Dorothy Goes to Law School: Stories of Institutional Inertia and Response in the American Legal Academy[1]

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Women, Legal Education, and Inertia

> *They thought the Great Wizard would send for them at once, but he did not. They had no word from him the next day, nor the next, nor the next.*[2]

Perhaps because of the emphasis on precedent, law is a backward-looking profession. We members of the legal academy tend to revere tradition, time-honoured 'truths', and consistency. Yet this approach to our profession has contributed to miring legal education in a stodgy inertia, slow to react to changing circumstance or indeed to recognize the need to do so.

One of the changing circumstances over the last several decades is the presence of women law students. It is only within the past thirty-odd years that women began to enrol in law school in numbers significant enough to make their presence felt.[3] The combination of the removal of barriers to professional and academic entry and the consciousness-raising of the 1970s saw dramatic increases in females in the law classroom. Women have made up a significant percentage in both American and Australian law schools for the past twenty years.[4] The percentage of women is now at or approaching parity with male law students in both countries.[5]

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1 An earlier version of this paper was presented at the F-Law 2001 Conference, Queensland University of Technology, Brisbane, Qld, Australia on February 15 2001. Thanks go to the participants at the conference for their helpful comments, especially to my husband and colleague at Deakin University, Dr Chris Geller. I am also grateful for the comments of the anonymous referee for the *QUT Law and Justice Journal*. Most importantly, thanks also go to the women whose stories are told in this paper.

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2 L F Baum, *The Wonderful Wizard of Oz*, first published 1900, J M Dent edition 1966 at 101.

3 C Fuchs Epstein, *Women in Law* 2nd edn 1993 at 59; J A Scutt, *Women and the Law*, 1990 at 31; M Thornton, *Dissonance and Distrust: Women in the Legal Profession*, 1996 at 94.

4 In Australia, females have made up greater than 40% of the beginning students studying law since at least 1983: DEETYA, Higher Education Division, *Higher Education Students Time Series Tables* 3rd edn 1998, Table 13.3. The figures for women completing a law course during that period are lower, but still represent a substantial presence: *Ibid*, Table 18.3. By the close of the

Despite the gains in female numbers, law schools have been slow to react to the potential for different needs among students that this represents. As women's presence in law schools increased, so did calls for change in the system. For example, the work of many early feminist legal scholars centred on giving women a voice in part by asking the "woman question".[6]

The 1990s saw efforts to make women's voices heard in the legal academy. Teaching about gender and the law was incorporated into more curricula; the visibility of female academics increased; more journals dedicated to feminist concerns were launched. Though there has been increased visibility in some sectors, the overall institutional response to calls for change has been erratic. The American academic hierarchy, still overwhelmingly white and male, tends to resist substantive change proposed by women students. This institutional inertia inhibits law schools from moving forward in the effort to fully include women in the legal academy. Despite women being admitted to the classroom and to the law degree, significant barriers remain to women feeling an integral part of the law school community.

Female students attending law school in the twenty-first century may run up against obstacles in the legal academy structure which they are unprepared to encounter. Many women view law as the source of fairness in our society and do not expect to meet structural constraints that block their voices in the legal academy. Others may have expected that their pioneer predecessors had already wrought sufficient change that they personally would not need to prompt further action.[7] Many women believe that a legal education can provide them with power and independence and are surprised when the system does not assist them to achieve those goals.[8]

1970s, the top US law schools began to have graduating classes between 20 and 40% female, with the average US law school having 30% of its degree recipients female: Epstein, *supra* n 3 at 53-58.

5 J D Glater, 'Women are Close to Being Majority of Law Students' March 26, 2001 at 1, available at <http://www.lawschool.com/femalemajority.htm> (visited 26 July 2001, on file with author) (citing American Bar Association statistics); DEETYA, *supra* n 4.

6 See eg K T Bartlett, 'Feminist Legal Methods' (1990) 103 *Harvard Law Review* 829; C Menkel-Meadow, 'Portia in a Different Voice: Speculations on a Women's Lawyering Process' (1985) 1 *Berkeley Women's Law Journal* 39. Using the word 'voice' in a feminist paper calls to mind the work of Carol Gilligan, who has been highly influential in the development of modern feminist legal theory. See C Gilligan, *In a Different Voice: Psychological Theory and Women's Development* 1982. My use of the word here is not intended to suggest a single perspective owned by women, but rather to encompass the many perspectives represented by women law students, practitioners, and teachers as, quite literally, expressed in their voices or speech.

