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Seeing Through "The Glass Ceiling": A Response to Professor Angel

Dan Subotnik

Metaphors . . . are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.¹

In the 1980s, according to a 1988 article by Marina Angel, the status of women in law school was gradually improving.² Her more recent article in this journal—"The Glass Ceiling for Women in Legal Education: Contract Positions and the Death of Tenure"—takes a darker view. Although "[o]n the surface," she reports now, "it still appears that there has been constant progress[, a] more careful analysis proves otherwise."³ A "glass ceiling," she explains, blocks progress for women legal academics.

Does her well-worn metaphor fit? Or is Angel just extending to legal education a universal feminist assumption that the law oppresses women?⁴ Is she highlighting a problem that needs remediation? Or is "The Glass Ceiling" mostly cant? In sum, is Angel's glass ceiling not only invisible, but also imaginary?

Angel begins by telling about the Philadelphia Bar Association's Sandra Day O'Connor Award that she won in 1996. On the dais at the function honoring her were a few women and "three tiers" of men. Accepting the award, she expressed the hope that in a few years' time the "composition of the dais would mirror the diversity of the lawyers in the room" (1). Someone important was paying attention because at the following year's ceremony many more women were on the dais. Year three, however, was different. Women lost their newly acquired honor. The chancellor explained that everyone he had talked to "liked it better with just tables," so he abolished the dais (2). For Angel, this is the prototypical outcome when women challenge men's

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1. Justice Cardozo, *Berkey v. Third Avenue N.Y. Co.*, 244 N.Y. 84, 94 (1926), rehearing denied, 244 N.Y. 602 (1927).
2. *Women in Legal Education: What It's Like to Be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 *Temple L. Rev.* 799, 840 (1988).
3. 50 *J. Legal Educ.* 1, 1 (2000). Other page references to this article are in parentheses.
4. "Whatever their differences, feminists tend to start with the assumption that the law's treatment of women has not been fair and that change is desirable." Martha Chamallas, *Introduction to Feminist Legal Theory* 9 (Gaithersburg, 1999).

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hegemony: "Women Get a Ticket to Ride After the Gravy Train Has Left the Station."

But is Angel the best interpreter of her own story? In her very first sentence she echoes many feminists in proclaiming an aversion to hierarchical structures. In this view, leveling the seating area should be celebrated as a minor triumph in the effort to feminize America's legal institutions.

The rest of Angel's article can be reconstructed in the same manner. The percentage of female full-time teachers, we are told, was "stuck" below 30 percent from 1988 through 1998, having gone from 23.8 to 29.3 percent, a "slight increase" in Angel's terms, and one which she attributes to "increased hiring of clinicians and legal writing teachers, who are overwhelmingly women" (9). But a gain of 5.5 percentage points (29.3 less 23.8) represents a 23 percent increase, a figure that is hardly insignificant. Angel does not, moreover, provide any information on the increase in contract hiring for women during this period. Most important, surely, is the success of women in legal academia reflected in numbers Angel herself reports: for the 1997-98 year, 44.2 percent of associate professors and 51.1 percent of assistant professors were women.⁵

Angel concedes that the 1997-98 numbers would seem to augur well for women. She quickly informs readers, however, that "women fare worse than men in achieving tenure" (9). Attempting to prove her point, she cites her own 1988 study of women law faculty during the 1970s and 1980s. But this now-dated study dealt with women at only five schools. More revealing, she cites no post-1988 study of the status of women in law schools to counter the stunning 44 percent and 51 percent statistics.

Focusing on new hires in legal education, Angel concedes that women's success rate at the AALS faculty recruitment conferences over the last five years was 12.3 percent as opposed to 9.9 percent for men, a disparity she calls "slightly greater" for women. But when you do the math again, the rate for women turns out to be 24 percent higher than that for men. Angel then plays what she sees as her trump card: 57.3 percent of the hires in 1996-97 were men, but only 43.2 percent were women.⁶ That card, I suggest, is a dud, because, as Angel herself reports for 1997-98, women made up only 36.7 percent of candidates, a datum to which I shall return (9). Under all these circumstances, a conclusion that women have not made "constant progress" in recent years is untenable.

Angel is perhaps on firmer ground when she writes about low-status positions (lecturers and instructors), where women make up 66.9 percent of the workforce (9). But that fact triggers a number of questions, none of which Angel addresses. Who applies for these positions? Would women be better off if law schools hired more men for these jobs, even if they were less qualified? Are contract employees as well trained as those hired for the professorial positions? Conversely, is the publishing requirement, along with the related

5. Comparable data, according to AALS data specialist Rick Morgan, are not available for 1988.

6. I am not sure why these numbers do not equal 100 percent.

need for academic freedom, of such great import as to justify salary and status disparities? Are too many highly paid professors coasting, while legal methods instructors are burdened with students who have not learned to write? Finally, whatever the answers to the foregoing questions, should law schools be campaigning for mandatory retirement or against tenure in order to allow for the promotion of women?

