

The Language of Oppression — Alice Talks Back

"But I don't want to go among mad people," Alice remarked.

"Oh, you can't help that," said the Cat: "we're all mad here. I'm mad. You're mad."

"How do you know I'm mad?" said Alice.

"You must be," said the Cat, "or you wouldn't have come here."

— *Alice's first discussion with the Cheshire Cat. Alice's Adventures in Wonderland, by Lewis Carroll.*¹

I am grateful to Mr E.A. Driedger for having replied to *Alice Through the Statutes*² in his article *Are Statutes Written for Men Only?*³ Nothing could illustrate better the failure of men to listen when women cry out against the injustices which they suffer. No doubt it may be said that women also fail to listen or to understand when men speak, but since men are responsible for the position of women under the law,⁴ it is obvious that men who run the affairs of Canada have a duty to listen, to understand, and to correct the injustices.

Let us dispose of some things first. Alice explored the insane world of the law, in which women have failed to make more than token breakthroughs in their long search for equal rights. Uncounted generations of women have spent their lives working to gain rights which later generations have seen taken away. Alice found the same situation in *Through the Looking-Glass*, when the Queen told her:

Now, *here*, you see, it takes all the running *you* can do, to keep in the

¹ See Gardner (ed.), *The Annotated Alice: Alice's Adventures in Wonderland and Through the Looking Glass by Lewis Carroll* (1960), 89.

Alice's adventures in Lewis Carroll's world of fairy tales made her an expert. She qualified by the Merit Principle to examine the treatment of women under the statutes.

² Ritchie, *Alice Through the Statutes* (1975) 21 McGill L.J. 685.

³ Driedger, *Are Statutes Written for Men Only?* (1976) 22 McGill L.J. 666.

⁴ One need only look at the absence of women from the power structure of Canada to be made aware of this situation. This can be seen in other countries throughout the world, of course. See e.g., Doris Sassower, *Women, Power, and the Law* (1976) 62 A.B.A.J. 613: "For the nearly two centuries of our national existence, power has not belonged to the people but to male lawmakers. As controllers and dispensers of the nation's collective force, they have institutionalized legal precepts and constitutional principles that served to perpetuate the 'natural male dominance' and left to women a heritage of dependency and second-class citizenship."

same place. If you want to get somewhere else, you must run at least twice as fast as that!⁵

But why should the law be insane? Why should women who run as hard as they can, find that they are still in the same place? Why should women find that they must run twice as hard as they can, if they want to get somewhere else? Alice found that the ordinary principles of the law constitute a *system* which excludes the female half of the population from justice and equality. The combined operations of the legislative drafters and the courts have reduced women to a status of aliens in their own country.

Alice found that women have been cheated of their rights by the customs of drafting on the one hand and by the open prejudice of the courts on the other. Use of male terms to include women has resulted in a double standard by which women have shared the burdens but have been denied the right to equality. Language has been a tool which has taxed women or jailed them equally with men, but has denied them the rights and privileges of men unless women were expressly included. And even if women are expressly included, the courts have almost always found a means of interpreting the language of the statutes to give effect to their own prejudices against women.

The law has, in fact, operated as a "con" game, in which male terms include women for the purposes of pains and penalties but not for rights and privileges. It works exactly like the game adults play with children, in which they show children a coin and say, "Here, I will play fairly with you. Let's toss a coin and see who gets it. *Heads I win, tails you lose.*"

That is how women have been tricked by the use of male terms on the pretence that they included women. Heads or tails, the woman loses. If the courts find that she is included, she "wins" the right to pay taxes or to go to jail. If the court relies upon the "context" to exclude her, she finds that she has lost some right which would be given to men. Heads or tails, the woman loses.

Everyone who defends this system of using male terms to include women helps to cheat women. Contrary to Mr Driedger's claim,⁶ *Alice Through the Statutes* did not single him out alone for special mention, but included the names of legislators, judges, and public officials who share responsibility in one way or another for the present system. Contrary to Mr Driedger's claim, I did not "castigate . . . male legislative draftsmen for demeaning women by

⁵ *Supra*, note 1, 210.

