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THE DIRECT VOICE IN LEGAL DISCUSSIONS ON EQUALITY: AN ESSAY

BRUCE MACDOUGALL[†]

I. THE DIRECT VOICE

There are certain areas of law where it assists a scholar (and perhaps to an extent a lawyer) to have an overtly and directly personal stake in the legal discussion or debate in which he or she engages. When engaging in such a discussion in this personal way, the participant uses what I call a “direct” voice. To be distinguished from this type of participant is a person who, while interested intellectually or politically, does not have the same personal stake in the outcome of the discussion or debate. This person has what I call an “indirect” voice; in fact, in most legal discussions, most participants have indirect voices. Legal discourse is historically characterized by this detached perspective. The indirect voice is the ordinary role for both the lawyer and the scholar in legal debates and discussions.

In this essay, I reflect on the advantages and disadvantages of the direct voice. I explore some of the unrealistic assumptions associated with that voice and the consequent limitations on the voice. I consider, too, how the role and even the need for a direct voice changes as the discussions in which it participates conclude or the context in which the discussions occur alter.

This categorization of voice had an impact on how I personally have contributed to discussions on certain legal issues and, indeed, whether I even entered the discussion in the first place. For example, in my contributions on the law and sexual orientation, I have used a direct voice.¹ I will reference that

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¹ See e.g. Bruce MacDougall, *Queer Judgments: Homosexuality, Expression and the Courts in Canada* (Toronto: University of Toronto Press, 2000); Bruce MacDougall, “A Respectful Distance: Appellate Courts Consider Religious Motivation of Public Figures in Ho-

context most in this essay. On the other hand, in my contributions on secured transactions law, for example, I have used an indirect voice. The use of different voices in different contexts or discussions has a rationale. In topics where I contribute to discussions on contract law or secured transactions law, it is irrelevant whether I have a personal stake in the outcome of the legal debate. A personal stake does not usually add weight to my contribution. So, for example, a discussion on what the definition of “purchase money security interest” ought to include in the *Personal Property Security Act*² is not assisted by virtue of the fact that I have arguably held or hold such an interest. In fact, my direct voice might not have as strong an impact in this discussion if others assume I have a vested financial interest in the outcome. In such a discussion, an academic ought to be placed as neutrally as possible and not be perceived as having vested interests in the outcome. Neutrality can bring a gravitas to the indirect voice and so to the arguments it makes.

That will be true too of many contracts debates in which I engage. At the moment, for example, I am doing a great deal of research into the doctrines of estoppel. Here, an indirect voice is appropriate. Indeed, it is hard to imagine how, outside a very particular fact context, any person could have a direct voice on such a topic. In a few contracts issues, however, there is an advantage to a direct voice. So, for example, in consumers’ rights issues, the fact that the speaker is a consumer—or perhaps not a non-consumer—might be thought to give weight to particular arguments. Here, where the interests of a particular class of individuals are being discussed, the direct voice can further an argument. If it were known that I, the participant in the discussion, were a major investor or a large business operator, it might negatively affect the weight my voice would be given. On topics such as this, however, the audience will likely assume that the speaker has some sort of direct voice since the class of consumer is a sort-of default class by virtue of numbers.

On the other hand, when I contribute to a discussion on equality issues involving gays and lesbians, the fact that I identify with that category of society may add weight to my argument. Unlike in the discussions on the pur-

mosexual Equality Discourse—The Cases of *Chamberlain* and *Trinity Western University*” (2002) 35 UBC L Rev 511.

² RSBC 1996, c 359, s 1(1).

chase money security interest or the doctrines of estoppel, a neutral or indirect voice is not (necessarily) perceived as better or weightier. In fact, a certain skepticism might meet a voice perceived as neutral or that of an “outsider.”

II. WHEN A DIRECT VOICE MATTERS

Why, whether it is the class of consumers or the class of gay men, should a direct voice help in terms of the weight of the participant’s argument? Where the argument one is making is for a class that has been historically disadvantaged and not-heard-from in discussions or debates directly affecting that class, the direct voice assists with the position that there is true or authentic engagement with the topic by the speaker. It also helps shelter the speaker from accusations or mere assumptions that the content of what is being spoken is infused with the assumptions and prejudices of the advantaged and historically-heard-from class. Given that so much legal discussion in recent times has been on topics related to the disadvantaged and historically-not-heard-from, direct voices have become more commonplace and almost the norm on many legal issues.

The direct voice in rights arguments is particularly important because the audience tends not to expect arguments in this area to be “balanced.” While a contribution to a given discussion relating to contracts will creditably present arguments for and against, say, the value of past consideration, it is surely not logical to expect a direct-voice contributor to a discussion about women’s rights, for example, to present arguments both for and against the granting of such rights. Another voice with a different perspective could often best present the contrary arguments. This other voice could be a different direct voice (e.g. a woman with a non-feminist perspective) or an indirect voice. It is simply awkward to expect a person entering such a discussion to present balanced, objective arguments. In this way, academic discussion about such issues mimics to a certain extent the form of discourse in a common law judicial proceeding, with the two sides expected to present only their own subjective positions and not some overview taking into account the other side. Traditional academic discourse tends to be more along the lines of the inquisitorial continental approach with the judge engaging in a role of investigating and reporting on both sides of an issue.