7 The pioneers in this context are women who attended law school during the so-called second wave of feminism, also known as the 'women's liberation' movement, in the late 1960s and 1970s. This era of feminist thought emphasised formal equality and the elimination of legal barriers to equal rights for women. Second-wave feminism, generally speaking, began in Europe with the publication of S de Beauvoir's *The Second Sex* 1949 and gained steam in the United States with B Friedan's *The Feminine Mystique* 1963 and the passage of Title VII of the *Civil Rights Act* of 1964, 42 USC s 2000e, outlawing discrimination based on sex. In Australia, this stage of feminism may be roughly dated by the *Equal Pay* cases of 1969, 127 CAR 1142, and 1972, 147 CAR 172, and the passage of the *Sex Discrimination Act* 1984 (Cth). See generally M Thornton, *The Liberal Promise: Anti Discrimination Legislation in Australia* 1990. For further information and bibliographies on the second wave of feminism, see the website for the International Archives of Second Wave Feminism at <http://home.att.net/~celesten/2ndwave.html>, visited on 10/10/2001, web page on file with author.

8 See Thornton, *supra* n 3 at 88.

Like Dorothy in *The Wizard of Oz*, most women upon encountering these barriers rather naively seek help within the academic structure, expecting to get it. Dorothy goes to the "Great and Terrible Oz" asking to be sent home to Kansas. Oz replies that he will help her IF she will kill the Wicked Witch of the West.[9] The Wizard of Oz refused to respond to Dorothy's request although maintaining an appearance of receptiveness and demanding superhuman performance of her in return. Analogously, the traditional academic institution's responses to female voices are often inadequate, as demonstrated by the experiences of women law students themselves. Law schools still have a long way to go toward making their structures accommodating, much less welcoming, to many women.

This paper presents three stories of women's interaction with the American legal academy during the 1990s.[10] These stories typify modes of response of the university community to demands by its female students and illustrate the need for further change in institutional structures. This paper then calls for an alternative structure that could be useful for women, as well as other non-traditional students, in providing them a more effective voice within the legal academy.

1. The Women Who Did Not Cry Wolf

> *'Oz himself is the Great Wizard', answered the Witch, sinking her voice to a whisper. 'He is more powerful than all the rest of us together. He lives in the City of Emeralds.'*[11]

This is a story from an American first-year criminal law class.[12]

> The class was discussing the merits of rape shield statutes, which make certain evidence regarding a rape victim's dress or sexual habits inadmissible at trial. The topic provoked strong emotions in many women in the class. The professor became excited because the class did not seem to agree with his point of view that rape shield statutes impermissibly infringe the rights of an accused to a fair trial. He was adamant that evidence of a woman's dress or sexual history was clearly relevant to the issue of consent. He began to speak more heatedly.
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> Most women in the class were visibly upset. Some raised their hands to respond to the argument but the professor did not acknowledge the raised hands. 'They tell you down at the Rape Crisis Centre -- if she says "no," it's

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9 Baum, *supra* n 2 at 68-70.

10 The stories related herein are the real stories of women who were law students in America during the 1990s. Names are not used and some details have been altered to protect the privacy of the persons involved. The narratives were not gathered as part of a formal study, but rather are the product of conversations with several female legal practitioners over a period of years. The specific words used to tell the stories are my words, unless indicated by quotation marks. My commentary on the narratives is slight, as I prefer to let the stories speak for themselves.

11 Baum, *supra* n 2 at 9.

12 For a suggestion on how to teach about the crime of rape without gender bias, see N S Erickson, 'Sex Bias in Law School Courses: Some Common Issues' (1988) 38 *Journal of Legal Education* 101 at 114-115.

rape.' The professor's voice was rising but his expression was a sneer. 'Wrong, wrong, wrong!' he shouted.

A brief, shocked silence ensued. One female student spoke without raising her hand. This student almost never spoke in class unless called on. She hesitantly commented that what a person wore did not have anything to do with whether she consented to be raped.

