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The Impact of Cutbacks in Affirmative Action on Community Lawyering

Bernida Reagan†

A man's abilities are limited only by his lack of opportunities.
- Jackie Robinson

I was asked to write this commentary following my presentation at Boalt Hall School of Law's Women's Reception in March 1999. At the reception, I spoke about the impact of recent changes in affirmative action on my work providing legal services to poor people in the East Bay. During my presentation, I discussed the impact of affirmative action on the law school's student body and how it would directly impact the clients that we serve. As I looked out into the audience I noticed that there was not one African-American woman present. This was very telling to me. I began to remember the 400 Boalt Hall law students who have interned at the East Bay Community Law Center (EBCLC). This new audience make-up was a reflection of how many fewer students of color would be available to help our clients. In addition, I realized how so many law students would miss out on the kind of first rate education that Boalt Hall offers. After the reception, I continued to reflect on the new admission policies and truly recognized the reality of the impact that affirmative action has had on my life and the lives of our clients.

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† J.D., University of California at Los Angeles, 1979. Founding Executive Director of the East Bay Community Law Center, a non-profit community law office founded by students at Boalt Hall School of Law in 1988. Thanks to my mother, Lillian Reagan, who has inspired me with her strength, courage, determination, and love. Thanks also to my talented, dedicated and beautifully diverse EBCLC family and my “home” family, James and Christopher. A special thank you to Jen Botch, for her support and editing assistance.
1. I focus here primarily on University of California Board of Regents Policy Ensuring Equal Treatment in Admissions (SP-1), adopted July 20, 1995, which eliminated the use of affirmative action in the University’s Admissions Process; Proposition 209, passed by voters in 1996, which ended affirmative action in public contracting, employment and education; and University of California Board of Regents Policy Ensuring Equal Treatment in Employment and Contracting (SP-2), adopted July 20, 1995, which curtailed affirmative action in University of California hiring and contracting. See CHINESE FOR AFFIRMATIVE ACTION AND EQUAL RIGHTS ADVOCATES, OPPORTUNITIES LOST: THE STATE OF PUBLIC SECTOR AFFIRMATIVE ACTION IN POST PROPOSITION 209 CALIFORNIA 1-20 (1998) [hereinafter OPPORTUNITIES LOST] (on file with author).
2. The East Bay Community Law Center was formerly the Berkeley Community Law Center.
Back in my office, I thought about the full implications of Proposition 209 and how so many communities of which I am a part have been impacted by affirmative action: my family and friends; my neighborhood and city; the community-based organizations with which I work; the professional organizations to which I pay my dues; the University of California at Berkeley, which produces most of the interns and volunteers staffing EBCLC's many projects; and the world of clinical law teachers. I also reflected on the impact affirmative action has had on my own life.

Growing up in South Central Los Angeles as the daughter of an African-American single mother of five, I was a smart child with a lot of potential. Yet my future opportunities may very well have been limited. My mother struggled to make enough money to send me to a private school so that I would have a chance to go to college. In the pre-Bakke era of my high school days, I applied to UCLA and was accepted after full consideration was given to all of my attributes—not solely my SAT score and grade point average. After completing my undergraduate studies to UCLA, I applied and was accepted at UCLA School of Law, again, with full consideration of the many talents that I have to offer.

Those of us who were fortunate enough to benefit from affirmative action understand our privilege. As students, we fought hard to maintain affirmative action policies which addressed race and gender discrimination. We knew we would not be able to take advantage of the excellent educational opportunities of the University of California higher education system without affirmative action. We affirmative action babies are often the only professionals in our families and in our communities. We continue the struggle to increase the opportunities available to others that have been traditionally oppressed in this society. Our communities understand the opportunities we have gained; thus, they have set high expectations for us. Throughout the nation, our communities have benefited from the return of dedicated, culturally and professionally competent doctors, lawyers, engineers and teachers to their communities.

Affirmative action has allowed us to acquire the skills, knowledge, and experience to help others, to meet people from all walks of life and to make alliances that support the work that we do. In short, it has allowed a generation of minority and women lawyers to have hope—to feel that we have the opportunity to learn, to break down barriers that have been reinforced and institutionalized over time, and to create social jus-

3. See Regents of the University of California v. Bakke, 438 U. S. 265 (1978). The Bakke case held that although educational diversity was considered a legitimate state and institutional interest, race-conscious admissions policies could not legally maintain quotas. During my law school years, those of us fighting for affirmative action at the University of California at Los Angeles (UCLA) considered Bakke a major setback in the quest for equality. We feared that the impact of race on experience would be minimized, and that systematic, racialized bias would not be addressed through revised admissions policies.
tice. Proposition 209, SP-1 and SP-2, if not overturned, will change all of this forever.