A prerequisite for the utility of a direct voice, however, is a basic starting proposition that the class for which the direct voice speaks ought to be engaged more meaningfully in the law (and society). So, for example, a violent criminal, a pedophile or a traitor is unlikely to be better heard and be given greater weight in a discussion about those legal and social issues by identifying with groups made up of people (or organizations) with those characteristics. While it is undoubtedly accepted that members of such groups are disadvantaged in a broad sense and have historically not been heard from, it is the case that society (however defined) is simply not ready to consider such direct voices as contributing to the debates on point in a way that has much weight. In fact, such direct voices are quite likely to be dismissed or given very little weight in a discussion the outcome of which will directly affect them.

Largely, then, direct voices contribute best or most effectively when there is some momentum already in place in terms of sympathy towards the outcome they seek relating to issues that directly affect them. So, direct voices that would once not have been heard from with any weight at all may become weightier with time. For example, while violent criminals are likely still in the category that is beyond the pale in terms of weight given to their direct voices, certain other “criminal” direct voices might well be usefully and constructively engaged in a given discussion. So, the direct voices of drug users or sex trade workers might be valued in the legal discussion on issues in which they have a vested interest. That is because there is already some momentum in place to decriminalize certain activities in which they are implicated or some sense that the criminal laws have “got it wrong” in the way in which they impact on the members of these groups.

Direct voices might well even be involved in triggering the momentum that leads to the eventual valuing of such voices. At the outset, however, it is a gamble at best to assume that any particular value will be given to such voices, at least in a legal discussion. It is just as likely that hostility or ridicule will meet their voices and contributions. This phenomenon is an example of the idea that the law must necessarily follow the lead of society: A legal argument will not succeed unless society is already (at least somewhat) inclined to have it succeed.

A further constraint on value being attributed to a direct voice will arise when there is an assumption that the group for which the person speaks is in

fact not an excluded, denigrated, oppressed, or historically-not-heard-from group at all, but quite the contrary. Indeed this is arguably the situation for the case of the consumer mentioned above, the consumer being constructed as “every-person” and so perhaps not needing a direct voice. Likewise, a middle-class direct voice might be treated as unnecessary for a participant’s contribution to have weight when making a majoritarian argument. Further analysis, however, might well reveal that, like the class of women, the middle class does not in fact have the impact and clout its numbers warrant and that myths perpetuate. Perhaps it is in fact disadvantaged and historically-not-heard-from. So, a direct voice might add weight, but preliminary work would have to be done to convince others that a direct voice does indeed bring such weight. For another direct voice—for example, the gay or lesbian direct voice—this “preparatory” exercise, laying the groundwork for the acceptance of the idea that a direct voice should have added weight, is probably not necessary. Some groups might, in a sense, move in a reverse direction so that, while direct voices at one time might not have been thought useful or necessary, they might become so over time. Thus, a racial, ethnic or economic “majority” can move into minority status in terms of power. That might be so, for example, with whites in Zimbabwe or even South Africa. Historically they had the majority of power and so their direct voices carried little or no weight in terms of equality discussions. Now, the opposite might be true. Such a reversal might arguably be happening today in Canada in terms of members of traditional religious groups.

The group with which I identify as speaking with a direct voice is homosexuals—gays and lesbians—in terms of various discussions and debates relating to equality rights based on sexual orientation. When I entered the discussions in about 1990, there was already momentum in the direction favouring engaging the members of this group in an inclusive, positive way in society. Overt criminalization and most in-your-face discriminatory attitudes had disappeared or been disguised. Society and the law were ready to hear the direct voices of this group and to give them weight. I did not face the same situation as some of my fellow academics of a somewhat earlier generation, whose direct voices on these topics as often as not diminished the weight to

which their voices were given.³ They spoke when society was not ready to contemplate legal change. Undoubtedly, however, the sheer persistence of their direct voices even in these circumstances mattered in terms of the eventual social (and later legal) momentum towards inclusion for the members of the group for which they spoke.

III. THE ADVANTAGES OF THE DIRECT VOICE

Why should a direct voice be given some weight and importance in certain legal discussions? As mentioned above, the group for which the voice speaks traditionally had significant disadvantage and was historically not heard from. It comes from a member of a group that likely has, however, been the subject of much discussion and regulation from the law, typically as a result of discussions in which its own members' voices were not heard, at least not as direct voices.

To translate this matter directly into my own circumstance, gays and lesbians were undoubtedly the subject of many discriminatory laws and attitudes for generations upon generations. These regulations and attitudes arose from discussions in which no direct voices of gays or lesbians were given any weight at all. The direct voices that existed were met with either ridicule at best or hostility as the norm. Homosexuality thus became something discussed by outsiders and the points of reference were constructed by outsiders, occasionally well-intentioned but nonetheless outsiders. Homosexuality (more particularly male homosexuality) was famously the love that dared not speak its name.⁴ It had no acceptable direct voice. Lesbianism was perhaps somewhat differently situated as there was some disbelief that such a phenomenon even existed, a disbelief doubtless caused in part by the official invisibility of women as persons.

³ See Tom Warner, *Never Going Back: A History of Queer Activism in Canada* (Toronto: University of Toronto Press, 2002), especially Parts 1 and 2; Miriam Smith, *Lesbian and Gay Rights in Canada: Social Movements and Equality-Seeking, 1971–1995* (Toronto: University of Toronto Press, 1999).

⁴ See Lord Alfred Douglas' infamous poem, "Two Loves" *The Chameleon* 1:1 (December 1894) 25, which featured prominently in Oscar Wilde's 1895 trial for "gross indecency."