⁶ *Supra*, note 3, 666.

writing laws as if only men existed".⁷ Everyone, male or female, who supports this system must accept responsibility for the injustices it creates. Correspondingly, *Alice Through the Statutes* identified and paid tribute to other men, in the courts, the professions, and in government, who protested against the injustices imposed upon the female half of society by the way in which the laws are written and the way in which they are interpreted by the courts.

What about Mr Driedger? Where does he stand with respect to the drafting technique which uses male terms to include women? He protests that there was a slight inaccuracy in the statement in *Alice Through the Statutes* that he "adopted *without criticism or comment* the provision of the *Interpretation Act* which provides that words importing male persons include female persons and corporations".⁸ He protests that he did not *adopt* anything; that he simply drew attention to the existence of this provision; and that a comment on or criticism of the substance or policy of that provision would have been wholly out of place. His Memorandum,⁹ however, speaks for itself. The Foreword expressly notes that the rules set forth therein were intended "as a guide" to officers in the Department of Justice and other persons concerned in the drafting of legislation. The Memorandum included the *Interpretation Act*^{9a} without comment, in an *Appendix*,¹⁰ but the body of the Memorandum also reproduced provisions of the *Interpretation Act* with Mr Driedger's comments or criticisms¹¹ and reproduced the provision here under discussion *without* any comment or criticism of any kind. There was therefore no inaccuracy, slight or otherwise, in my observation. However, much more important is the fact that Mr Driedger fails to appreciate that the problem here is one of a fundamental injustice extending far beyond words. Thus he seems to think that I was protesting against the use of male terms to include females because such use seems to be an "excessively artificial" definition.¹² I can only suggest that he reread *Alice Through the Statutes*. My concern is not with word games but

⁷ *Ibid.*

⁸ *Ibid.*

⁹ Memorandum on the Drafting of Acts of Parliament and Subordinate Legislation (1951), Dept. of Justice, Ottawa, prepared by Driedger, Parliamentary Counsel, Dept. of Justice.

^{9a} R.S.C. 1970, c.I-23.

¹⁰ *Supra*, note 9, 21.

¹¹ *Ibid.*, 11.

¹² *Supra*, note 3, 666.

with real injustices against real women. The situation is not, after all, merely "Miss Ritchie's problem", as Mr Driedger terms it.¹³ It is the problem of injustice to half the human race.

What is the solution to the problem? Mr Driedger is wrong when he claims that I referred "particularly with approval to section 157 of the 1953-54 *Criminal Code*"¹⁴ to imply that neutral words would be an answer. I cited section 157 as an example of the way that "drafters themselves have abandoned consistency" and "have used neutral terms or terms relating to both sexes wherever they have thought it desirable to achieve their own purposes".¹⁵ As I pointed out, the neutral words in section 157 were adopted and the male wording abandoned, by the male drafter of that day, to make certain that females would be included in a criminal prohibition of acts of gross indecency previously prohibited only with respect to males. The drafter intended to share the burdens with women, and not to confer a benefit. My point, backed by examples drawn from different statutes, was that the drafters of legislation "have never hesitated to abandon the sacred canon of drafting in the form of the male whenever they themselves wished to do so Drafting is flexible if the drafters wish".¹⁶ It is time that the drafters of legislation opened the door to equality for the excluded half of the population.

Trying to Open the Door

Alice went timidly up to the door, and knocked. "There's no sort of use in knocking," said the Footman, "and that for two reasons. First, because I'm on the same side of the door as you are. Secondly, because they're making such a noise inside, no one could possibly hear you."

— *Alice's discussion with the Footman. Alice's Adventures in Wonderland.*¹⁷

It is true in most countries that the drafters are so much occupied with the noise being made inside the establishment that they have shown no intention of opening the door so that women can get in. Mr Driedger is no exception; his only suggestion is the cosmetic one of inserting into the *Interpretation Act* a provision "that words importing one gender include all other genders",¹⁸

¹³ *Ibid.*

¹⁴ *Ibid.*, 670.

¹⁵ *Supra*, note 2, 704.

¹⁶ *Ibid.*, 705 (emphasis added).

¹⁷ *Supra*, note 1, 80.

¹⁸ *Supra*, note 3, 671.

and he adds that "there could be no suggestion of discrimination".¹⁹ However, he then admits frankly that an amendment along these lines would not solve the pronoun problem.