The reply was swift and brutal: 'You are *so* wrong I can't even **tell** you how wrong you are.'

The student tried to respond but instead began to cry. She walked out of the class. The women in the class were frozen. One woman later remarked that 'We were so shocked we didn't know what to do—whether we should protest or walk out. I felt like I had been slapped.'

The professor, apparently realizing temperatures had gotten too high, attempted to continue with class, but he had lost the women. They were whispering mutiny to each other: 'I can't believe he said that!' 'He made her cry!' 'Should we walk out?' 'No, he won't even let you in class if you come late. What would he do if you walked out?' Shortly afterward, he dismissed the class.

A group of women congregated afterward, talking of this professor's behaviour. It was not just the legal and political implications of the professor's statements that angered the women students. It was his utter disregard for any pedagogical purpose in his responses. It was rumoured that he graded women harder than men. He bullied the students. Today was the last straw. They all agreed he had gone over the edge of acceptable professional behaviour. But could they do anything about it?

One woman suggested that they should go to the Dean and protest what happened in class. The other women objected: 'You will be branded a troublemaker.' 'He's got tenure. They can't do anything to him.' 'You still have to take this man's class. He can fail you.' 'Going to the Dean could wreck your career.' So no one went to the Dean.

They decided to discuss the matter with the only female teacher they had as first-years: their part-time, non-tenure-track instructor of legal writing. She, however, advised them to 'just take it'. Years later, one woman related she is angriest about 'doing nothing'.

From this incident the fledgling women law students learned a lesson in ineluctable logic. (1) No one will fight your battles for you. (2) Even you should not fight battles if they are risky. (3) All clashes with those in power over you are risky, (4) so you just take it. Although one could argue that it was the students' choice to remain silent, with the imbalance in power between first-year law students and a professor or administrator, it is questionable whether that 'choice' was truly authentic or voluntary. From a student's perspective, the power of a law professor is awesome. Not only is a tenured

academic in a 'job for life', but also can hold significant power over immediate consequences, such as marks, as well as long-term consequences, such as job recommendations.

In the face of such power, our first response as women is often to censor ourselves. In so doing, we deny our own voices and needs. Some researchers suggest that women's silence can mask psychological distress with clear implications for academic performance.[13] Commentators have also suggested that the law is itself diminished by the absence of women's perspectives.[14]

Importantly, silencing ourselves denies the institution an opportunity to respond. Without giving the institution 'notice' of the problem and an opportunity to be heard, the academic hierarchy is denied *its* natural justice. Thus, in the paradigm of legal procedure, any real criticism of the system without this due process can be dismissed as illegitimate and effectively ignored. However, as the following stories demonstrate, women law students who find their voices don't fare much better in moving the academic hierarchy.

2. Learning to Swim

> *'When you came to me I was willing to promise anything if you would only do away with the other Witch; but now that you have melted her, I am ashamed to say that I cannot keep my promises.' 'I think you are a very bad man,' said Dorothy. 'Oh no my dear; I'm really a very good man; but I'm a very bad wizard, I must admit'.*[15]

> I will never forget the first time I walked through my law school. Down each hall, at appropriately dignified intervals, hung huge, gilt-framed portraits of important alumni in judicial or academic robes or dark suits. They were, with a single exception, middle aged white males: only one woman, no people of colour. For the first time I felt strongly my position as 'other'.

> The presence of these portraits was a powerful symbol for me. It said that those alumni who were valued by the law school and who made significant contributions to it were people who were not like me. My first thought was, they're not going to let me play this game. I doubted that success as the law school measured it was within my grasp because I did not look like a member of the club. Other women felt the same as well. The women's organization went to the administration to see whether the symbolism of the

13 L Guinier, M Fine and J Balin, *Becoming Gentlemen: Women, Law School, and Institutional Change* 1997 at 59-61. Several studies have reported that women law students experience greater levels of stress and anxiety than male law students: S Daicoff, 'Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism' (1997) 46 *American University Law Review* 1337 at 1376-1377.

14 L M Finley, 'Women's Experience in Legal Education: Silencing and Alienation' (1989) 1 *Legal Education Review* 101; R F Moran, 'Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall (2000) 88 *California Law* Review 2241 at 2342; C Tobias, 'Respect for Diversity: The Case of Feminist Legal Thought' (1989) 58 *University of Cincinnati Law Review* 175 at 182.

