

WORDS THAT WOUND AND LAWS THAT SILENCE: OFFENCE, HARM, AND LEGAL LIMITS ON DISCRIMINATORY EXPRESSION⁺

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ABSTRACT

This article analyzes when expression is discriminatory and when discriminatory expression should be legally prohibited. It reaches theoretical conclusions about these matters by examining the recent *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)* judgment of the Supreme Court of Canada. In *Ward*, the Court determined that a comedian's jokes that ridiculed the appearance of a disabled boy did not constitute discriminatory expression because of disability. In any event, there was no reason to prohibit them under Quebec's *Charter of Human Rights and Freedoms* that could outweigh the countervailing reason to protect the comedian's freedom of expression. We argue that there are

⁺ Our title borrows from Richard Delgado's pioneering discussion of discriminatory expression. See Richard Delgado, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling" (1982) 17:1 Harv CR-CLL Rev 133.

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Citation: (2025) 70:1 McGill LJ 95 — Référence : (2025) 70:1 RD McGill 95

two weaknesses in the Court's opinion. First, the Court adopted a conception of how to define expression as discriminatory expression that is inconsistent with standard approaches to this issue in law and the philosophical literature on the ethics of antidiscrimination. Second, while the Court held that only the imperative to prevent harm gives a reason to prohibit discriminatory expression, as opposed to preventing offence, it relied on an impoverished conception of harm that was restricted to the societal harm of hate speech. There are reasons to prohibit discriminatory expression to prevent other types of harms.

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RÉSUMÉ

Cet article analyse les conditions dans lesquelles une expression peut être qualifiée de discriminatoire et les circonstances justifiant son interdiction légale. Il s'appuie sur l'arrêt récent *Ward c. Québec (Commission des droits de la personne et des droits de la jeunesse)* rendu par la Cour suprême du Canada. Dans cette affaire, la Cour a conclu que les propos humoristiques ridiculisant l'apparence d'un jeune garçon en situation de handicap ne constituaient pas une expression discriminatoire fondée sur le handicap. En tout état de cause, elle a estimé qu'aucun motif ne justifiait leur interdiction en vertu de la *Charte des droits et libertés de la personne du Québec* pouvant primer sur l'impératif fondamental de protection de la liberté d'expression. Nous soutenons que cette décision repose sur deux faiblesses majeures. D'une part, la Cour adopte une conception restrictive de l'expression discriminatoire, en décalage avec les approches généralement admises tant en droit qu'en philosophie morale de l'antidiscrimination. D'autre part, en limitant la justification d'une interdiction aux seuls préjudices sociétaux résultant des discours de haine, la Cour s'appuie sur une conception réductrice du préjudice, écartant d'autres formes de torts pouvant néanmoins légitimer des restrictions à l'expression discriminatoire.