The cutbacks in affirmative action in education are particularly damaging because education affects every aspect of our lives. It is the keystone of democracy. In this highly technologized, global economy, educational and training opportunities are a necessity, not an option.

The cutbacks in affirmative action have had a devastating effect on the Boalt Hall community, in particular. In just two short years, the University of California law school has become a resegregated institution. While everyone assumed there would be an impact on admissions as a result of SP-1, no one was prepared for the enrollment of only one African American in Boalt Hall's class of 2000. In 1997-1998, the first year of implementation of Proposition 209, Boalt Hall suffered a forty-six percent decrease in minority enrollment.4

In last year's Berkeley Women's Law Journal, six authors wrote about the personal impact of the decline in enrollment of students of color at Boalt Hall.5 The student authors spoke of broken promises, shock, disappointment, anger, and sadness as they confronted what it meant to be part of a resegregated environment. They spoke of tension-filled classes when students and professors dared to discuss race or gender. They eloquently explained how everyone in society benefits from affirmative action because it brings us closer to a just world. They renewed their commitment to fighting for social change.

In one Commentary piece, Professor Marjorie Shultz provided dramatic examples of how diversity enriches the learning experience.6 She referred to the decline in minority enrollment as the loss of a "vital source of excellence."7 She spoke of how not having all relevant points of view as part of the issue exploration process prevents students, lawyers, and educators from understanding the different issues, norms, injuries, and remedies that shape our law.

I agree that a diversity of perspectives adds to an incredibly rich learning experience both in the classroom and in clinical education. Perhaps for the only time in their lives, students examine how their beliefs, values, and morals influence their work as advocates. Learning how to critically reflect on the assumptions and judgments we make as students prepares us to more consciously and effectively undertake this task throughout our professional careers. Hearing perspectives from students representing the full spectrum of experiences enhances reflection and the

6. See id. at 26.
7. Id. at 33.
entire learning experience. All students will lose out as the voice of minorities becomes even more faint in our discussions regarding the impact of the legal system on us as advocates and on the communities that we serve. Our ability to prepare students to serve an increasingly diverse population is irreparably harmed.

I fear that our clinical program will experience the loss of excellence to which Professor Shultz refers. At EBCLC, interns learn how to practice public interest law by experiencing real life ethical and professional dilemmas. Our interns develop the skills necessary to address the many complicated issues affecting our clients’ lives, including poverty, domestic violence, mental disability, HIV infection, and drug and alcohol problems. These interactions provide a full and rich legal advocacy experience.

Students enrolled in the clinical must also enroll in the companion course “Community Law Practice at EBCLC” (CLP). The CLP class, which satisfies Boalt Hall’s Professional Responsibility requirement, provides an opportunity for students to reflect in writing upon their clinic experiences and class assignments, which include readings and film showings. In both writing their reflection pieces and discussing them with the group, students grapple with difficult and sensitive issues regarding the role of public interest advocates in this society.

In a class on “Difference,” students are challenged to examine themselves and the ways in which difference impacts their clients and the students’ practice of law. Questions of race, class, and privilege are explored in connection with the judgments and assumptions we make about our clients and the impact those assumptions have on our ability to provide competent advocacy. We also examine the role that “difference” plays in our clients’ lives in the context of the legal system. While color is generally the most obvious difference between the students and their clients, it is the one that students have the most difficult time addressing.

During the most recent “Difference” class, an African-American student raised the issue he faces when administrative law judges presume that Blacks are lazy and dishonest when they (Black people) assert their inability to work. Not one person responded to this observation. The conversation quickly turned to a separate discussion about the difficulty students face with the issues regarding economic disadvantage and, to a lesser extent, health. Some students talked about how difficult it is to screen for a client’s eligibility for the clinic’s services, or to ascertain how someone became infected with HIV. Further discussion concerned mental disability and the basis of our “discomfort” surrounding this issue. However, the topic of race, alone or in the context of other issues, was not addressed.

In his reflection piece, the student who initially raised the issue of the perception of the lazy Black stereotype analogized what had happened in class to the debate surrounding affirmative action. Citing Charles
Lawrence, he made the point that "[w]hen an individual experiences conflict between racist ideas and the societal ethic that condemns those ideas, the mind excludes his racism from consciousness."8 The student’s point became even more moving when I read the reflection pieces of the other students. Many of the reflection pieces were silent on the subject of race as a “difference,” or minimized its impact on our clients or on the advocacy relationship. Yet, the students did identify less threatening “difference” issues, and did a fine job analyzing how those issues impacted their client relationships. Even these students who had chosen to serve poor people—if only for a semester—found it difficult to grapple with real questions of race.

