihood of tolerance.35

---

33 Butler, supra, note 12, at 480, citing Towne Cinema, id., at 505.
34 Butler, id., at 483.
35 Id., at 485.
Degrading or dehumanizing materials would frequently, though not invariably, cause this sort of harm to the community.\(^{36}\) In a sense, then, the dissenting judges in Labaye were right when they argued that the Butler Court made reference to harm only to conceptually link the community standards test to the degrading or dehumanizing treatment test.\(^{37}\) This would seem to suggest that the community standards test might be satisfied in cases where the impugned materials are not degrading or dehumanizing or cause no harm at all, but are simply contrary to popular notions of sexual morality. The mere fact that degrading or dehumanizing works necessarily transgress community standards does not, after all, mean that community standards are offended only by those works — there is room for a residual category. The Labaye dissent argued on this basis that nothing in Butler displaced the community standards test for obscenity.\(^{38}\)

The Butler Court’s use of the idea of harm, though, went much further than this. Justice Sopinka rested his decision on the propositions that certain kinds of pornography are neither degrading nor dehumanizing, and that certain kinds of degrading or dehumanizing pornography might nonetheless be harmless.\(^{39}\) It would not be open to a judge to declare such materials “obscene” for the purposes of section 163(8) of the Criminal Code, merely because they offend his or her individual sensibilities or taste. There must be an “intelligible standard”.\(^{40}\) The harm test was meant to provide a non-subjective basis for deciding obscenity cases. It would have been pointless to articulate such a test while simultaneously recognizing a residual category. Moreover, the provision was saved under section 1 of the Charter precisely because it targeted material that “reinfore[d] ... unhealthy tendencies in Canadian society” and “male-female stereotypes to the detriment of both sexes.”\(^{41}\) To say that the provision’s objective was to prevent harm to society, but concede that it also criminalized the publication of harmless materials, would be tantamount to saying that the subsection is overbroad.

After Butler, then, harm was not only a relevant or dominant feature of the community standards analysis; it effectively supplanted that

---

\(^{36}\) Id., at 496-97.

\(^{37}\) Labaye, supra, note 13, at para. 93.

\(^{38}\) Id., at para. 97. See also Brenda Cossman et al., Bad Attitudes on Trial: Pornography, Feminism, and the Butler Decision (Toronto: University of Toronto Press, 1997), at 50.

\(^{39}\) Butler, supra, note 12, at 505.

\(^{40}\) Id., at 490-91.

analysis. And yet there was still a point of ambiguity. As we have seen, the Court used the concept of harm to establish a bridge between the community standards test and the degradation or dehumanization inquiry. The Court plainly thought that, if obscenity means *anything* in a liberal, secular society like Canada, it *must* refer to words or pictures that, by portraying women as things to be used for the sexual gratification of men, fly in the face of our constitutional commitment to substantive equality. Though the Court opted not to *expressly* disavow the community standards test — no doubt to avoid giving the impression that the community standards jurisprudence had simply been swept away — it was necessary to explain how the fact that materials are degrading or dehumanizing matters to that inquiry. Thus, while harm dominates the obscenity inquiry in and after *Butler*, the intuition that Parliament intended to target instrumentalizing treatment — objectification in its most morally problematic forms — is what drove the Court to refer to harm in the first place.

Admittedly, this is not how the Court itself always frames its reasoning. At times, as in Sopinka J.’s discussion of the shifting purpose doctrine, there seems to be a suggestion that harm, and not objectification, is the real target. But in making these claims, the Court was forced to engage in mighty feats of mental gymnastics, arguing that because Parliament had always targeted the corrupting influence of obscene materials on those who consume it, it must likewise have targeted the broader harms it produced in society. And in a sense an individual’s “corruption” *can* be described, albeit loosely, as a kind of harm befalling him or her. Indeed, the term evokes images of a sort of decay or rot — think of Oscar Wilde’s *The Picture of Dorian Gray*, or of references to “the stain of sin” in Dante’s *Purgatorio*. We speak of people (or ourselves) being “damaged” by experiences that have nurtured attitudes or habits of thought that, from our point of view, strike us as real, tangible obstacles to being the sorts of people we want to be. With that in mind, the language of “harm” does not seem altogether out of place. It should be clear, though, that we are talking about a kind of harm very different from that which Parliament was said to have targeted. Before *Butler*, it would not have been necessary to look beyond the corrupting influence of certain kinds of pornography upon the viewer himself. After

---

42 *Butler*, id., at 494.
Butler, the emphasis was repositioned so that the impact on the viewer was significant only insofar as it gave rise to a significant risk that others in the wider community would ultimately suffer harm of their own. Though objectification provided the impetus for introducing harm to the analysis, Butler drew the eye away from it.