Out of such a context, when the group moves towards equality or when there are arguments made in favour of the equal position for its members, part of the imperative that must occur is that the members of the group learn to and do take responsibility for speaking on their own behalf. This is the key importance of the direct voice. In itself, quite apart from whatever the contents of its speech might be, it becomes emblematic of the goal and even ideal of equality and inclusion by the very act of speaking on its own behalf. Even well-intentioned outsiders can be met with some resentment and perhaps suspicion on the basis of the historical condescension of do-gooders in the past. Such an attitude is doubtless unfair towards those who have brought support to the demands of gays and lesbians for equality, but it has many parallels in the context of direct voices in other contexts. So, when members of oppressed races or religions begin to speak for themselves, there is a certain sense that it is perhaps inappropriate for an outsider, an indirect voice, to speak for the cause, however positive and well-intentioned that indirect voice might be. Among gay and lesbian scholars, it is far from uncommon for an informal discussion to happen concerning the sexual orientation of a voice that is participating in a discussion relating to sexual orientation equality. This activity serves to ascertain the authenticity of the voice. Some disappointment is admittedly heard when a "likely" voice is not in fact direct, or perhaps there is even disbelief in the professed self-categorization of the voice as "indirect."

Apart from the emblematic value of the direct voice's very existence, there is the importance of the content of the speech of the direct voice. The way the law impacts in an unequal way on the member of a historically-disadvantaged group may not be clearly comprehended by an outsider, again no matter how well-intentioned and "connected" to the group that person might be. In the context of homosexuality, the forms of censoriousness towards homosexuality manifested by the law and society will really perhaps only be appreciated by a person who has always or for some great time been placed at the receiving end of those attitudes. While direct discrimination may well be readily perceived by an observer, indirect discrimination is often very subtle and appreciated only by the object of the discrimination.

Likewise, it may be difficult for an indirect voice to make what might be called robust arguments that will have a hard impact on the members of the disadvantaged group. So, for example, I engaged in a discussion of the issue

of “outing,” a topic that was much discussed in the 1990s.⁵ It would be very difficult for an indirect voice to make an argument (then, especially) in favour of freedom to out somebody as gay or lesbian. The result would appear to be the advocacy by a safe outsider for a result that would put a gay or lesbian person in a position of some (potential) peril. Likewise, it is difficult for an indirect voice to make arguments that justify some forms of legal discrimination against members of the group while at the same time being perceived as being supportive of the overall project of equality for the group. So, while indirect voices (and some judges) were vocally supportive of deregulation of homosexual pornography when there would not be an equivalent approach to heterosexual pornography, it was really only direct voices who could make arguments in favour of regulation and still be perceived as supportive voices for the interests of that group in general. Also, it may be difficult for the indirect voice to make arguments against fighting for particular equality goals. So, in the same-sex marriage debate, while I appreciated the arguments in favour of same-sex marriage that were made by indirect voices, it was rather easy to dismiss the indirect voices who argued against same-sex marriage. Their contributions could be diminished as overly coloured by their membership in some advantaged group; their arguments could be characterized as not really connected with homosexuality but with issues relating more directly to the group to which they authentically belonged. In this way, the contribution to the discussion could be characterized as arrogant or oppressive. Too, it is probably necessary for a direct voice to make the arguments in favour of a recategorization for a historically-disadvantaged group out of the class of victimhood. An indirect voice will with difficulty be believed when the message given is that equality has been achieved for the group, in whole or in part.

Another value of the direct voice is the awareness of the complexity within the membership of the group. This awareness is not beyond the ken of the outside, indirect voice but it may not be easy to comfortably speak of the complexity or its ramifications for particular legal issues. For example, the importance of or the position within a pride parade of various members of

⁵ See Bruce MacDougall, “Outing: The Law Reacts to Speech about Homosexuality” (1995) 21 *Queen’s LJ* 79.

the community may be something that is only comfortably discussed by a direct voice. So, whether a NAMBLA (“North American Man Boy Love Association”) contingent ought to be represented or whether “Dykes on Bikes” ought to lead the parade and, if so, whether they ought to go bare-breasted may be minefield issues for the indirect voice in any discussion. Even the use of certain terminology—fag, queer, dyke, and so on—may be fraught for any but the direct voice because of the sensitivity to such terms coming from outsiders.

IV. THE PERILS OF THE DIRECT VOICE

There are, however, perils in the use of the direct voice. One danger is that in fact the direct voice may not be heard in some contexts or to a certain extent because of its overt or assumed one-sidedness. Thus, some judges might be reluctant to hear from or cite a voice in support of a particular resolution where it is a direct voice. The judge might have a concern about himself or herself appearing biased if there is too much reliance on direct voices. Attitudes of different judges on this issue vary widely and it is fair to say that the direct voice carries more weight within an academic context than in a court context. There is also a possible concern by various people of “guilt by association” if too much reliance is placed on a direct voice.