15 Baum, *supra* n 2 at 107.

portraits could be put to some positive use by giving those of us who did not look like the figures in the portraits someone to look to.

The university's response was first, 'well, one must fit certain criteria to have a portrait hung. No women meet that criteria.' 'What criteria?' we asked. The official did not really know, but said no women had achieved places in the profession equal to that of the males represented. 'How about Judge X?' we suggested. 'Oh, she has not been on the bench long enough; she has not proven herself yet,' was the reply.

Since the administration could not even tell us what the alleged criteria were, we researched the issue and discovered there *were* no criteria. There was no uniform standard about what attainments had to be made or even an indication at what point in a career the portraits had been placed. In fact, one man was up on the wall simply because he left his portrait to the law school in his will.

When we returned to the administration with this information, the response changed. This time the answer was more practical: to get a new portrait there would have to be fundraising. 'Could you help us with that,' we asked? No, the law school was stretched too thin for that. There was no attempt to put the women's group in touch with possibly sympathetic alumnae or law firms with deep pockets. We were given no explanation of how one approached the process of raising funds. In fact, we were actively discouraged from even beginning such a process of fundraising because the administration feared we would draw off alumni who would otherwise give to the school's general fund.

Ten years later, there is still only one female portrait.

This incident reminds me of the way young children were taught to swim when I was small. "Jump", our parents would say, "I'll catch you" and when you start to swim toward them, they back away. Sometimes it worked. Sometimes panic ensued. You might be learning to stay afloat, but at the cost of trust in your parent and in the water. I question not only whether this method is necessary but also whether it produces competent and confident swimmers.

The only surprising thing about this story is its persistence over time and among numerous law schools. Issues surrounding law school portraits have been prominent in the minds of female students and graduates for decades.[16] Yet the universality of the issue for many has failed to lead to its resolution. While many women and men of colour attempt to ignore or suffer the portraits in silence, if students do express dissatisfaction, they are often dismissed as strident, radical, or worse--trivial.[17]

16 M Harrington, *Women Lawyers: Rewriting the Rules*, 1993 at 45; L Guinier, 'Models and Mentors' in L Guinier, M Fine and J Balin, *Becoming Gentlemen: Women, Law School, and Institutional Change*, 1997 85 at 85-86.

17 As noted by some feminist commentators, many legal academics and lawyers are uncomfortable discussing issues relating to emotional reactions. See eg C L Hill, 'Sexual Bias in the Law School Classroom: One Student's Perspective' (1988) 38 *Journal of Legal Education* 603 at 605; L M

The response of the academic hierarchy in this story is typically Janus-like. On the one hand, the academy tends to dismiss the significance of this issue as 'mere decoration'. Typical responses are that the portraits have always been there, they merely reflect the reality of a previously (white) male-only profession, and that dwelling on the issue suggests a certain unlawyerly over-sensitivity. Simultaneously, as occurred in this story, the administration defends the sacredness of the portraits by investing them with a meaning they do not independently possess: the illusory 'criteria'. Thus, American legal academia has both tended to deny any symbolic significance of alumni portraits and to invest the portraits with symbolic meaning. Once the unstable character of the criteria is exposed, Dorothy is then expected to conquer the Wicked Witch of Fundraising without any assistance or advice from the academy—hardly a fair fight.

Most academics and administrators would acknowledge the significance of alumni portraits with respect to the 'typical' law student—the portraits give them role models to strive for, a sense of history to belong to. Yet those same people often fail to recognize the obvious converse—that 'atypical' law students (including women and men of colour) find it difficult to model themselves on a conservative white male, and that for them, the history of the portraits reinforces a strong sense of not belonging. In matters where a law school risks alienating a significant portion of its future contributors by lack of responsiveness to their concerns, it seems short-sighted at least to cling to tradition for its own sake.