Here, we should be careful, if only in the interests of fairness. Butler does not stand for the proposition that some kinds of objectifying attitudes are okay whereas others are not. It only says that the criminal sanction should be limited to cases in which there is a significant risk that exposure to pornographic materials will give rise to anti-social behaviour or attitudes. One can, with no inconsistency, say that the publication of some objectifying materials is harmless, and therefore should not give rise to sanctions, and at the same time say that it is wrongful and to be discouraged. But the Court in Butler does not satisfactorily articulate the distinction between wrongfulness and sanctionability. It does not say what makes some pornographic works objectifying but in benign (or even positive) ways, what makes others objectifying in pernicious ways, and what makes still others worthy of punishment. As a result, the casual reader of Butler could be forgiven for thinking that, so long as objectification is harmless in the narrow sense articulated by Sopinka J., it is morally unproblematic.

This failure to distinguish between wrongfulness and sanctionability, in turn, is tied to our present confusion about the role and value of consent. Because Butler was concerned with the harms flowing from the publication of obscene materials, and not mere possession, the Court needed only to deal with the harms resulting to society. The reasoning employed in Butler, though, was extended to offences of sexual indecency in which harm could conceivably be sustained not just by the wider community, but by the participants themselves. This produced a difficulty of its own. When our concern is the tendency of materials to predispose viewers to adopt objectifying attitudes, the fact that the participants appear to consent to the acts portrayed may make no definitive difference: to see a woman treat herself as a sexual object may only encourage viewers to think of her in that way as well. As Sopinka J. observed in Butler, “[s]ometimes the very appearance of consent makes the depicted acts even more degrading or dehumanizing.”

Later, in Little Sisters, Binnie J. made a similar remark in the course of rejecting

---

45 Butler, supra, note 12, at 479.
claims that it would be inappropriate to apply the harm-based approach endorsed in *Butler* to gay and lesbian pornography:

The potential of harm and a same-sex depiction are not necessarily mutually exclusive. Portrayal of a dominatrix engaged in the non-violent degradation of an *ostensibly willing* sex slave is no less dehumanizing if the victim happens to be of the same sex, and no less (and no more) harmful in its reassurance to the viewer that the victim finds such conduct both normal and pleasurable.\footnote{Little Sisters Book and Art Emporium v. Canada (Minister of Justice), [2000] S.C.J. No. 66, [2000] 2 S.C.R. 1120, at para. 60 (S.C.C.) (emphasis added) [hereinafter “*Little Sisters*”].}

But if we think that consent is not necessarily capable of dignifying sexual acts for *viewers*, then it is not clear why the presence of consent should be determinative when assessing whether there is harm to *participants*. If consent sometimes makes the acts in question *more* degrading or dehumanizing, then the consent of the participant may give us more reason to think that she is being harmed by engaging in them, not less. That conclusion, though, would run up against the intuition that respect for the autonomy of persons requires us to grant them a zone of free choice within which they can consent even to acts that we think damaging. Approaching the matter from the other direction, if there is no harm in people treating themselves as sexual objects, then how can it be harmful for others to see them as sexual objects, and to encourage them to think of themselves in that way, so long as they obtain consent before acting on their attitudes?

*Butler* had already quietly raised this problem in its discussion of the artistic merit defence. Where the portrayal of sex — even degrading or dehumanizing sex — justifiably advances a plot or theme in a work with scientific, artistic or literary merit, the Court held that it cannot be “undue” within the meaning of section 163(8). Justice Sopinka did not suggest that such portrayals of sexual activity must become “harmless” merely because they occur in the context of an artistic work. On the contrary, it seems plain enough that the representations fall outside the obscenity provisions in spite of the fact that they may yet predispose others to anti-social attitudes. That suggests there is more going on in the obscenity prohibition than the targeting of harm; that Parliament was prepared to tolerate some harms for the sake of one or another competing social value. Once we say that, we might think that autonomy, too, could be just such a competing social value.
But we have seen that consent can matter in different ways. When does it matter because it renders objectifying acts morally unproblematic, and when does it serve to license (perhaps inadvisedly) acts that should be discouraged? Without engaging in a more considered study of what makes portrayed acts instrumentalizing, it is difficult to see just what difference consent should make in particular cases. We can see this confusion manifest itself in Labaye.

