

2010

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Recommended Citation

A. Felicia Epps, The Obama Effect: A Pipeline Issue, 1 *Faulkner L. Rev.* 239 (2010)

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THE OBAMA EFFECT: A PIPELINE ISSUE

*A. Felecia Epps**

I live in Lonoke, a small town outside of Little Rock, Arkansas. My parents, both in their seventies, were born and raised in Arkansas between 1930 and 1950. This was a period when many African Americans feared to vote and would never have considered running for political office.¹ A poll tax receipt, found as our family prepared to celebrate my parents' fiftieth wedding anniversary, reminded me of efforts to keep African Americans from voting during my parents' lifetime.² My father often recalls how one of his uncles insisted upon voting in the rural Arkansas town they lived in even though the white officials had a special box for the black votes. Who knows what happened to the votes that went into that box? I sat in the living room of my parents' home in Lonoke on November 4, 2008, waiting like the rest of the country for the election results. I had declined election party invitations so that I could be home to wait and watch with my parents, who had truly come a long way. My parents were extremely proud of Mr. Obama's accomplishment. My daughter called from college shortly after the television networks announced Mr. Obama's victory. My father enthusiastically told her that now she could someday be President.

Voters in Lonoke, a red city, in a red county, in a red state, voted overwhelmingly for Senator John McCain, as did most other

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¹ GRIF STOCKLEY, RULED BY RACE 207-250 (2008) (describing race relations in Arkansas during this period).

² Poll taxes required payment of a fee in order to be eligible to vote. They were used to deter African Americans from voting. *Id.* at 124-25, 141, 233. See also JUDITH KILPATRICK, THERE WHEN WE NEEDED HIM 26 (2007).

Arkansas voters.³ Yet my mother fearlessly and proudly sported her collection of Obama victory buttons around town. I engaged in a similar practice, wearing one of my Obama t-shirts to the fitness center each time I went to work out. The shirts, bearing images of President Obama and Martin Luther King Jr. complete with sayings like “keep the dream alive” or “it is not about me, it is about you,” drew lots of stares and a few positive comments. This is how I have experienced Mr. Obama’s election personally as an African American woman living in Arkansas, a southern red state.

I have thought about what the election of the first African American president means to me personally. I have also thought about what it means as a historical event that has changed the country in many ways and perhaps has marked the beginning of changes in the way African Americans are viewed in this country. I had not thought much about what it means to the future of the legal academy until I was invited to participate in the Fifth Annual Fred Gray, Sr. Civil Rights Symposium to discuss the impact President Obama will have on the academy.

In search of inspiration for a presentation at the symposium and for this essay, I did a Lexis search of the words “President Obama.” I discovered that there have already been numerous articles written mentioning Mr. Obama.⁴ Mr. Obama’s presidency has provided and will provide fertile ground for scholarship in various areas of the law. In addition to the political arena, President Obama will draw attention to various legal issues simply because he is an African American man occupying the most powerful office in the world.⁵

³ According to CNN Election Center 2008, 59% of Arkansans voted for Senator John McCain while only 39% voted for President Obama. In Lonoke County 73% of the vote went to Senator McCain. Only 25% went to President Obama. <http://www.cnn.com/ELECTION/2008/results/county/#ARP00map> (last visited March 29, 2010).

⁴ A search of the words “President Obama” on October 15, 2009, yielded 913 articles. The first article discussed the possible ramifications of the mistake Chief Justice Roberts made when administering the oath of office. Bruce Peabody, *Imperfect Oaths, the Primed President, and an Abundance of Constitutional Caution*, 104 NW. U. L. REV. 12 (2009).

⁵ The impartiality of Gwen Ifill, moderator of the debate between the then vice presidential candidates Governor Sarah Palin and Senator Joe Biden, was subject to a last minute challenge by the McCain-Palin campaign because of her soon to be released book. GWEN IFILL, *THE BREAKTHROUGH: POLITICS AND RACE IN THE AGE OF OBAMA* (Double Day 2009). This book is an example of a type of political scholarship the Obama presidency

For example, attention was drawn to the issue of racial profiling as a consequence of the arrest of an African American man, a friend of President Obama, in Cambridge, Massachusetts. A white police officer arrested Professor Henry Louis "Skip" Gates, a professor at Harvard University and a renowned scholar, just outside his own home.⁶ A reporter questioned President Obama about this incident at a news conference.⁷ His response to the question led to additional news coverage. This incident culminated with President Obama, Vice President Biden, Professor Gates, and Sergeant James Crowley of the Cambridge Police Department sharing beers and conversation at the White House. Regardless of who was right or wrong in this incident, the country began to talk about racial profiling, an issue that frequently confronts people of color.⁸ This incident is sure to be the subject of continued discussion and analysis by legal scholars. It may even cause scholars to revisit the United States Supreme Court's decision in *Whren v. United States*.⁹ In *Whren*, the Court upheld a pretextual traffic

will inspire. I, no doubt like many others, immediately pre-ordered the book from Amazon.com.

