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Addressing the Wrongs in Ward:
Towards a Harm Reduction Approach to Discriminatory Speech in Canada

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I. INTRODUCTION

During her 2017 Bauer Lecture, Justice Rosalie Abella relates the ideas of justice and democracy to an imperative of understanding. She states, “for democracy to work, we must never forget how the world looks to those who are vulnerable.”¹ The regulation and legal line-drawing surrounding discriminatory speech is a locus of tension where the friction between vulnerability and freedom complicates adjudication. These tensions culminated in the 2021 *Ward v Quebec* decision.²

This paper aims to examine the majority decision in *Ward* and to illuminate the foundational underpinnings for recognizing discrimination flowing from discriminatory speech acts. It will suggest that *Ward* was a missed opportunity to protect human dignity and to enshrine substantive equality. Considering the tensions between freedom of expression and protection from discrimination in a free and democratic society, this paper argues that *Ward* obscured the judicial interpretation of dignity and failed to effectively recognize the dignitary harms which flow from discriminatory speech — notably in the context of people with disabilities.

II. WHAT IS THE HARM? ASSESSING THE RELATIONSHIP BETWEEN DIGNITY AND DISCRIMINATORY SPEECH

A significant body of hate speech literature invokes the idea of human dignity as the most effective way to characterize how speech can corrode welfare and invade rights.³ Robert Mark Simpson posits that this is because dignity is a moral concept that is especially associated with considerations of rank, status, and hierarchy.⁴ A person’s dignity is not just a matter of being treated well or poorly; it is a matter of how one is treated in light of prevailing community attitudes

¹ Justice Rosalie Silberman Abella, “Freedom of Expression or Freedom from Hate: a Canadian Perspective” (2018) 40:2 *Cardozo L Rev* 503 at 522.

² *Ward v Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43 [*Ward*].

³ Robert Mark Simpson, “Dignity, Harm, and Hate Speech” (2013) 32:6 *Law & Phil* 701 at 707–708.

⁴ *Ibid* at 708.

– including their own attitudes about their worth or standing relative to others and to the community as a whole.⁵ Accordingly, a person’s dignity is not a mere Kantian aura; it is their social standing that “entitle[s] them to be treated as equals in the ordinary operation of society.”⁶

In this way, speech and discrimination are deeply intertwined. Colleen Sheppard highlights how the very essence of discrimination moves beyond isolated individual stories of betrayal and abuse by connecting them to patterns of group-based exclusion and harm.⁷ Canada’s commitment to substantive equality⁸ requires “embrac[ing] the voices and stories of exclusion and discrimination,” and the harm which grants them empirical validity.⁹

Harm can and does result from discriminatory speech. Discriminatory speech infringes the dignity of its targets by undermining their *assurance* regarding the security of their dignitarian status.¹⁰ This idea is reflected in L’Heureux-Dubé J’s characterization of dignity as necessarily two-dimensional: internal and external, bearing both a subjective and objective component.¹¹

The Court understands internal dignity as a person’s perception of their intrinsic worth as a human being in juxtaposition with others which “is harmed by unfair treatment premised upon personal traits or circumstances.”¹² As such, when an individual or group is subject to treatment

⁵ *Ibid.*

⁶ Pia Riggiozzi, “Everyday Political Economy of Human Rights to Health: Dignity and Respect as an Approach to Gendered Inequalities and Accountability” (2021) 26:5 *New Pol Econ* 735 at 737.

⁷ Colleen Sheppard & Sarah Westphal, “Narratives, Law and the Relational Context: Exploring Stories of Violence in Young Women’s Lives” (2000) 15:2 *Wis Women’s LJ* 335 at 357.

⁸ Canada’s understandings of discrimination and equality underwent significant shifts by the 1980s, with the recognition of substantive equality as the “foundational premise” and “animating spirit” of the Court’s s. 15 analyses. See e.g. *Fraser v Canada (Attorney General)*, 2020 SCC 28 at paras 42, 134.

⁹ Colleen Sheppard, *Inclusive Equality: the Relational Dimensions of Systemic Discrimination in Canada* (Montreal: McGill-Queen’s University Press, 2010) at 66–67.

¹⁰ Simpson, *supra* note 3 at 718.