Because of the peculiar situation of a given minority group in each society, there is only limited usefulness for the direct voice in comparative law arguments. For this reason the direct voice does not seem nearly so significant in such discussions. Here, the arguments can be more neutral. There is no “outcome” of many comparative discussions for the voice. Likewise, a study of the situation in a foreign jurisdiction does not have the dynamic for the direct voice. It is still the voice of an outsider. Such an outside voice can only to a very limited extent ever be considered direct in a way that carries particular weight. In fact, such a foreign voice, taking a direct-like stance in the context of another jurisdiction, can be criticized for insensitivity and interference through an imposition of its own views and agendas. For this reason, the direct voice does not make an easy jurisdictional transfer. For example, if I argue for same-sex marriage within Canada, then my views will be given a certain weight by virtue of the directness of my voice. If I make the same sort of arguments in the context of, say, Italy or Nigeria, I might be accused of interference and of having a neo-colonialist mentality. My position

may be dismissed for ignorance of certain local factors that more than counterbalance the persuasiveness of any contributions I am making.

Apart from these possible perils in the use of the direct voice are complications in the designation itself. Most of these complications relate to definitional issues. In the first place, who is to define or even label the group for which the direct voice speaks? In the context of homosexuality, that very term is contentious and (depending on the definition) can be considered overlarge or unduly restricted. Are bisexuals, transsexuals, and transgendered included? What qualities does a person need to have to be “in” the group? The qualities that make a person “gay” are notoriously subject to definitional change over time.⁶ Can a person be included wholly on the basis of a political or some other deliberate choice? Can a person pass in and out of the group at will? Who is to decide what characteristics make a person homosexual? Is the term “homosexual” even appropriate or ought the term “queer” to supplant it? How do such matters affect the directness of the voice?

These issues relating to homosexuality have related complications among other disadvantaged groups where direct voices are arguably important. For example, race is a famously contested category and the extent to which a person must visibly appear to be of a particular group in order to be considered a member of a given race is not settled. For a person to be a member of a particular religious group, how closely affiliated does that person have to be? Can a person who never goes to church be a Roman Catholic? Can a Muslim who rejects many of the traditional tenets of the faith claim to speak for Muslims as a group? These sorts of definitional issues can be contested both by the person who might claim membership (in a group or an organization that broadly rejects his or her membership) or by the group or the organization that might claim him or her (despite his or her professed rejection of membership). Issues of defining and determining membership in a group in general are usually facets of the ongoing debate about essentialism and constructionism.

Assuming the membership/definitional issues are decided, how is it in any event that a given person is the direct voice for the particular group? Who decides for the group the matter of who can speak for it? When I claim

⁶ See MacDougall, *Queer Judgments*, *supra* note 1 at ch 1.

a position for gays and lesbians, how do I know that is the position “they” want argued? How is the group to be confident that I truly have “their” interests at heart? How have I ascertained their position—solely through my personal experience and through my knowledge of the personal experiences of a few friends? Outside of some narrowly-constituted religious organizations, perhaps, no group of the sort being discussed here has a comprehensive well-defined legislative structure that facilitates the identification of speakers for the group. Indeed, in some cases it is the very historic persecution of the group under discussion that has contributed to the lack of centralizing organization within the group that might be able to allow the designation of speakers. Even in situations where there might be such a centralizing legislative structure, questions arise as to whether that very structure and the speaker-designation process is in fact somehow oppressive of membership within the group in that specific persons can somehow be taken to speak for all.

Another peril of the direct voice is the associated oversimplification and overgeneralization of the presentation of the interests or perspectives of the situation for the group as a whole. Even while perhaps understanding them, the direct voice tends not to express all the complexities as they affect the particular members of the group or of subgroups within the larger group. In some cases, this will be partly for reasons of lack of knowledge or even awareness of some of these complexities. But, more often it will be for reasons that it would be impossible for the voice to speak coherently (especially to outside ears) if all the complexities were included and explained. Legal argument of any sort is generalized and broadly categorized in order to make it comprehensible. These same considerations tend to lead to arguments in favour of simple solutions. It is difficult for legal arguments that call for complex solutions to be accepted in any context, especially when the mainstream is not directly involved and tends to have little interest in or attention span for the “details” of a minority group. While academics or members of the group itself might be intrigued by and value such complexity, rarely are actual legislatures and courts content to create an overly complicated solution that is truly sensitive to the diversity within an issue or group, especially when “only” minorities are directly affected. The more usual goal and result is simple solutions to simplified problems.

V. THE DIVERSITY PARADOX: INTERNAL ABSOLUTES

These structural constraints on making complex arguments by the direct voice for the interests of the group lead to a paradox. The paradox is the tendency to deny the diversity within the group while arguing for inclusion-oriented outcomes based on ideals of social and legal diversity. Arguments made by the direct voice will be arguments for inclusion and accommodation in the interests of fulfilling ideals that value such social and legal diversity. The homogenization that typifies or results from some of the arguments the direct voice will make may deny or diminish the diversity within the group. So, for example, in an argument for same-sex marriage rights made by a given, perhaps dominant, direct voice, the voices and concerns of those gays and lesbians who do not want and perhaps cannot have same-sex marriage tend to get minimized or relegated to a footnote or the briefest of mentions. This absolute quality to legal arguments is common in any debate but the paradox arises in the contexts dealt with here because of the claim made by the direct voice for a place within a diversity project. The situation is not equivalent to that where an argument is made to obtain a majority position in a universal legislature so as to impose particular results or standards on a population generally. In the context at issue here, there will instead be a minority claim made by the direct voice for a place in a majority-sanctioned structure of diversity and accommodation. The paradox is that the minority is commonly presented in the discussion as homogeneous.