⁶ According to the police report prepared by Sergeant Crowley, on Thursday, July 16, 2009, he went to a house on Ware Street in Cambridge, Massachusetts, to investigate a 911 report of a crime in progress. The caller reported seeing two black males on the porch of a neighbor's home. She became concerned when she saw one of the males "wedging his shoulder into the door as if he was trying to force entry." Sergeant Crowley entered the home where he talked with Professor Gates. Sergeant Crowley was ultimately satisfied that Professor Gates was in fact the person who lived in the home. Professor Gates accused the officer of racial profiling and of "being a racist police officer." As Sergeant Crowley left the house, Professor Gates came out of his home and continued to yell accusations of racism at the officer. Officer Crowley arrested Professor Gates for disorderly conduct. He was taken to the police station. The charges were later dropped. Cambridge Police Department, Incident Supplement # 900512, July 16, 2009.

⁷ In response to a reporter's question about the incident President Obama said that the police had "acted stupidly." This led to comments from both Cambridge Police union officials and civil rights leaders. Cheryl Thompson, Krissah Thompson & Michael Fletcher, *Gates, Police Officer Share Beers and Histories With President*, WASH. POST, July 31, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/30/AR2009073003563.html> (last visited March 29, 2010).

⁸ A recent report by the ACLU provides an in-depth discussion of the problem of racial and ethnic profiling in the United States. THE PERSISTENCE OF RACIAL PROFILING IN THE UNITED STATES (ACLU 2009). See also JOSHUA DRESSLER & GEORGE THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 389-391 (3d ed. 2006).

⁹ 517 U.S. 806 (1996). In *Whren*, plain clothes vice squad officers stopped a car with young African American men inside ostensibly due to a minor traffic violation. *Id.* at 808. Once they stopped the car, one of the officers observed drugs in plain view. *Id.* at 808. This led to the arrest of the occupants and a search of the car. *Id.* at 809. The occupants were convicted of various offenses based on evidence found inside the car. *Id.* at

stop, refusing to consider the officer's subjective motives for the stop. As a consequence of the holding in *Whren* officers may use minor traffic offenses as a basis to stop motorists in order to investigate crimes other than the traffic offense. They may make such traffic stops even though a reasonable officer would not have done so and even though the officer's actual motive for the stop is to investigate other offenses. Unfortunately, the discretion allowed to law enforcement officers may be inappropriately used to target African American motorists.¹⁰

President Obama's appointment of Sonia Sotomayor, the first Hispanic justice to sit on the United States Supreme Court, will lead scholars to analyze aspects of the cases she decided during her 17 years as a judge in search of evidence to predict what type of justice she will be. For instance, the recent decision in *Ricci v. DeStefano*,¹¹ involving Connecticut firefighters who alleged that New Haven Connecticut violated Title VII of the Civil Rights Act of 1964 when it failed to promote them, will receive even more attention by scholars in part due to Justice Sotomayor's role in the case as a judge on the United States Court of Appeals for the Second Circuit.¹² Eventually, scholars will analyze her decision-making while on the Supreme Court to determine what type of justice she has become.¹³ Critical race scholars will have opportuni-

809. On appeal the occupants challenged the stop, arguing that the traffic offense was a pretext and that the officers had actually stopped the car because they suspected that drugs were in the car. *Id.* at 810. *Whren* argued that the Court should consider whether an officer acting reasonably would have made the stop for the reason given by the officers. *Id.* at 814. The Supreme Court upheld the traffic stop and the search. *Id.* at 819. It held that as long as officers have probable cause for a stop, in this case a minor traffic violation, the officers' subjective motive for the stop is irrelevant. *Id.* at 819. See also Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 192-197 (2002); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U.L. REV. 956, 978-983 (1999).

¹⁰ JEFFREY B. BUMGARNER, *PROFILING AND CRIMINAL JUSTICE IN AMERICA* 59-61 (2004). See also Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 192-197 (2002); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U.L. REV. 956, 978-983 (1999).

¹¹ 129 S. Ct. 2658 (2009).

¹² As a judge for the Second Circuit, Justice Sotomayor voted in favor of New Haven. *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008). The Supreme Court ruled in favor of the firefighters, reversing the Circuit's decision. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2681 (2009).