¹¹ *Quebec (Public Curator) v Syndicat national des employés de l’hôpital St-Ferdinand*, [1996] 3 SCR 211 at para 101 [*St-Ferdinand*]. This two-dimensional approach to dignity was reaffirmed by the Supreme Court of Canada, see *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 53 [*Law*].

¹² *Law*, *supra* note 11 at para 53. See also Christopher McCrudden, “Human Dignity and Judicial Interpretation of Human Rights” (2008) 19:4 *Eur J Intl L* 655 at 691.

which denigrates their self-respect, self-worth, and empowerment, it can subject them to dignitary harm.

The Court also recognizes the external components of human dignity, which “is harmed when individuals and groups are marginalized, ignored, or devalued [...] within Canadian society.”¹³ Jeremy Waldron builds on this idea, qualifying dignity as extending beyond one’s subjective sense of personal worth towards one’s objective social standing.¹⁴ Contemporary understandings of dignity require that honour and esteem be portioned out equally, insofar as all people occupy an equal rank as members of a shared moral community.¹⁵

Understanding dignity as two-dimensional blossoms into an understanding of both the internal and external components of dignitary harm which discriminatory speech can trigger.

III. HOW DID WARD ADDRESS THESE HARMS?

Having established the harms flowing from discriminatory speech, I will move to analyzing how the courts have assessed, addressed, and responded to these harms through *Ward v Canada*.

1. Overview of Ward’s Factual and Legal Background

In *Ward*, the Court had to contend with reconciling the right to freedom of expression with the right to safeguard one’s dignity.

At the time, Jérémy was a minor and a student in secondary school.¹⁶ He was born with Treacher-Collins Syndrome, which caused him certain physical malformations and severe hearing impairments. Starting in 2005, Jérémy established a successful singing career and performed for high-profile celebrities.¹⁷

¹³ *Ibid.*

¹⁴ Jeremy Waldron, *The Harm in Hate Speech* (Cambridge: Harvard University Press, 2014) at 4. See also Chris Bousquet, “Words That Harm: Defending the Dignity Approach to Hate Speech Regulation” (2022) 35:1 Can JL & Jur 31 at 36; Stephen L Darwall, “Two Kinds of Respect” (1977) 88:1 Ethics 36 at 38.

¹⁵ Simpson, *supra* note 3 at 708–709.

¹⁶ *Ward*, *supra* note 2 at para 9.

¹⁷ *Ibid* at para 10.

In 2007, Mike Ward began posting videos on his website mocking Jérémy's disability. He called Jérémy the "ugly guy who sings," and "can't control what comes out because [his] mouth doesn't close all the way".¹⁸ Jérémy was 10 years old.

Between 2010 and 2013, Ward's performances featured his routine *The Untouchables*, which purportedly made fun of society's "sacred cows". He made the following comments:

You remember little Jérémy, y'know, the kid with the subwoofer on his head? [...] he's still not dead! [...] he doesn't die [...] I saw him with his mother at a Club Piscine. I tried to drown him [...] couldn't do it, he's unkillable. I went online to see what his illness was. You know what's wrong with him? He's ugly!¹⁹

Around 135,000 tickets to the performances, as well as 7,500 DVD copies, were sold.²⁰ A recorded version of the show was also publicly accessible.²¹ Jérémy learned about the videos when he was 13. His peers tormented him, repeating Ward's jokes. The impact during his formative years was substantial: Jérémy questioned whether his life had any value, felt lost, isolated, and experienced repeated suicidal thoughts.²²

In 2012, Jérémy's parents filed a discrimination complaint against Ward through the Quebec Human Rights Tribunal,²³ which concluded that Ward's comedy infringed Gabriel's right to safeguard his dignity, honour, and reputation, protected under s. 4 of the Quebec *Charter*, as well as his right to equality under s. 10.²⁴

Ward appealed the decision to the Quebec Court of Appeal, which upheld the Tribunal's findings of discrimination.²⁵ Ward then appealed to the Supreme Court of Canada.

¹⁸ *Ibid* at para 112.

¹⁹ *Ibid* at para 123.

²⁰ *Ibid* at para 124.

²¹ *Ibid*.

²² *Ibid* at para 125.

²³ *Commission des droits de la personne et des droits de la jeunesse (Gabriel et autres) v Ward*, 2016 QCTDP 18.

²⁴ *Ibid*. See also *Charter of Human Rights and Freedoms*, CQLR c C-12, s 10. The Tribunal ordered Ward to pay Jérémy \$35,000 in damages, see *ibid* at para 175.