IV. LABAYE, FUNGIBILITY AND CONSENT

The reasoning in Butler was expressly relied upon by the majority in Labaye. The accused in Labaye had operated a members-only club in which couples and single people would meet each other for group sex. He was charged with keeping a common bawdy-house for the practice of acts of indecency. Ultimately, it fell to the Supreme Court to determine the circumstances under which “indecent” acts could be regarded as criminal behaviour. As we have seen, the majority concluded that criminal indecency must involve harm of a kind and degree that is incompatible with Charter values or other fundamental norms.\(^{47}\) Writing for the majority, McLachlin C.J.C. suggested that conduct could be criminally indecent where it produced one of three types of harm: “(1) harm to those whose autonomy and liberty may be restricted by being confronted with inappropriate conduct; (2) harm to society by predisposing others to anti-social conduct; [or] (3) harm to individuals participating in the conduct”.\(^{48}\) To be sure, the majority stressed that “other types of harm may be shown in the future to meet the standards for criminality established by Butler”.\(^{49}\) Nonetheless, the list is instructive for several reasons.

First, conduct that is essentially private, the majority observed, will generally not give rise to the first type of harm.\(^{50}\) So long as the public’s exposure to the sexual acts in question is carefully controlled, as it ostensibly was in Labaye,\(^{51}\) the majority found that they cannot harmfully confront them with inappropriate conduct. The mere fact that members of the public, not exposed to the conduct in question, are

\(^{47}\) Labaye, supra, note 13, at para. 29.
\(^{48}\) Id., at para. 36.
\(^{49}\) Id.
\(^{50}\) Id., at paras. 42, 47.
\(^{51}\) Id., at para. 65.
offended by the idea that it is happening somewhere, is not to be treated as a harm warranting the criminal sanction.

The second and third harms are, for my purposes here, more interesting. Chief Justice McLachlin, citing Butler, observed: “The second source of harm is based on the danger that the conduct or material may predispose others to commit anti-social acts.” It is not necessary for the Crown to show that the conduct or material in question expressly invites or encourages people to engage in anti-social behaviour. It is enough that the impugned conduct subtly influences the attitudes of members of the public in such a way that they become more likely to think and act in anti-social ways. Thus, the Chief Justice noted, the second type of harm will be made out where the “[c]onduct or material ... perpetuates negative and demeaning images of humanity [that are] likely to undermine respect for members of ... targeted groups and hence to predispose others to act in an anti-social manner towards them”.

In Labaye, the majority quickly concluded that there was no conduct taking place in the accused’s club that was capable of “predisposing people to anti-social acts or attitudes”. Chief Justice McLachlin remarked:

Unlike the material at issue in Butler, which perpetuated abusive and humiliating stereotypes of women as objects of sexual gratification, there is no evidence of anti-social attitudes towards women, or for that matter men. No one was pressured to have sex, paid for sex, or treated as a mere sexual object for the gratification of others. The fact that [the club] is a commercial establishment does not in itself render the sexual activities taking place there commercial in nature. Members do not pay a fee and check consent at the door; the membership fee buys access to a club where members can meet and engage in consensual activities with other individuals who have similar sexual interests. The case proceeded on the uncontested premise that all participation was on a voluntary and equal basis.

A few observations are worth making about this passage. First, the touchstone for the majority appears to be whether the participants being observed have been treated “as objects of sexual gratification”. Whether the conduct in question is harmful turns, to no small extent, on simply

---

52 Id., at para. 45.
53 Id., at para. 46.
54 Id.
55 Id., at para. 67.
56 Id.
whether the participants have *objectified* each other. That in itself suggests that there was an opportunity to learn something about other objectification offences from the Court’s reasoning in *Labaye*. The second point is that, in considering whether the sexual activities in the accused’s club are objectifying, McLachlin C.J.C. placed heavy emphasis on the non-commercial nature of those activities. The mere fact that the participants were not perceived to be paying one another for sex, or engaged in purely financial transactions, was treated as an important reason not to infer that an observer would think of them as sexual objects. Third, the consensual nature of the activities was likewise regarded as an important — perhaps overriding — factor when determining whether the conduct would have a negative impact on the attitudes of observers. In the companion case, *R. v. Kouri*, the majority likewise put the stress on the non-commercial and consensual nature of the sexual activities in assessing whether the second kind of harm would result.\(^\text{57}\)

With respect to the third category of harm, McLachlin C.J.C. again made a number of intriguing remarks. First and foremost, she emphasized “physical or psychological” harm.\(^\text{58}\)