The issues of race profiling, police abuse, and discrimination are issues that large numbers of white Americans never have to think about. White people do not have to think about racism, whereas people of color experience frequent acts of brutality, injustice, and unfairness on a daily basis because of their race. But differences in perception and experience are exactly the reasons why we must discuss race in “mixed company.” If we are ever to move forward to true social equality, we must be able to honestly explore the power systems which govern our world and gain a greater understanding about how each person’s experiences may limit opportunities or allow privilege.

In another reflection piece, a student described her propensity to assign responsibility to people with whom she identifies, while she found it easier to blame structural forces for the behavior of people who appear different from her. She talked about how it is easier to recognize another’s innocence. I realized how very different her world is from mine. Having experienced racism and sexism so frequently in my life, it is difficult to ascribe a non-racist or non-sexist motive to personal acts of injustice that I experience. Students of color and other subordinated groups in our class have also described the ways in which internalized oppression affects their relationships with their clients. The reflection pieces reveal a plethora of issues faced—including shame, anger, and prejudgment resulting from our different past experiences. These pieces continue to impress upon me how very important these realities are and why they need to be explored in the context of our roles as advocates.9 Difference, particularly concerning how we perceive our clients and how they perceive us, certainly has an impact on the advocate-client relationship. The opportunity to explore these issues and to learn how to view each and every client as an individual, worthy of respect and of access to justice, should

9. For example, one student became almost paralyzed by shame and embarrassment over her client’s circumstances. She realized that her relationship with her client reminded her of painful and difficult times in her own life with which she was not quite ready to deal.
be available to every person who seeks to prepare for the practice of law, not just the privileged.

I have learned from the students' reflection pieces. I learned not only that Lawrence's thesis had proven right once again, but that I too played a role in supporting unconscious racism. I recognized how easily I had let the conversation shift to a safe place. While the discussion about difference was fruitful and comfortable, it may have prevented students from examining a critical reality that our clients, who are predominantly African-American, face in trying to secure disability benefits, safe and affordable housing, and access to health care, employment and education. I am acutely sensitive to these dynamics and continue to explore ways of teaching so that students can even more effectively get to the "hard" issues. Without the participation of diverse students and their forthright reflection and discussion, important issues will go unnoticed.

It is also important for all students to understand how differences between themselves as advocates, and the clients they serve, impact the justice system. The American Bar Association and National Bar Association recently conducted a poll on the different perceptions of justice between Blacks and Whites in America. According to the study, two-thirds of the black lawyers said they had witnessed racial bias in the justice system in the past three years. More than eighty percent of the white lawyers said they had not. Nearly all the black lawyers—about ninety-two percent—said that the justice system has the same amount of racial bias or more as other segments of society. Nearly half the white lawyers believed there is less racial bias in the justice system. These differences—particularly concerning how much justice a client can receive in the legal system—have an impact on the advocate-client relationship as well as the development of the legal system. The exploration of these issues is much more meaningful and likely to lead to needed change when people with diverse perspectives and experiences participate in the discussion.

In addition to the classroom benefits, having students of color working at the clinic is very important to our clients. Our overall client population is fifty-seven percent female and forty-three percent male. Fifty four percent of our clients are African Americans, and at least thirty percent of our clients speak a language other than English as their primary language. Having students of color and those reflective of the

10. See Terry Carter, *Divided Justice*, NBA MAG., Jan.-Feb. 1999, at 16. The ABA Journal and NBA Magazine Poll, conducted by Research USA from November 9 through December 3, 1998, was a random telephone survey of 1,002 lawyers with a margin of error of plus or minus 4.6%.
11. See id. at 17.
12. See id.
13. See id. at 16.
14. See id.
16. See id.
community serving as advocates can help reduce some of the inevitable barriers inherent in the advocate-client relationship. There is already an incredible power dynamic between clients and their advocates. While client autonomy is cherished in American law, poor people and people of color must battle to hold on to their autonomy in the face of scarce resources and the "we know it all" mentality that law school and experience foster. There is an uphill battle for clients to be heard, particularly when they have had very little experience with being heard in the past. Having an advocate who is likely to have shared similar experiences, or who can communicate in the same language as the client, often increases the client's sense of trust and faith. As a woman of color, I know that feeling of warmth and openness which I experience in my interactions with other women of color.