²⁵ *Ward v Commission des droits de la personne et des droits de la jeunesse (Gabriel et autres)*, 2019 QCCA 2042.

The Court delivered a divided judgment, with the majority overturning previous decisions and qualifying Ward’s conduct as falling short of the legal standard for discrimination. It found that although Ward’s jokes subjected J r my to differential treatment, he was only selected based on his status as a public figure. Additionally, Ward’s comments did not infringe J r my’s dignity as they “did not incite the audience to treat Mr. Gabriel as subhuman.”²⁶ With that, the Court dismissed the previous decisions, absolving Ward of legal liability.

2. Wrongs in the Court’s Conception of Dignity

I suggest that the Court dismissed the multiple dimensions of dignity affirmed in Canada and Quebec’s jurisprudence.

Bombardier confirms that provincial human rights statutes must be subject to a “liberal, contextual and purposive interpretation” with any doubts being “resolved in keeping with the intent of the *Charter*.”²⁷ However, the majority in *Ward* attempts to justify an unjustly strict application of the *Charter*. The Court sought to ensure that the right to safeguard one’s dignity is invoked only against conduct that involves a “denial of their worth as a human being.”²⁸ According to the majority, “the right to the safeguard of dignity is a shield against [...] interference that does no less than outrage the conscience of society.”²⁹

Through likening the right to safeguard one’s dignity in the context of discriminatory speech which caused dignitary harm to a mere “right not to be offended”,³⁰ the Court unjustifiably restricts its understanding of human dignity. It dismisses established jurisprudence,³¹ which recognizes the internal and external dimensions of dignity – negating the internal component.

²⁶ *Ward*, *supra* note 2 at para 108.

²⁷ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier A ronautique Centre de formation)*, 2015 SCC 39 at paras 30–31.

²⁸ *Ward*, *supra* note 2 at para 58.

²⁹ *Ibid*.

³⁰ *Ibid* at para 82.

³¹ See e.g. *St-Ferdinand*, *supra* note 11.

The right to safeguard one’s internal dignity extends far beyond one’s right not to be offended; it relates to one’s identity in relation to the potential for social exclusion. Sarah Schindler posits that when certain groups of people are intentionally kept out of or made to have difficulty accessing certain parts of a community through physical, social, or psychological exclusion, it “limits their freedom and harms their dignity.”³² Individuals who are exposed to discrimination – including small, repetitive, and even unconscious acts – understand themselves as socially excluded.³³

The Court’s decision also points to a wrongful valorization of a recourse in defamation for claims of discriminatory speech. By emphasizing that Jérémy could have brought an action in defamation,³⁴ the Court misconstrues the harm stemming from discriminatory speech: harm negating one’s dignity. An action in defamation is designed to protect a person’s reputation from unjustified and untruthful attack, with its foundations stemming from the common law “preoccupation with reputation and honor.”³⁵ Discriminatory speech, on the other hand, depends on an undue emphasis placed on a distinguishing characteristic of the person which is given special weight under s.10 of the *Charter*.³⁶ These characteristics are protected since they relate to the heart of a person’s identity, and are often linked to birth, background, or how a person self-defines.³⁷ When discriminatory speech is uttered, it intends to denigrate the target to a lower social standing uniquely due to their protected characteristic.

³² Sarah Schindler, “Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment” (2015) 124:6 Yale LJ 1934 at 2016–2017.

³³ Katie Duke, “Calling a Racist a Racist: A Case for Reforming the Tort of Defamation” (2016) 37 Windsor Rev Legal Soc Issues 70 at 71.

³⁴ *Ward*, *supra* note 2 at paras 30, 100, 113. The Court affirms that a “discrimination claim is not, and must not become, an action in defamation.”

³⁵ Duke, *supra* note 33 at 75–76. Defamation relies on a characterization on the veracity of the spoken comments, or on the slander that motivates their dissemination, see *Prud’homme v Prud’homme*, 2002 SCC 85 at para 36.

³⁶ *Mboula Lebala v Procureur général du Québec (Ministère de la Sécurité publique)*, 2022 QCTDP 11 at para 62.

³⁷ *Ibid* at para 63.