A third source of harm is the risk of physical or psychological harm to individuals involved in the conduct at issue. Sexual activity is a positive source of human expression, fulfilment and pleasure. But some kinds of sexual activity may harm those involved. Women may be forced into prostitution or other aspects of the sex trade. They may be the objects of physical and psychological assault. Sometimes they may be seriously hurt or even killed. Similar harms may be perpetrated on children and men. Sexual conduct that risks this sort of harm may violate society’s declared norms in a way that is incompatible with the proper functioning of society, and hence meet the *Butler* test for indecent conduct under the *Criminal Code*.\(^\text{59}\)

Strikingly, the majority places far less importance on the (non-)commercial nature of the activity in this context than it did when determining whether the second type of harm was imposed. Though McLachlin C.J.C. refers to prostitution and the sex trade, she is talking about the harms associated with being *forced* to provide sexual services for money. There is no suggestion that one harms oneself by *voluntarily* providing those services. This, we may suppose, is tied to a point that the

---


\(^{58}\) *Labaye*, supra, note 13, at para. 48.

\(^{59}\) *Id.*
majority made in the following passage: the presence of genuine (as opposed to merely “apparent”) consent would “generally be significant in considering whether this type of harm is established”. Where consent exists, the majority seems to say, the objectifying nature of commercialized sexual practices becomes harmless — at least vis-à-vis the participants themselves. The significance of consent is hinted at in other aspects of the indented quotation reproduced above. Chief Justice McLachlin mentions the harm that might befall child participants, but of course children would not be able to consent to sexual activities in the first place. The Court in R. v. Jobidon made it clear that consent cannot be a defence to certain kinds of assault; this can explain why the majority emphasizes physical and psychological injury. Ideas of consent and voluntariness take on overwhelming significance in the harm-to-self analysis.

The Labaye majority’s treatment of harm is dissatisfying, not least because it glosses over a number of considerations which one would have thought obviously relevant to any discussion of objectification in the sex club context. Recall Nussbaum’s observation that objectification may manifest itself in an attitude towards others as “ fungible” — as interchangeable with other persons or inanimate objects. When we act as though a woman’s unique personality or characteristics are irrelevant — as if she is valuable only because she possesses characteristics shared by any other woman — we at least risk suggesting that she is essentially disposable. In an environment like the accused’s club in Labaye, where relative strangers engaged in more or less anonymous sexual encounters, it is open to us to wonder whether they have reduced each other to a set of interchangeable body parts. Yet the majority in Labaye says nothing about the problems of fungibility.

This is not to say that, had the Labaye majority addressed fungibility head-on, it would necessarily have found anything morally problematic with the sexual encounters taking place in the club. I have said that treating others as fungible may entail disposability, but I would hesitate to say that it must. To regard human beings as fungible might be to adopt an equalizing or democratizing attitude; to see all persons as equally worthy of respect insofar as they are all autonomous moral agents. Perhaps one can see others as fungible and yet celebrate the autonomy

---

60 Id., at para. 49.
62 Nussbaum, supra, note 19, at 264.
63 Id., at 286-87.
and personality of each of them. Something like this view has been
articulated by the “free love” movement, “swinger culture”, and by
writers who celebrate the bathhouse culture in the gay community. 64

But this should not be accepted uncritically. Even if an attitude to-
wards people as fungible is equalizing in the thin sense that it entails the
view that persons are more or less the same, we may chafe at the idea
that this is all that a commitment to equality requires. We may fear that
this is an empty equality, one that reduces human beings to the sum total
of their body parts, effacing their personalities, and stripping away
everything about them that imbues them with dignity. 65 Addressing
Richard Mohr’s claim that gay bathhouse culture expresses a “demo-
cratic spirit”, Nussbaum remarked:

[T]he suspicion remains that there may after all be some connection
between the spirit of fungibility and a focus on ... superficial aspects of
race and class and penis size, which do in a sense dehumanize, and turn
people into potential instruments. For in the absence of any narrative
history with the person, how can desire attend to anything but the
incidental, and how can one do more than use the body of the other as a
tool of one’s own states? 66

If these concerns resonate when we are talking about sexual relation-
ships between people of the same gender, we should be all the more alert
to concerns of disposability — to the suggestion that people may be
consumed and discarded like so many junk food wrappers — when the
relationships are between men and women, with all the skewed power
dynamics they frequently entail. Again, my point is not that the sexual
activities at issue in Labaye were instrumentalizing, that they reduced
human beings to things to be used. It is that the majority in Labaye
missed an opportunity to say something important about what it means to
engage in objectification; that this was, we might say, a “teachable
moment” for Canadians about what gender equality is.