It is also important that our clients see us—women, people of color and other subordinated groups—as capable, intelligent beings. Our clients and their children share a sense of pride and comfort when they see us in roles as lawyers, law students and people in charge. It gives them hope and optimism that is rare in this day and age. It challenges stereotypes to which we have all become accustomed. For example, Elise Brown, an African-American attorney and Director of EBCLC's Housing and Economic Development Units, talks about how she, as a woman of color, is often thought to be the client rather than the attorney. She relays how, at a tenant workshop, a woman walked in to find Elise talking with an older white man. The woman immediately approached the man with questions, assuming that he was an attorney. The woman registered embarrassment when she was told that Elise was, in fact, the attorney. The man was amused and smiled with a sense of recognition and acknowledgment of the woman's perception. Incidents like this point out the importance of increasing opportunities for women and people of color. We will have made progress when no one is surprised that I am the one in charge.

Affirmative action had represented the hope for this progress by breaking down some of the barriers of institutionalized racism. We continue to witness daily, however, the brutal remnants of racism and ignorance throughout the nation. The killing of Amadou Diallo, an unarmed African immigrant at shot forty-one times by police in New York City; 17 the dragging/torture death of James Byrd in Jaspar, Texas; 18 and the countless beatings and murders of people because of their national origin or sexual orientation are proof that intolerance and discrimination continue to exist. With modern technology, we are able to document discrimination, even when the perpetrators try deftly to conceal it. In the

Community Law Practice, we view the ABC Prime Time Live production of "True Colors."\(^{19}\) While many students—particularly the students of color—know that discrimination exists, a large number better understand the pervasiveness of racism after seeing this film. In it, undercover cameras capture an African-American man being discriminated against in every arena of his life—employment, housing, transportation, even a taxi ride—because of the color of his skin. The lack of affirmative action, in the wake of Proposition 209 and its progeny, will further institutionalize this racial isolation and inequality as even fewer people of color will have access to the skills, knowledge, resources, and contacts that enable us to strengthen our communities.

The inequality of access to resources for people of color can be seen at EBCLC. Instead of seeing opportunities increase for our clients, the clock is being turned back. Benefits are being curtailed, restrictions are being imposed, and now, the opportunity that most poor people and people of color had to improve their circumstances—affirmative action—has been taken away. The demolition of affirmative action is not just the loss of a remedy. It is a signal to my community that we can no longer take for granted a commitment in this society to equality and justice. Without educational and employment opportunities, poor and minority communities will only fall further behind.

The full impact of the assault on affirmative action will take some time to discern. Some of the impact that the implementation of Proposition 209 and related court decisions have already had are discussed in the "Opportunities Lost" report.\(^{20}\) The report found the following repercussions: widespread confusion about the meaning and scope of Proposition 209, and a fear of lawsuits; increased resistance to outreach and other affirmative action requirements; increased difficulty in enforcing federal affirmative action requirements; and fewer certifications of minority- and women-owned businesses.\(^{21}\)

Sadly, many of the effects of Proposition 209 and its progeny will never be known. In March 1998, then-Governor Pete Wilson ordered state agencies to stop collecting data on the number of contracts awarded to minority- and women-owned businesses.\(^{22}\) The Executive Order prevented state agencies from evaluating the impact of Proposition 209 and the prevalence of discrimination against minorities and women. It goes well beyond anything required by Proposition 209 and shows the lengths to which Pete Wilson was willing to go to continue centuries of discrimination and exclusion. Hopefully, the Order will be invalidated through the courts, or Governor Davis will reinstate the data collection requirement.

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20. See OPPORTUNITIES LOST, supra note 1.
21. See id. at 7-8.
22. See id. at 7 (referring to Executive Order W-172-98, issued Mar. 10, 1998).
by executive order. We must be able to document what this society does to limit the opportunities available to some of its members, and to take appropriate action—affirmative and otherwise—to remedy the situation.

The sad truth is that even before Proposition 209, SP-1 and SP-2, we were already far from parity in education, employment, and public contracting. While efforts have been taken to increase minority enrollment since the passage of Proposition 209, there were still only eight African-American students enrolled in Boalt Hall’s class of 2001, less than two-fifths the number of African Americans enrolled in the Class of 1999.23 There is only one African-American tenured professor at Boalt Hall. We know that, over the long term, Proposition 209 will result in fewer college graduates and professionals of color; fewer contracting opportunities for minority owned businesses; fewer role models and mentors for women and people of color; fewer "qualified" candidates for faculty appointments in public universities; and fewer job opportunities and training programs which lead to living wage employment.