The "unless the context otherwise requires" rule would have to remain. A gender provision could not be absolute, because there are certainly instances where corporations would not in a particular context be included, and the same could be said of male or female persons.²⁰

So he would put us back at the starting point. He ignores the fact that *Alice Through the Statutes* examined the "context rule" and traced its infamous history dating from the 1867 *Interpretation Act*.²¹ As *Alice* found and documented, the context rule, far from protecting women, exposed them to the judiciary's "openly prejudiced opinions about the mental capacity and the place of women".²² The judiciary "deliberately erected into permanent law in modern times the common law view that the male includes the female for the purposes of pains and penalties but not for rights and privileges".²³

Jam Tomorrow and Jam Yesterday, but Never Jam Today²⁴

Mr Driedger insists that the problem "is not one that was created or is curable by legislative draftsmen [*sic*], male or female. It is rooted in a defect in the English language; it exists in all English speech or writing and is not confined to legislation".²⁵ He notes that although the plural pronouns, "they", "their", "them", are common-sex, there is no common-sex personal pronoun in the singular.

In statutes the masculine *he*, *his*, *him*, are used and it is this fact that generates the complaint that male terms are used to apply to both sexes, that legislation is written as if only men exist, or written in terms of the male.²⁶

But as *Alice Through the Statutes* found, the drafters of legislation fail to practise what they preach. The *Criminal Code*,²⁷ for example, uses male terms in some places to include women, neutral terms

¹⁹ *Ibid.*

²⁰ *Ibid.*, 672.

²¹ S.C. 1867, c.1, ss.6 and 7. Discussed in *Alice Through the Statutes*, *supra*, note 2, 688.

²² *Ibid.*

²³ *Ibid.*, 702.

²⁴ *Supra*, note 1, 247. One of *Alice's* discussions with the White Queen.

²⁵ *Supra*, note 3, 666.

²⁶ *Ibid.*

²⁷ R.S.C. 1970, c.C-34.

in other places to achieve the same purposes and sex-based legislation in still others.²⁸ It is therefore impossible for the drafters of legislation to argue in good faith that they are using male terms to include women only because they have no alternative. There are too many examples to the contrary, in too many statutes, with no rational explanation for the confusion.

It is impossible to accept Mr Driedger's arguments that drafters are unable to prepare laws which are not openly discriminatory in their language. The problem is not lack of *ability* but lack of *will*. Drafters who *are in the habit of thinking in masculine terms only*,²⁹ will draft statutes in masculine terms only.

Getting Through the Door

The open discrimination which excludes women from equality can, therefore, be removed by the drafters *without* any change in anything except the goodwill of the drafters. It would, of course, be even *easier* if the English language could be adapted very slightly. Could this be done by the drafters? Mr Driedger says no. He blames "a defect in the English language",³⁰ the absence of a common-sex personal pronoun in the singular, which would perform the same function as the plural personal pronouns, "they", "their", "then". But is the language so static? He notes that a solution would be "to invent a new series of pronouns",³¹ but asserts that "that is not something that draftsmen may do; they must take our languages as they are".³² So he betrays his lack of will by such words as "draftsmen" instead of "drafter" and he relies on a static, unchanging language, a dead language. But we are not, after all, dealing with forgotten hieroglyphics left by peoples who are extinct. We are dealing with living people, and living languages, where words change, die out, and are replaced by totally new ones.

²⁸ *Supra*, note 2, 703: "The Actual Practice of Drafters".

²⁹ See Charles Ferguson, *The Male Attitude* (1966), 17: "The male thinks of himself as the universal, so that you find much about Man (embracing Woman) in such stentorian terms as Man's Unconquerable Spirit, Man and His Destiny, Man and Civilization, Man and His Gods, Man Above Humanity, Man and the Future, Man Against Nature, Man and the Universe The godhead is encased by theologians, virtually all of them men, in phrases that preserve and sanctify the male ego."

³⁰ *Supra*, note 3, 666.

³¹ *Ibid.*, 672.

³² *Ibid.* (emphasis added).