In some respects, the majority did indeed take up the challenge. The
suggestion that it could harm onlookers to watch commercialized sex —
to watch a person’s body and sexuality turned into a sellable commodity
— evokes Nussbaum’s point that one can objectify another person by

64 Id., at 286–88.
65 Thus, in Erica Jong’s Fear of Flying (New York: Signet, 1995 [1973]), the narrator was
ambivalent towards anonymous sex and the free love culture.
66 Nussbaum, supra, note 19, at 287.
treating her as property. But having said, in effect, that the commodification of another person’s body harms society by predisposing observers to see others as ownable things, McLachlin C.J.C. failed to observe that treating others as fungible can amount to treating them as if they are disposable consumer goods. That being the case, what is the moral difference between treating human beings as property, and treating them as fungible?

Ultimately, the majority may have thought it unnecessary to engage in a more careful and sustained analysis of objectification because it was able to fall back on the consent of the participants. Insofar as we are concerned about the harm of predisposing observers to engage in antisocial acts, the issue is presumably not the actual consent of participants, but their apparent consent. The majority expressly observed that participants do not “check consent at the door”, meaning that they would need to obtain consent from each sexual partner. It is worth remembering that, in Ewanchuk, the Supreme Court held that the defence of honest but mistaken belief in consent, in sexual assault cases, would not be available merely because consent was not expressly refused. That aspect of Ewanchuk was grounded in the proposition that someone who takes consent for granted possesses the mens rea for sexual assault; one shows a minimum degree of respect for the autonomy of one’s partner by taking active steps to elicit a clear statement of consent. In a context where sexual activities are no longer private in the strict sense, the Labaye majority may have proceeded on the basis that participants would take special care to elicit express consent from each other and that it would be apparent to observers.

But even if it was reasonable for the majority to proceed in that way, it is not intuitively obvious that harm in the second sense would not result. That people treat themselves as commodities to be bought and sold may make an observer more dismissive of their autonomy and dignity, not less — it may suggest (however wrongly) that consent ought to be an easy thing to obtain, and that it is appropriate to exert social pressure on women who do not readily provide it. Recall the remarks in both Butler

---

67 Id., at 264. For arguments against prostitution that are grounded in concerns of commodification, see Margaret Jane Radin, “Market-Inalienability” (1987) 100 Harv. L. Rev. 1849; Elizabeth S. Anderson, “Is Women’s Labor a Commodity?” (1990) 19 Phil. & Pub. Affairs 71. But see Nussbaum’s discussion in “Bodily Services”, supra, note 26, in which she rejects suggestions that prostitution inherently commodifies women’s bodies and sexuality in a morally problematic way.

68 Labaye, supra, note 13, at para. 67.

69 See Ewanchuk, supra, note 4, at para. 46.
and *Little Sisters* that the appearance of consent may make sexual acts more, not less, degrading or dehumanizing. To make this point is not to deny the importance of consent. Quite the contrary, it underscores just what it is that often makes consent important — *i.e.*, the fact that consent often serves to *license* the use of oneself as an instrument, not to make it something other than instrumentalizing. If our concern is not just to ensure that men obtain consent from women, but to avoid objectifying them in morally problematic ways in the first place, a mere focus on consent will not suffice. We must make it clear that merely consensual sexual conduct can still be wrongful, and that it should be discouraged, even if it should not be subject to criminal sanctions in a liberal democratic society.

For a similar reason, the focus on consent in the majority’s analysis of the third kind of harm is likewise wrong-headed. A respect for sexual autonomy may require us to allow men and women to objectify themselves — and to consent to their objectification by others — to some extent. It hardly follows from that modest premise that they should be encouraged to think of themselves in base and degrading terms. If we think that treating others as fungible is instrumentalizing at its core, and as such is inconsistent with robust notions of equality, then it is surely open to the courts to say so, even as it permits people to do what they will.

V. CONCLUSION

The changes to sexual assault law over the past 30 years have been part of a broader public conversation about what it means for women to be treated as equals. That conversation is about more than harm and consent. There is a simple reason for that: respect and dignity require more than not causing women physical or psychological pain, more than getting their permission to degrade them. The Charter was to some extent a conversation-starter but, as Butler and Labaye suggest, we have trouble knowing what to say about ideas of objectification and dignity once we try to think beyond the bare minimum of human decency. In that spirit, the Supreme Court might adopt a greater leadership role. To take equality seriously — really seriously — we need all the help we can get.

---

70 See *supra*, notes 45-46 and accompanying text.