An upshot of this tendency to present an absolute position on behalf of a given group is the factionalism that bedevils claims made by different direct voices for particular groups. One direct voice may directly contradict another direct voice in the same group, both claiming to speak for the group as a whole. Much energy is lost as a result and the interests of the group are not advanced in either direction advocated. Furthermore, the group can be perceived from the outside as being extremist, confrontational, and represented only by people speaking with shrill and even intolerant voices.

The absolute positions that are taken can lead to a form of oppression within the group whereby dissenting voices are distinctly discouraged. Furthermore, those who do not measure up to the standards idealized by the direct voice might be marginalized within the group. One manifestation of

this felt need to present an ideal is the well-known search for “ideal” parties to take forward important test cases on rights.⁷ These parties are supposed to match perfectly the rhetoric used by the direct voice and the claims made by it for the group. So, for a same-sex marriage case, the parties ought to be nearly the same age, not too young or old, not too diverse in terms of other characteristics, not too colourful in terms of personal history, and ought to have been together for quite some time and appear likely to remain so. They should, thus, apart from their sexuality, be rather dull and not stand out.

The absolute quality of the direct voice and the tendency to deny diversity within the group or in the arguments made for the group can rebound on the direct voice itself. This voice is not permitted itself to have doubts or concerns about a particular position. It is expected to be all things to all members of the group. There can be a sense of betrayal if the direct voice deviates from the perceived consensus position within the group.

A related peril is the elimination of the other characteristics of the direct voice. So, the “gay” direct voice can become and is perhaps expected to be just that: unidimensionally gay. Any other characteristic is stripped away or at least hidden so as not to complicate the picture. An upshot of the unidimensional quality of the direct voice is a fixing of that voice. The person was, is, and will always be and only be a voice for that particular group. The person cannot be expected to leave or later rejoin the group. He or she should not be the direct voice for another group. Like a politician who changes parties, a direct voice that changes focus or voice will tend to have its authenticity questioned. This unidimensionality, of course, lends strength or weight to the direct voice as that voice is not complicated by other distracting characteristics. Thereby the direct voice is not “tainted” somehow by associations with or inclusion in another group. This unidimensional expectation of the direct voice is, however, not just unrealistic but it also tends to isolate the voices of the particular group. So, a direct voice advocates most effectively a

⁷ See Jo-Anne Pickel, “Wedding Toasts and Unmannerly Wedding Gossip: Same-Sex Marriage and the Charter’s Paradoxes for Equality-Seeking Groups” (2004) 3 JL & Equality 111; Christine Davies, “Canadian Same-Sex Marriage Litigation: Individual Rights, Community Strategy” (2008) 66 UT Fac L Rev 101; Christopher P Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilizations and the Women’s Legal Education and Action Fund* (Vancouver: UBC Press, 2004).

gay position or a religion position or a race position and the impression is given therefore that the person cannot be, in terms of voice, a religious gay person of a racial minority. This tends to isolate not only the individual but also the interests of the minority concerned as the absolute and categorical quality of the voice and its arguments can make it easy for other minority groups to assume that it is not their concern what the outcome of the others' discussions might be. It may also lead to a concern that a gain for one group might tread upon the gains another group might otherwise make. The unidimensional direct voice also tends to lead to conclusions that, but for the minority characteristic concerned, the voice is otherwise part of the majority. This conclusion itself tends to lead to assimilationist assumptions about the outcome of rights discourse. If equality on the basis of the given characteristic is achieved, then the speaker of the direct voice and presumably the members of the group for which he or she speaks can otherwise simply blend into the mainstream, as there is no other known characteristic that distinguishes the direct voice (and the members of the group) from the mainstream. If the assumption is that the dominant or perhaps the only defining characteristic of the members of a group is, for example, sexual orientation, then there is no need to take into account religious, ethnic, or economic differences, let alone the philosophical or directional differences discussed earlier. In discussions about gays and lesbians, the impression can be given that, but for their sexual orientation, the membership of the group is made up of law-abiding, white, 9–5, middle-class folk.

Another danger of unidimensionality of the direct voice is a resultant isolation of the arguments made by that voice. This isolation can be from discussions in other jurisdictions, from other debates and discussions within the same jurisdiction or from discussions that change in nature due to time and context. Perhaps of most concern is a distancing of a direct voice from similarly-situated discussions in the same jurisdiction. So, for example in the context of discussions relating to sexual orientation, there is a great deal to learn from discussions that have been and are taking place relating to gender and race. Even participation in the discussions or issues directly involving what might be perceived as a threatening or competitive group—for gays and lesbians, this is most notably religious groups and individuals—can be used to great advantage.

The argument is sometimes made that drawing on analogies from other contexts is inappropriate because the two categories and the discussions relating to them are simply “different” and that such analogies only serve to oversimplify.⁸ While it is true that every context and discussion will have its own parameters, the value of what can often be borrowed from those other contexts and categories usually outweighs any disservice or oversimplification that follows as a result. In fact, I have always found it instructive to turn arguments against rights for gays and lesbians into equivalent arguments against rights for racial minorities or religious minorities.⁹ By doing this, the inequity of the counter arguments against rights for gays and lesbians often becomes clear to the outsider. Similarly, when morality arguments are used against gays and lesbians, a resurrection of the old morality arguments that used to be made in the context of women, certain races, and certain religions helps underscore the highly questionable framing of a rights question in such terms. The roots of different forms of discrimination and oppression often have their roots in the same place and are manifested using the same tools and techniques against various minority groups. The fight against such marginalization should be as efficient as possible and it is pointless to have to reinvent the wheel each time a journey into equality is undertaken. There is also, frankly, strength in numbers and a direct voice for a small group—such as gays and lesbians—can piggyback on the arguments and gains made by direct voices for a “senior” (i.e. larger or longer-accommodated) group such as race or religion.