The loss of affirmative action will have other, less visible, impacts as well. The impact of Proposition 209 on community based, non-profit and public interest organizations is seldom discussed. Last weekend, as I stood up to address the audience at the Trina Grillo Retreat,24 I once again faced the prospect of talking to a crowd almost completely devoid of people like me. There were a few other people of color, but out of perhaps a hundred participants, the only other African Americans in the room were a staff person from the National Association for Public Interest Law and a guest of one of the other speakers. I wondered why there was such a low turnout of African Americans. Here was a wonderful opportunity for people who share a commitment to social justice to come together in the beautiful surroundings of the Marin Headlands to discuss issues that directly affect our community. Where were the Black people?

The truth is that there are few people of color in public interest law practice. Low-paying jobs, political restrictions, and constant exposure to many of the problems we went to law school to escape are but a few of the reasons.

The public interest community, in many respects, reflects society at large. While many in the Black community are engaged in grassroots civil rights work and political struggles, the racial isolation and segregation that exist in the general society often prevent us from forming important cross-cultural alliances that are so necessary for social justice. As we struggle for social justice, we in the public interest community must address the very same problems within our community (racism, sexism,
elitism, and classism) that we address on behalf of our clients. The same is true of law schools, including clinical education programs. Proposition 209 will further limit the number of people of color in the public interest community and restrict the synergy and creativity that emerges when diverse people work together.

Despite the challenges presented by Proposition 209, EBCLC's clients and advocates continue to move forward. Our clients have faced monumental barriers before. Many of our clients are just beginning to plan for their futures. Many have never worked before or have minimal skills. With few exceptions, those who are able to work are eager to take advantage of job training and development opportunities. Advocating for increased opportunities for our clients, particularly for education and job training that will lead to future careers and living wage jobs, continues to be of paramount importance in our work. This advocacy is undertaken by community members who continue to address critical issues such as access to health care, safe and affordable housing, and economic security. Activists in the East Bay are coming together to make concrete and positive changes. Many of these efforts are led by people who have been fortunate to get an education and obtain job opportunities that allow them to give back to their communities. The implementation of Proposition 209 not only erodes the significant progress that women and minorities have made over the past few decades, but also ensures that large numbers of talented people in our communities may be forever doomed to poverty and hopelessness.

While I seek to inspire hope and optimism, I am reminded of the daily indignities and injustices heaped upon me and people like me. I am truly afraid for my son and for my community. The same societal factors that will likely cause him to be stopped by police for "driving while Black" when he is old enough to drive necessitate affirmative action. While I struggle to give my son every possible opportunity in life, I witness the evisceration of affirmative action strategies specifically designed to ameliorate the systemic and institutionalized racism and sexism so deeply rooted in this society. Over the last twenty years, I have visited elementary, junior high, high schools, and universities to reach out to young people. Prior to the passage of Proposition 209, I encouraged them to pursue careers in the law. Now I still encourage them to pursue their dreams. But, in reality, I see doors closing every day.

Perhaps Proposition 209, SP-1 and SP-2 will be repealed. Perhaps Governor Davis' proposal to ensure a place in the University of California system for the top four percent of every high school graduating class will increase minority enrollment.25 Perhaps more of those who have en-

joyed the benefits of class and wealth in this society will someday recognize the benefit to all when everyone is judged on the quality of their character rather than the privileges from which they have benefited. Until we confront, admits, and resolve the very difficult and complex issues related to race, class and gender discrimination in this country, inequality and injustice will persist.

As a woman of color and a social justice advocate, I will continue to work to protect and to expand opportunities for my community. I will join with people like Eva Paterson and organizations like Equal Rights Advocates and Chinese for Affirmative Action to fight for equality and justice. I will take every opportunity to learn about and teach the impact of racism and its effect on my community and my clients. While the struggle often seems never-ending, we do witness victories from time to time. We must hold onto those victories for times like these.

26. Eva Paterson (J.D., Boalt Hall School of Law, University of California at Berkeley, 1975) is Executive Director of the Lawyer’s Committee for Civil Rights of the San Francisco Bay Area. Over the past 20 years, Eva has been an inspirational role model for those seeking to eradicate racism and discrimination.

27. Equal Rights Advocates (ERA) is a small public interest law firm in San Francisco that focuses on representing women of color.

28. Chinese for Affirmative Action is a San Francisco-based advocacy group that has worked for more than 25 years to improve voting rights, education, job opportunities, and health care for Asian Americans.