Mr Driedger cites excerpts from various authorities to show that "[t]he masculine singular personal pronoun has been used in English literature since its very beginnings".³³ He quotes Chaucer, Shakespeare and the proverbs. His comment on Martin Luther is significant: "I believe we can all agree that Martin Luther and the authors of the Authorized Version or the Revised Standard Version knew their language."³⁴ Was it not Luther who said: "If a woman grows weary and at last dies from childbearing, it matters not. Let her die from bearing, she is there to do it". Women know the men who wrote the various translations of the Bible as men who wrote into it their own views about women. Women are, for that very reason, rewriting history themselves to eliminate the masculine bias reflected in language or in ideas.³⁵

The whole point is that language cannot be seen in the abstract. It reflects the views of the writers. And the language itself is a living organism, continually growing and changing. Look at Mr Driedger's Chaucer excerpt³⁶ ("beest", "peyne", "moot wepe") to see how much has changed. Or to go further back, to the beginnings of English literature, look at the opening lines of the epic poem *Beowulf*:

HWÆT, wé Gár-Dena on zéar-daguin,
þéod-cyninga þrymm zefrugnon,
hú þá æðelingas ellen fremedon. ³⁷

The fact is that we cannot speak or understand the language of our early ancestors. It is possible to find in both French and English the traces of the history which has affected them; it is possible to find in each, the mingling of many peoples and many tongues. There is nothing permanent where language is concerned; it changes with the needs of the times. And the rate of change of all languages has grown enormously. With advances in science new words have flooded into the languages of the world; "television" and "radio" or "train" or "airplane" were unknown to Chaucer. The reality of a living language is that it does grow.

But do new words also come into the law? Or is law completely immune? The same influences are at work. Alfred the Great's Code

³³ *Ibid.*, 668.

³⁴ *Ibid.*, 669.

³⁵ E.g., the *Encyclopedia Britannica* (1958) does not mention Cleopatra in the history of Egypt.

³⁶ *Supra*, note 3, 668.

³⁷ Klaeber (ed.), *Beowulf* 3d ed. (1950) 1; "Yes, we have heard of the glory of the Spear-Danes' Kings in the old days — how the princes of that people did brave deeds." Trans. by Donaldson in *The Norton Anthology of English Literature*, rev. (1968), vol.1, 35.

is an example of 9th century Anglo Saxon, virtually incomprehensible to the modern reader:

Be eyninezes swiedome.
 Be ciricene friðe.
 Be ðam ðe steleð on ciricean.
 Be ðam þæt man feolteð on kyninges healle.
 Be ðam þe numman of mynstre utalædeð.
 Be ðam ðæt man ofslea wif mid eilde.
 Be hæmed ðingum.³⁸

Statutory language has changed repeatedly over the centuries. In Canada, the statute revision of 1970 was shaped by the decision to give equal importance to the French and English languages, enormously increasing costs and totally changing the format of statutes.³⁹ New words such as "ombudsman", "Anglophone", "Francophone", are proof that governments can create new words at will. The drafting of statutes is completely flexible if the drafters or their political rulers wish.⁴⁰

What about Mr Driedger's concern about the absence of a common-sex personal pronoun in the singular? Mr Driedger quotes Jespersen's⁴¹ three examples of solutions: use of "he or she", use of the male term only, and Thackeray's use of the plural: "Nobody prevents you, do they".⁴² Mr Driedger rejects the first possibility, approves the second, and condemns the third as "common in speech and used occasionally in writing, [but] . . . grammatically incorrect".⁴³ Yet the common usage of the plural is a practical solution. The need for such usage is confirmed by its continuation in the speech of the people. It will not as Mr Driedger fears, "in effect expunge the singular pronouns from the English language".⁴⁴ On the contrary, usage of the plural where one person represents a plural idea will make the language *more precise and more just*, and will reserve the singular pronouns for usage where a single person or object is intended.

There are other ways to solve the problem. The invention of a new series of pronouns is certainly possible, if the drafters or the political rulers wish. Can new pronouns be invented? Of course.

³⁸ Turk (ed.), *The Legal Code of AElfred the Great* (1893), 59.

³⁹ See Revised Statutes of Canada, 1970.

⁴⁰ See Russell, *Legislative Drafting and Forms* 4th ed. (1938), 22-23.

⁴¹ *Essentials of English Grammar* (1950), 193.