⁸ See Beverley Baines, “Equality, Comparison, Discrimination, Status” in Fay Faraday, Margaret Denike & M Kate Stephenson, eds, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2009); Donna Greschner, “Does Law Advance the Cause of Equality?” (2001) 27 Queen’s LJ 299; Sonia Lawrence, “Choice, Equality and Tales of Racial Discrimination: Reading the Supreme Court on Section 15” in Sheila McIntyre & Sandra Rodgers, *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Toronto: LexisNexis Canada, 2006).

⁹ See e.g. MacDougall, “A Respectful Distance,” *supra* note 1.

VI. THE DIRECT VOICE IN A CHANGING CONTEXT

The direct voice is not just constrained by the interests of the group and certain expectations of a direct voice, but is also constrained by the social and political context and the changes that occur within that context.

Rights discourse arises in the first place because a changing social and political context facilitates such a discourse. The changed context will allow for value or weight to be ascribed to the direct voice. Once engaged in such discussion, however, the direct voice cannot expect that the social and political context will remain unchanged except for the specific discourse in which that voice has become engaged. So, for example, in the context of sexual orientation rights discourse, opposition to the equality goals of gays and lesbians often has religious roots and originated from religious individuals and organizations. While engaged in the discourse about sexual orientation equality, a participant cannot expect that there are not also other discourses in process relating to religion, the outcomes of which will affect the perception of the appropriate place of or the entitlements of religion in the law and society. These outcomes will in turn inform the participation of religious direct voices in the discourse on sexual orientation rights. Religious direct voices will be in flux. Their engagement in (and opposition to) certain goals advocated by the gay direct voice will change with time. The gay or lesbian direct voice will have to adjust its contribution to take into account those other changes and outcomes. Likewise, governments change and with such changes come a need for a change in discourse. The site of discourse may shift from one government level to another. While the direct voice will to a certain extent be able to control the direction of the site of the discourse, to a large extent it will be beholden to the larger social picture. If society is fixated on economic issues or constitutional reform or national identity, then the direct voice will be engaged to a necessary extent in issues that are framed with those larger contexts in mind. Similarly, of course, the location or site of the discourse or the focus of discourse will change as needs and emphases of the group change and as issues become settled or abandoned. So a focus on basic equality protection will give way to a focus on entry to social institutions like marriage and pensions and that will give way to a focus on representation in matters like school curriculum or sports events. Such changing contexts affect all voices participating in discussions. A direct voice will feel pressure to change with these various shifts and it may be more difficult in some ways for

a direct voice to make such a change that it would be for an indirect voice, given the very personal stake that implicates the direct voice.

One aspect of the changing context is the emergence of discussions relating to “new” minority groups and the perception that the outcome of those new discussions might adversely affect one’s own group. This is particularly the case if discussions about rights and inclusion are somehow seen as zero-sum situations. So, if rights for gays and lesbians are interpreted to mean fewer resources for certain racial groups or a diminishment of rights and inclusion for religious groups, the direct voices for those other groups can become hostile to the “new” voices for gays and lesbians. Likewise, a direct voice for gays and lesbians might feel threatened if direct voices for another group in some new discussion, say polygamists, seem to threaten the acquired or desired rights of gays and lesbians. This conclusion that a threat exists in a new discussion should be avoided wherever possible, as it may end up only hurting the interests of both groups. That said, it has to be admitted that in some contexts the interests truly are opposed to each other and it is a fact that the achievement of a particular result for one group may well entail a diminished position or resources for a particular other group. A Utopia cannot validly be posited where everybody gains equally or at all from the outcome of all discussion.

Another facet of changing context having an impact on a direct voice seems commonly to be the case, namely: Positive results for the members of one group can appear to cause that group to lose concern for members of other groups that are still discriminated against. Having “made it” can cause the given group and its voices to become indifferent at best to the struggles others still face or, worse, to diminish or oppose those struggles. Direct voices in specific discussions might in time drop out of more general discussions on rights and equality, or might speak against a continuing extension of inclusion and diversity. So, there has been some dismay among gays and lesbians that direct voices for certain minority racial and ethnic groups, having to a great extent been successful in achieving goals of acceptance and inclusion, have been among the most hostile to the equality positions of gays and lesbians. The direct voices for these other groups refuse, it would sometimes appear, to admit of an equivalence in position in terms of oppression and discrimination. Also, there has been some disappointment that certain feminist groups and voices have not expressed support for transgendered persons in

some contexts that are closely connected to contexts where women generally have been historically disadvantaged. Likewise gay and lesbian groups and direct voices have sometimes been criticized for being self-satisfied about their own position and not therefore caring much for the continuing plight of other sexual minorities.