3. Story of the Library Dragon[18]

> *On the fourth day, to her great joy, Oz sent for her, and when she entered the Throne Room he said pleasantly: 'Sit down, my dear; I think I have found the way to get you out of this country.' 'And back to Kansas?' she asked eagerly. 'Well, I'm not sure about Kansas,' said Oz, 'for I haven't the faintest notion which way it lies'.*[19]

The law library normally closed at midnight. However, due to the large demand for further access to the library, the policy developed that law students were permitted to stay in the library after the staff left at closing and could essentially be 'locked in', using a push-bar door which remained locked to exit after hours. There was a car park next to the library where those using the library at night usually parked.

Thus, it was commonplace for one to twenty students to remain in the building after closing: doing research, meeting in study groups, or using the computers. However, when the staff left, after-hours students had no access to a telephone, as it was locked up in the office, and students could not re-enter the building once they had left.

Finley, 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' (1989) 64 *Notre Dame Law Review* 886 at 897; R F Moran, *supra* n 14 at 2332-2333.

18 With apologies to Carmen Agra Deedy, whose wonderful children's book about the guardians of libraries provided the inspiration for this title. C A Deedy, *The Library Dragon*, 1994.

19 Baum, *supra* n 2 at 114.

> One night, as a female law student left the library at 1am to walk to her car, a man grabbed her from behind and tried to tear her clothing off. She screamed. Several male students, hearing the scream, ran out of the library and into the car park. The attacker then let the female student go and began to run. The male students chased him down and held him until the police arrived.
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> The following day, a group of female students requested a meeting with the Dean of the law school regarding the attack. The students had several suggestions regarding improving the safety of the area around the law library. The administration later met with the students.
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> Among other suggestions, such as better lighting of the area at night, the women students suggested that, as the university already provided an escort service which could be called to walk students to their cars, the best way to prevent a repeat of the incident would be to install a pay telephone in the library so that students who used the library after hours could either call a friend or the campus escort service before leaving.
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> Administration officials were sceptical: students would abuse the phone and disturb library patrons. The women countered: you could make it a campus-only phone. No, it would still disturb readers. The women then suggested installing it in the vestibule of the exit so that it would not be near library patrons. No, the administration said, not really giving a reason why this was not possible. Finally the women suggested having library staff place their phone out only when locking up at night and have students remaining sign in so any abuse of the phone privilege could be traced. The answer was no.
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> The solution the Dean's office proposed was that students would no longer be allowed to stay in the library after closing. The women protested that this was in effect punishing all the law students for what an outsider did, but the policy was implemented immediately. The new policy angered students who used the library after hours, and most students tended to blame the women's group for bringing the issue before the Dean, rather than attribute the closing to Dean's restrictive response to their suggestions. The general feeling seemed to be if the women just had not complained, everything would have been ok in the end. After all, they caught the rapist.
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> None of the suggestions put forward by the women's group were implemented. The students were left with feelings of frustration and diminishment: Isn't this what we are supposed to do--be assertive and communicate our needs; go through the proper channels; be reasonable? Why were we ignored?

Somewhat incredibly, despite the fact that the students in question were all in training for the law, the women never considered filing a lawsuit against the university for creating or allowing conditions that facilitated the commission of crime. The university was likely vulnerable on that point and, if for no other reason, should have given more

consideration than it did to the students' requests. Instead of being helped by the administration, the women students were made worse off by voicing their concerns.

This story is, I think, an illustration of the ostrich-like approach with which many legal academies address problems. From the institution's perspective the tenure of an individual student is brief; perhaps ignoring students will make the issue 'graduate'. However, the morality of ignoring or discounting the student's perspective is dangerous. Student fees enable us to pursue our research. It is at bottom a patronage system, though the students frequently do not realize it. Beyond sheer moral questions, the legal academy is at risk of alienating its women students—nearly half of its market at present--and thus foregoing the benefit of expanded experience and perspective, if we in the academy fail to act, misdirect, and, most importantly, fail to listen.

So Which Way is Kansas?

> *'Your silver shoes will carry you over the desert,' replied Glinda. 'If you had known their power you could have gone back to your Aunt Em the very first day you came to this country'.*[20]

Essentially what these stories have in common is that the institution has failed women students. These stories are not uncommon. They are all the more troubling because of that. The sheer fact that the same difficulties have persisted over time and across campuses dramatises the long-overdue need for positive change. Women students either do not express dissatisfaction out of fear or find expression fruitless when institutions fail to engage with or respond to what students are saying. As noted by several feminist academics, the continuing exclusion of women's voices from the legal academy—despite presence in equal numbers—may be reflected in different academic outcomes along gender lines[21] and go a long way toward explaining differences in professional opportunities and the so-called glass ceilings in all aspects of the legal profession.[22] Indeed, the legal profession will not realise the potential benefits of its female members as long as it educates in conformance with practices which perpetuate the silence of women.[23]

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20 *Ibid* at 144.