I offer no answers here. It would seem, however, that Angel is hiding behind statistical disparities and that these issues need real discussion. My call for serious debate, I want to emphasize, should not be interpreted as a brief for the status quo. I make no claim to having had greater credentials when I entered legal education than those offered by my legal writing colleagues at the time. Some of my own research, moreover, shows that status provides benefits in legal academia that are too frequently unearned.⁷

Angel's data relating to legal writing directors, clinicians, and librarians provoke similar concerns. Of tenured legal writing directors, 38.1 percent are men, 61.9 percent women. Of those legal writing directors on the tenure track, 7.7 percent are men, while 92.3 percent are women. This would seem like great news for women. Not, however, for Angel. In her view, the focus should not be on the percentage of tenured or tenure-track legal writing directors who are men or women, but rather on the percentage of all men and women directors who are tenured or on the tenure track. She points out that 32 percent of men directors are tenured, but only 17 percent of women, while 4 percent of men are on the tenure track, and 16 percent of women. But her analysis here is no less problematical. The men and women directors are assumed to have equal experience. But if, as feminists regularly point out, legal education has been overwhelmingly dominated by men until recently, then male directors likely have more experience. The same could be said of clinicians and librarians, who at the top levels are disproportionately male. Almost inevitably, men would be more senior and more likely to have achieved tenure.

In short, the data show unequivocally that men have had an unfair advantage for too long a time. But where does this admission lead us in evaluating the climate for women faculty today? Here again, the existence of overall statistical disparities says little, if anything, about the current climate.

The last part of Angel's argument relates to the increasing use of contract positions in academia generally. "Just as women have begun to amass the credentials necessary to enter the professoriat, colleges and universities are changing the way they operate" (13). The implication, of course, is that it is precisely because of women's academic success that employment doors are closing. But, one wonders, is Angel's argument yet another example of the post hoc fallacy, produced, in this case, by a paranoia inherent in the Feminist Assumption? Tenure, I would suggest, is in jeopardy not because of the recent increase in academic advancement of women, but because too many unproductive faculty, mostly men, are taking up space that might be available to

7. See Dan Subotnik & Glen Lazar, *Deconstructing the Rejection Letter: A Look at Elitism in Article Selection*, 49 *J. Legal Educ.* 601 (1999).

applicants, increasingly women; universities need more flexibility in a fast-changing work environment; and contract positions require less funding.

If the evidence adduced by Angel so consistently fails to support the charge of discrimination against women legal academics, why is she so firm in her position? I have elsewhere attempted to explain the general phenomenon of what could be called "marginal chic," and I will not repeat myself here.⁸ Let me suggest only that the Sandra Day O'Connor Award has something to do with that phenomenon. The O'Connor Award is given to someone for, among other things, "strong advocacy for the advancement of equal treatment of women in the profession."⁹ There are, presumably, no awards for projects such as this one which, highlighting the progress women have already made, have the paradoxical effect of taking the spotlight off women. It should not be surprising, therefore, that feminist scholars are so devoted to bad news.

What is the consequence of this orientation? I have elaborated elsewhere on the devastating consequences of assumed victimhood.¹⁰ But consider one datum here that, as noted earlier, Angel herself supplies: only 36.7 percent of the candidates in the Faculty Appointments Register for 1997-98 were women. Is it not possible, indeed likely, that continuing reports of a glass ceiling for women are themselves a major factor in limiting women's aspirations to be law teachers?

Finally, a word about my credentials for this undertaking. "[W]omen's experience," says Christine Littleton, is "a necessary prerequisite for doing feminism."¹¹ But, I suggest, precluding me from "doing feminism" on the grounds of standpoint and biology makes little sense in this setting. In the first place, my response is but an outgrowth of a new study by two women which concludes that the glass ceiling is mostly a myth.¹²

Second—and more important—I claim a significant advantage over Littleton, and Angel, in this corner of legal education. Six feet tall, I have been carefully examining women academics, presidents of the AALS, deans, full professors and others, at AALS meetings, academic lectures, and school receptions. In my scrupulous attempts to find evidence, I have occasionally found myself brushing up against the objects of my study. I hope I have not come too close for anyone's comfort; I will, presumably, find out in reactions from readers. I can say with assurance that I have yet to detect a single shard or cranial bruise, much less lacerations and contusions, which would follow propulsion through or collision with a functional glass ceiling.

8. What's Wrong with Critical Race Theory? Reopening the Case for Middle Class Values, 7 *Corn. J.L. & Pub. Pol'y* 681, 693-96 (1998).

9. ABA Division for Bar Services, Sandra Day O'Connor Award, Miscellaneous Memo, Fall 2000, at <<http://www.abanet.org/barserv/mm/fall00/memo.html>>.

10. Gender Climate in American Law Schools: A Male Voice Preaches Diversity to the Choir (forthcoming).

11. Feminist Jurisprudence: The Difference Method Makes, 41 *Stan. L. Rev.* 751, 765 n.72 (1989).

12. See Diana Furchtgott-Roth & Christine Stolba, *Women's Figures: An Illustrated Guide to the Economic Progress of Women in America* (Washington, 1999).