Words that Wound and Laws that Silence: Offence, Harm, and Legal Limits on Discriminatory Expression

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TOPIC AND IMPORTANCE

In the recent *Ward v. Québec* case, the Supreme Court of Canada ruled that a comedian's jokes ridiculing the appearance of a boy with disabilities were not discriminatory. The Court argued that free expression (the right enjoyed by all Canadians to hold opinions and share ideas without interference) should only be limited to prevent certain harms, not just to avoid causing offense.

However, even after the *Ward* decision, there is an ongoing, complex debate about how the law should balance the right to free expression and preventing discriminatory speech. This article analyzes when expression is discriminatory and should be legally restricted. It suggests that there are harms other than those discussed in *Ward* that Canadian law and society should consider when trying to strike that balance.

MAIN ARGUMENTS

The Court in *Ward* took a "perpetrator-focused" approach to defining expression as discriminatory, which looked at the comedian's own intent to mock the disabled boy because of the boy's public celebrity status, not because boy had a disability. This article argues that the Court should have taken a "victim-focused" approach, which is the correct approach under Canadian anti-discrimination law, focusing on whether a person's characteristic (like having a disability) explains their mistreatment regardless of the perpetrator's intentions. This approach attempts to address social inequality faced by historically marginalized groups rather than focusing on the moral blameworthiness of those who perpetrate discrimination (i.e., how culpable they are for their behaviour).

Ward addressed the tension between free expression and equality by ruling that the only reason to prohibit discriminatory expression is to prevent the harm that would come by inciting others to vilify and discriminate against the targeted individual or group, not to just prevent offense. This article also argues that other harms could justify limiting

discriminatory expression under anti-discrimination laws. One example of these various harms may be severe psychological and emotional damage to a victim of discrimination targeted because of the social group to which they belong. Like other areas of law, this would permit the courts to focus on the "grave" harm caused by discriminatory speech, as opposed to the "recruitment harm" the *Ward* majority relies on, where hate speech must lead to discrimination by third parties to justify restricting freedom of expression. Further, the challenge of distinguishing serious harm from mere offense can be managed by thinking about how a "reasonable person" would interpret the expression.

CONCLUSION AND ADDITIONAL CONSIDERATIONS

Though the majority in *Ward* endorsed a perpetrator-focused approach to defining certain kinds of expression as discriminatory, a victim-focused approach would allow courts to recognize additional relevant harms caused by discriminatory speech. This would not be without precedent, and it would permit the courts to acknowledge the broad and often sweeping impacts discriminatory speech can have on individuals' and groups' mental and physical well-being.