⁴² *Supra*, note 3, 667.

⁴³ *Ibid.*, 667-68.

⁴⁴ *Ibid.*, 668.

The word "thou" was once current in middle English, as a word of familiarity like the present "tu" in French or "du" in German, but it has passed out of ordinary usage, and has taken with it the second singular of the verbs, such as "lovest" or "lovedst".⁴⁵ The pronoun "you", which is used today by everyone as the pronoun of the second person singular or plural in any grammatical relation except the possessive, is recorded by Webster as having been used only as a *plural* pronoun of the second person from Old English times to the 13th or 14th century.⁴⁶ The acceptance of "you" for use in the singular is therefore the best possible precedent for the similar use of "they" and "their" to apply to the singular.

To make matters even easier, we could use a perfectly good series of pronouns, *without* inventing any. I refer to "it", which is already used with reference to things, and with respect to babies or pets without regard to their sex. Can it be done? Of course, *if* the drafters wish to do so. The word has already gone through a change in spelling, from the old spelling "hit".⁴⁷ And the word "its" actually displaced the use of sex terms with reference to inanimate objects so recently that it was just coming into use in Shakespeare's time. Shakespeare rarely used it, and the Authorized Version of the Bible used "his", "her", or "thereof" in places where we would use "its".⁴⁸ Richard Chenevix Trench, the learned author of a book on the study of words, points out that "the constant application by our rustic population in the south, and I dare say through all parts of England, of 'his' to inanimate objects, . . . no less than to persons, where 'its' would be employed by others" is really the retention of old grammar by some, and is not in fact ungrammatical usage.⁴⁹ So the word "it" and the recent

⁴⁵ See Trench, *English, Past and Present* 5th rev.ed. (1862), 175-76. See also *Webster's Third New International Dictionary of the English Language* (1968), 2380-81.

⁴⁶ *Ibid.*, 2653-54: "you . . . used from Old English times to the 13th or 14th century only as a plural pronoun of the second person in the dative or accusative case as direct or indirect object of a verb or as object of a preposition . . .; used since the 13th or 14th century also as a singular pronoun of the second person as direct or indirect object of a verb or as object of a preposition, at first only as the appropriate form of address to a person of high social status or to a person not well known to the speaker but later without this limitation . . ."

⁴⁷ *Ibid.*, 1202.

⁴⁸ Thus see Skeat, *An Etymological Dictionary of the English Language* 4th ed. (1910), 310. And see Trench, *supra*, note 45, 133-35.

⁴⁹ *Ibid.*, 133.

word "its" have shown that they can meet a need and be accepted fully by connoisseurs of the language. French, of course, is no less flexible than English, and it is impossible to argue rationally that there is any need for withholding drafting changes in English until the drafters decide upon them in French. If the drafters cannot do the job, the people can.

Would women obtain equality automatically by drafters using neutral terms in statutes? Mr Driedger claims that this is something I believe, but *Alice Through the Statutes* pointed out over and over again the nefarious role which the courts have played in reducing women to second-class citizens. The courts have, in fact, often applied the rules of the same "con" game even when apparently neutral terms have been used. *Alice* summed up the present situation in these words:

For over a hundred years it has been clear that legislation drafted in terms of the male exposes women to denial of rights granted to men. *Even legislation drafted in neutral terms has often been used to exclude women from rights and privileges.* The whole structure of the law with respect to women rests upon judgments of men who regarded women as inferior.⁵⁰

But the problem of the courts is a different matter. The drafters of legislation cannot blame the courts until they themselves have democratized the statutes of Canada.

Because the women are finished waiting. It is no longer possible to tell them that the rule is, jam tomorrow and jam yesterday, but never jam *today*. As *Alice* said, it *must* come sometimes to "jam today".⁵¹ And that "sometimes" is now.

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⁵⁰ *Supra*, note 2, 705-706 (emphasis added).

⁵¹ *Supra*, note 1, 247: " 'You couldn't have it if you *did* want it,' the Queen said. 'The rule is, jam to-morrow and jam yesterday — but never jam *to-day*.'

'It *must* come sometimes to "jam to-day"' Alice objected.

'No, it can't,' said the Queen. 'It's jam every *other* day: to-day isn't any *other* day, you know.' "

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