Beyond indifference to the discussions affecting other groups, there might, as mentioned, even be engagement in that discussion in a hostile way. So, for example in promoting same-sex marriage arguments, a direct voice for gays and lesbians might try to suppress equivalency arguments made by a member of another sexual minority such as the transgendered or perhaps polygamists. This tendency to avail oneself of oppressive techniques to make arguments against equality and inclusion in a different context ought to be avoided where possible. It can only serve to justify discrimination and oppression as justifiable in some contexts—and so therefore why not by the majority against one's own group? It has to be conceded, however, that in some contexts there is no real alternative but to use such techniques. If the direct voices of another group really are inimical to the interests of one's own group, then an oppressive/discriminatory stance is justified. If a white supremacist group asserts a right to make inflammatory racist arguments, then a direct voice of the racial minority quite rightly asserts arguments that are discriminatory against the supremacists and oppressive of their views. So too it is possible that certain religious arguments and positions are justifiably met with oppressive and discriminatory arguments by gays and lesbians. Where possible, however, it is no doubt more fruitful to try to accommodate the positions of others.

VII. THE OBSOLESCENCE OF THE DIRECT VOICE?

Connected to issues of changing context, one of the paradoxes for the direct voice is the reduction of the need for the voice when the aims for which it has been speaking become largely achieved. Can a direct voice become obsolete? In my own case, over the past two decades, the various discussions relating to legal rights for gays and lesbians in which I have contributed have by and large, at the legal level, been resolved in favour of the equality position for which I have been advocating. There are certainly issues still being discussed, but they might be characterized more as fine tuning rather than major issues like those in the past.

Furthermore, to a certain extent the role of the direct voices in the discussions in which I personally contribute has significantly shifted. Given the success in terms of outcome in earlier discussions, the nature of my contribution to current discussions in which I engage has become more protectionist rather than assertive of change. The positions that I assert are often in defence of the equality that gays and lesbians have achieved and in the face of arguments others make that to accommodate their minority concerns, there must be some “give” by gays and lesbians in terms of equality.¹⁰ The arguments in this regard in the discourses where I have contributed come almost exclusively from religions and religious individuals who claim that to protect their equality positions, there must be exceptions made to equality for gays and lesbians (and some others). The role of the direct voice changes in such a “protectionist” context. It is arguably not nearly so weighty when a direct voice makes the defensive arguments. It might be argued that with the success in the outcome of its earlier discussions and thus having been accepted by and large (at least legally) into the mainstream, a direct voice is not so essential to make the arguments protecting the inclusive status gained; they could perhaps be made just as effectively by an indirect voice as by a direct voice.

There is still nonetheless a role for the direct voice in such a changed context and the direct voice here can learn much from others in similar positions. While formally many of the legal aims might have been achieved, progress is undoubtedly still needed in the implementation of this formal equality to achieve equality in practice and also to prevent the erosion of the equality achieved. In these contexts, the direct voice has a role as a reminder of what that former situation was like and is best placed to be vigilant against complacency. While I think it is important that the direct voice not continue to defend a “victim status” that has in fact been legally removed, it is important to guard against a return to that status indirectly by the resolution of discussions in other places, for example in the realm of religious expression and entitlement.

¹⁰ See e.g. Bruce MacDougall, “Refusing to Officiate at Same-Sex Civil Marriages” (2006) 69 Sask L Rev 351.

Furthermore, while the larger formal claims for equality and inclusion might have been settled, there may be many details that still have to be worked out. In the context of gays and lesbians, there are many issues involving children (curriculum content, bullying, religious indoctrination), employment (glass ceilings, exclusion from certain fields like sports, and religious accommodation) and public life (civic proclamations, representation in government and administrative agencies, and international relations and policy) where there is a lack of equal treatment in practice, even if formal equality is claimed or asserted. In these areas, the true impact of continuing inequality can perhaps best be expressed by the direct voice. While these matters might be somewhat dismissed as “details,” those impacted still feel the sting of the unequal treatment and attitudes.

The direct voice is also important to engage in other discussions where voices from other groups are advocating for resolutions that will have an effective detrimental impact on the direct voice’s own area. So, when a religious person is claiming a right not to serve or hire gays and lesbians or to refuse to deal with queer content in an education curriculum, that person will situate the discussion in the forum of religious liberty and equality. The gay or lesbian direct voice will be best placed to underscore how the discussion is in fact just as much about gay and lesbian equality and how the resolution of the discussion in favour of the religious perspective will undermine the position of equality that has been achieved for gays and lesbians. The gay direct voice will serve to remind that while the discrimination or oppression of homosexuals that historically existed might be perceived to have been the result of a general social consensus, it was in fact sustained by the very religious attitudes that are again being asserted in the discussion on religious freedom or equality. The direct voice is best placed, in other words, to unmask the “new” voice as in reality claiming an old position, now under the guise of asserting equality claims for itself. It is important for the direct voice for a group not to itself become the discriminator or oppressor once its own aims have been achieved and so to deny the inclusion for others that it has won for its own group. But that is quite different from the task of identifying an old source of oppression as reasserting itself, now perhaps under a different guise. It is not inappropriate to engage in new discussions and to object to the inclusion of certain positions where such inclusion necessarily means the exclusion of or the diminishment of the position of one’s own group. Further-

more, it is a valuable task of the direct voice to argue against the recharacterization of the discussion that has already been engaged in for one's group—say as a recharacterization from being a discussion about equality to being a discussion about morality, the result of which will be a re-emergence of the old discrimination.