The Tribunal, in *Lebala*, articulates this principle in relation to human dignity, stating that in cases of discriminatory speech, “it is not the person's reputation that is affected, as would be the case with defamatory remarks: their very identity is used without reason to attack, belittle or discredit [them].”³⁸ Classifying discriminatory speech as warranting a recourse in defamation perverts the very idea of defamation. The Court has confirmed, through *Bou Malhab*, that an action in defamation may not be the appropriate recourse in cases concerning racism or discrimination.³⁹ As a result, it would be inappropriate to grant recourse to discriminatory speech under a defamation suit. The infringed right must be recognized as what it is: human dignity.

3. Wrongs in the Court’s Conception of Dignitary Harm

The Court’s curtailing of a broader, contextual analysis of discrimination negates the dignitary harm resulting from discriminatory speech. The majority found that “even if repugnant and offensive, expression that did not incite abhorrence, delegitimization or rejection did not risk causing socially harmful effects such as discrimination.”⁴⁰ In this qualification, the Court establishes that speech short of hate does not cause dignitary harm to a reasonable person.

This analysis incorrectly bars a component necessary to understand harm stemming from speech: context. Ward’s target was not an objective reasonable person. The target was a teenage boy with a disability who was rendered socially isolated and contemplating suicide.

Wilson J writes, “[r]eal lives [...] should not only be taken seriously but should be regarded as primary in interpreting constitutional guarantees which impact [...] equality.”⁴¹ Considering

³⁸ *Ibid* at para 65.

³⁹ *Bou Malhab v Diffusion Métromédia CMR inc*, 2011 SCC 9 at para 94.

⁴⁰ *Ward*, *supra* note 2 at para 73.

⁴¹ The Honourable Bertha Wilson, “Women, the Family and the Constitutional Protection of Privacy” (1992) 17:1 Queen’s LJ 5 at 13.

these real-life implications requires understanding the particularities of dignitary harm – in this instance, the ways in which it is intertwined with disability.

A person’s disability results from the interaction between persons with impairments and attitudinal and environmental barriers which hinder their full participation in society on an equal basis with others.⁴² Disability is a construct resulting from their impairment combined with their environment which, if unaccommodated, presents limitations to that person due to unjust social arrangements.⁴³ A person’s identity is equally inseparable from their disability.⁴⁴ If we are to understand disability as intimately tied to a person’s identity, we must also understand it as linked to their dignity.

The majority holds that Ward selected Jérémy as a target not because of his disability, but because of his status as a celebrity.⁴⁵ This analysis has no basis in law; the Court’s jurisprudence confirms that the impact of conduct is what matters, not the intention.⁴⁶ It also has no basis when considering the dignitary harms flowing from Ward’s comments – which uniquely attack Jérémy’s disability. The dissent notes that Jérémy’s celebrity status and disability “cannot be artificially severed to immunize Mr. Ward’s comments from human rights scrutiny.”⁴⁷ The Court’s reasoning, void of meaningful engagement with the context of disability, undermines its commitment to substantive equality.⁴⁸

IV. CONCLUSION

⁴² *Convention on the Rights of Persons with Disabilities*, UNGA, 61st Sess, UN Doc A/RES/61/106 (2006) GA Res 106 (entered into force 3 May 2008).

⁴³ Caroline Harnacke, “Disability and capability: exploring the usefulness of Martha Nussbaum’s capabilities approach for the UN disability rights convention” (2013) 41:4 *JL Med & Ethics* 768 at 773.

⁴⁴ Shaheen Shariff et al, “What is the Cost of Free Speech for Entertainment? A Missed Opportunity by the Supreme Court of Canada to Reduce Offensive Speech and Protect Marginalized Youth” (2022) 31:1 *Educ & LJ* 25 at 39.

⁴⁵ *Ward*, *supra* note 2 at para 12.

⁴⁶ *Ibid* at para 134.

⁴⁷ *Ibid* at para 148.

⁴⁸ Sheppard, *supra* note 9 at 66.

In this paper, I have outlined the idea of human dignity as the foundational underpinning for recognizing discrimination flowing from discriminatory speech. Indeed, *Ward* was a missed opportunity to protect human dignity, enshrine substantive equality, and recognize the dignitary harms which flow from discriminatory speech. Despite the tensions between freedom of expression and protection from discrimination, we must remember Justice Abella's words on never forgetting how the world looks to those who are vulnerable.⁴⁹

⁴⁹ Abella, *supra* note 1 at 522.