21 Guinier, Fine & Balin, *supra* n 13 at 75. According to empirical research as well as anecdotal reporting, women speak in law school classrooms less frequently than men. T Lovell Banks, 'Gender Bias in the Classroom' (1988) 38 *Journal of Legal* Education 137 at 141; C Menkel-Meadow, 'Feminist Legal Theory, Critical Legal Studies, and Legal Education, or "The Fem-Crits Go to Law School" (1988) 38 *Journal of Legal Education* 61 at 77. This is evidence that the 'voices' of women are literally heard less than their male counterparts within the legal academy.

22 C Grant Bowman and E M Schneider, 'Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession' (1998) 67 *Fordham Law Review* 249 at 257-58; T Lovell Banks, *supra* n 21 at 138.

23 See C Menkel-Meadow, *supra* n 21 at 74-81. There is interesting evidence to suggest that the traditional method of legal education currently employed (the Langdell case-Socratic model) homogenises expressions of difference between the genders and may preclude reformation of the legal profession simply by increasing numbers of women. See S Daicoff, *supra* n 13 at 1401-1402; L E Teitelbaum, A Sedillo Lopez, and J Jenkins, 'Gender, Legal Education, and Legal Careers' (1991) 41 *Journal of Legal Education* 443. Such an operation of the legal academy may explain why some studies have not found a correlation between gender and ethics. Compare W J Turnier, P Johnston Conover and D Lowery, 'Redistributive Justice and Cultural Feminism' (1996) 45 *American University Law Review* 1275. For an explication of various theoretical constructions of

The institution could have turned these experiences into a positive if it had provided avenues for presenting grievances which would (1) give women a legitimate and sympathetic forum to air their views free from negative repercussions, and (2) require real response from the institution. Having the traditional academic hierarchy as the sole avenue for seeking response from the academy simply does not work for most women. Research that suggests that many women do not respond well to authoritarianism and formal structures in law schools may provide some guidance here.[24] While networks and avenues for reporting sexual harassment which bypass the typical power structure of the Dean's office have certainly taken root in law schools over the past ten years, recognition that there may be other issues of concern primarily to women students which also require non-traditional routes of action has been slow in coming.

The stories of women's experiences as law students demonstrate that there are indeed issues of concern to women that simply are not covered under the rubric of harassment. A reasonable step toward eliminating the barriers to women in the profession would be for law schools to create from the tenured staff a position as student advocate, placed to advise and support women on issues of concern to them within the context of the law school. It would be her task to help students find a voice and to show them how to make that voice count. This advocate should not be directly responsible to the Dean but to the university's governing body so as to obviate any conflict of interest inherent in those responsible for the status quo of law school policy. Although some may question the need for a special advocate within the law school or faculty itself, as members of a profession which advocates equality under the law, it is important for legal academicians to demonstrate a commitment to substantive equality.[25] Offering alternative means of dialogue with the academy is one way law schools may show evidence of this.

In *The Wizard of Oz*, Dorothy learns that she has had the power all along to help herself achieve her goal of getting back to Kansas. Yet she did not discover this power by herself. Dorothy was instructed by Glinda the good witch, an older, wiser woman. The women's advocate, modelled possibly on structures already in place for harassment complaints, could serve in such a role as to give women back their voices and empower them to create legal academies with space for us all.

We academics have learned the feminist lesson of the eighties and nineties: that we must ask the woman question. What the academy must now do, and what it is failing to do, is really listen to the answers.

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law, including Langdell's theories, see G B Wetlaufer, 'Systems of Belief in Modern American Law: A View from Century's End' (1999) 49 *American University Law Review* 1.

24 See Guinier, Fine & Balin, *supra* n 13 at 58-59.

25 See C Menkel-Meadow, *supra* n 21 at 67; C L Hill, *supra* n 17 at 608.