A different aspect of obsolescence relates to the group in which the voice claims authenticity. The composition or construction of a given group can change over time. In my own case, it will not have escaped the reader that I have used the terms “gay” and “lesbian,” rather than the term “queer” (in most cases), and I have not generally expanded it to include categories such as the transgendered, transsexual, bisexual, and so on. There are several reasons for this. As explained earlier, a direct voice is to a certain extent the prisoner of its own self-identification early on. In my case, I entered the discussions when the debates were still very much based on homosexuality as including gays and lesbians (with a certain limited fuzziness, it will be conceded, in the definition of those terms). Having spoken for those groups and identified with them, there is a certain pressure, perhaps largely self-imposed, to remain constant to that group in terms of membership. The group as originally defined thus truly is the group for which the voice feels authentic. There is some awkwardness when a direct voice claims to speak for elements of a group with which it does not much identify. This is always the case to a certain extent. So, in my own case, though I always include lesbians when I speak for homosexuals as a group, in fact there is much that affects lesbians about which I have no particular knowledge, such as gender issues unrelated to mine and concrete issues that affect them differently including parenting and custody issues, sports issues, and certain employment issues. The situation is greatly altered when the group with which I identify has morphed into queers and is taken to include the transgendered, transsexuals, and so on, members with whom I feel little personal identification. I simply do not have the same feeling of authenticity or directness when I attempt to speak on behalf of the transgendered or transsexual. My voice, it seems to me, loses much if not all of its authenticity in these contexts and I become in reality an indirect voice.

If the group itself has changed, however, ought not its members to continue to speak authentically for the group as newly defined? Issues of uniformity and absolute identification again arise here. There should be no ex-

pectation that the group and its members as defined from time to time necessarily be in lock-step with any positions that each other has from time to time. A person ought to be able to move out of and back into a particular group in terms of identity. A person ought to be able to identify in a direct and personal way with a portion of the group or with some but not all of its goals. As mentioned earlier, however, the direct voice can lose some of its weight as a result of this flux because it can be somewhat confusing for an outsider, the arbiter of the discussion, to understand the nuances of identity or to understand why there is not complete and ongoing harmony of position or of identity. There may even be some hostility or resentment for the direct voice from within the group about the failure to “keep up” with changes over time.

The direct voice must, nonetheless, decide whether it can truly speak for the group as a whole as it used to. There are several possible courses. It would concentrate on the “defensive” issues as set out earlier. It could attach itself to the changing identity and truly feel that it is still authentic to the group as newly constituted. It could become a somewhat dissenting voice within the group as it fights the change of definition. It could speak for a defined category within the group but no more. It could drop out of the discussion altogether. It could become in a sense an indirect voice for the new group but with a particularly sympathetic position as having once been a direct voice for it under an earlier definition. All of these possibilities have their strengths and weaknesses and obviously it is for the direct voice itself to decide what it the most appropriate. It has to be understood, however, that there will be critics of whatever choice is made and some impact on its weight if it takes one of the routes that allows it to continue in some role as a direct voice.

The one position that is truly untenable is to try to pretend that nothing has changed, to continue as if one’s group is and always was fixed in terms of definition, as if issues and context can remain fixed in some way for any period of time. While this change in the construction of the group is particularly clear and rapid in the context of sexual orientation; it has related manifestations in gender, race, religion, (dis)ability, and ethnicity.

Another possibility for the direct voice involves the relocation of the contribution of a given voice from discussions dealing with concrete issues or with the law’s impact on the members of a particular group or subgroup to more general discussions about the law, justice, and equality. This shift was

alluded to earlier. The voice can contribute in discussions about discrimination in a broader sense, with an informed almost-historic perspective. The direct voice can transform the lessons and approaches used in earlier more specific discussions into contributions about more generalized ways of thinking about social and legal relationships. Thereby, the direct voice for a particular group moves to a different level of discussion—a more theoretical level.

Voices in many contexts including my own have done just that. Most notable are the feminist scholars who have moved, to a greater or lesser extent, from a focus on the law and women (where the direct voice is quite important) to a feminist analysis of various issues.¹¹ In such a theoretical analysis, the direct voice is far less important and in many cases the gender of the speaker, for example, may not matter. The content of the feminist contribution to a discussion may be mainly about power dynamics and access to that power. Such a discussion might have little or nothing to do directly with women as a group. In a similar way there has developed a queer theory that focuses on the idea of the outsider, the way in which challenges to accepted social norms develop within the law, and how the law and society respond to such challenges. Such a theoretical approach has value in a discussion where there is little or no direct impact on homosexuals (or queers) as a group. So, for example, it can readily be used when the discussion is about religion, disability, or race.

This is perhaps the great role for the direct voice over time in a society that values diversity: to be able to continue to speak but to necessarily change in terms of content and perspective; to be able to move from direct to indirect status; to be able to move from the concrete to the theoretical because the legal and social dynamics have facilitated inclusion of the speaker's group to such an extent that the speaker is thought now to have a perspective that is of importance and relevance for larger and other social issues. A legal and social system that values diversity will create a situation where discussions about equality move to different sites in concrete terms. Along the way, the

¹¹ See Katharine T Bartlett, "Feminist Legal Methods" (1990) 103 Harv L Rev 829; Brenda Cossman, "Sexuality, Queer Theory, and 'Feminism After': Reading and Rereading the Sexual Subject" (2004) 49 McGill LJ 847.

number of theoretical perspectives will accumulate as offshoots of the concrete discussions that have taken place and been to a large extent resolved. The mark of a truly un-diverse society and legal system would be a continued need for a particular discussion about inclusion for a given group to be ongoing and unchanging. The contributions of the direct voice will have succeeded when its contributions to legal discussions continue to be valued but the directness itself is no longer so important or weighty.