¹³ Justice John Paul Stevens is 89 years old and has served on the Court since 1975. Therefore, it is reasonable to believe that President Obama will have the opportunity to appoint at least one more justice to the Court.

ties to consider the tension that becomes obvious when a country, accustomed to looking at what is “normal” through the lens of the predominate culture, is challenged to look at things through a different lens.¹⁴ Law professors have an obligation to engage in scholarship by researching and writing about legal issues. Mr. Obama’s presidency will provide those of us in the academy with many issues and ideas to discuss and analyze.

It is much too early to tell how President Obama’s presence in the White House will affect the number of people of color serving at all levels in the academy. Most law schools look for scholars with similar characteristics when they search for new faculty. Important characteristics include: the law school attended, class rank, law review participation, judicial clerkships, articles published, research agenda, practice experience, and teaching experience. Although the relative importance of each characteristic differs from school to school, the basic considerations are the same. For the first time, I have the opportunity to serve on my law school’s Faculty Appointments Committee and to see - up close and personal - how this process works. First, the committee set basic parameters for our search. This year we needed someone to teach in our first year legal writing program. Our parameters included those with experience teaching legal writing or a desire to teach this subject. Next, we combed the Association of American Law Schools’ (AALS) Faculty Appointments Register looking for candidates who fit within the basic parameters. Simultaneously, we advertised the position nationally and locally.¹⁵ My law school

¹⁴ A clip from The Colbert Show makes this point. The Colbert Show (Comedy Central television broadcast July 16, 2009), available at <http://www.colbertnation.com/the-colbert-report-videos/238783/July-16-2009/the-colbert-report-the-word---neutral-man-s-burden> (last visited March 29, 2010). Mr. Colbert explains in his usual satirical manner, that Justice Sonia Sotomayor’s Hispanic “life experience” could not serve to make her a neutral justice, although the life experiences of the white male justices serve to make them neutral because these backgrounds are thought of as normal. He concludes that the only solution is to make Justice Sotomayor’s background invisible.

¹⁵ Many law schools use the AALS Faculty Appointments Register to search for candidates for open faculty positions. In addition, they advertise, and some are open to consideration of non-traditional candidates. I would describe myself as such a candidate and commend my law school for its willingness to look partly to other sources in an effort to diversify the faculty. I came to the UALR Bowen Law School to teach in the legal clinic in 1999 after ten years on active duty with the United States Marine Corps and six years with Georgia Legal Services Program. I attended Creighton University Law School, ranked in the third tier by the U.S. News & World Report. Although, I graduated in the top 10% of my law school class, I had none of the other traditional characteristics. I

sends representatives to the annual AALS Faculty Recruitment Conference where we interview faculty candidates. In order to increase the number of African American faculty in the legal academy, the number of African Americans who have the characteristics law schools tend to look for must increase.¹⁶

Statistics available from the AALS reveal that the number of people of color in the academy has slowly increased over the past seven years.¹⁷ The number, however, has remained relatively constant over the past two years. According to information ga-

never served as a judicial clerk. My sole law review article was published in 1982 by the Creighton Law Review when I was a law student. I did not know the traditional route to the academy.

Hopefully, President Obama's election will not lead law schools to focus exclusively on those who fit the more traditional characteristics. Although there are people of color who possess those characteristics, considering professors without the traditional characteristics who are from other backgrounds will serve to increase the diversity of law faculties.

¹⁶ Law schools should also consider expanding their search for faculty to include graduates from a variety of law schools rather than focusing on graduates of elite law schools. Over 40% of law faculty graduated from law schools ranked in the top ten by U.S. News & World Report.

Every law school has a top 10%. These graduates have demonstrated superior academic capabilities. Increasing the number of law faculty who are graduates from a variety of schools will improve diversity of thought and experience, as well as racial diversity. The top ten law schools according to the U.S. News & World Report rankings and the number of law faculty who are alumni from those schools are: Yale 805, Harvard 1179, Stanford 242, Columbia 368, New York University 304, University of California Berkeley 245, University of Chicago 339, University of Pennsylvania 190, University of Michigan 374, Duke 123, Northwestern University 149, and University of Virginia 199. US NEWS & WORLD REPORT, BEST LAW SCHOOLS RANKED IN 2009 (2009), available at <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/rankings> (last visited Feb. 26, 2010).

For comparison, Creighton Law School, ranked in the third tier, has twenty-two graduates who are law professors. The UALR Bowen Law School, also a third tier school, has six. *Id.*

¹⁷ In 1998-1999, 13.5% of law school faculty members were minorities. ASSOCIATION OF AMERICAN LAW SCHOOLS STATISTICAL REPORT ON LAW FACULTY AND CANDIDATES FOR LAW FACULTY POSITIONS PRELIMINARY TABLES Table 6B 59 (2005-2006), available at <http://www.aals.org/documents/statistics/20052006statisticsonlawfaculty.pdf> (last visited Feb. 18, 2010). In 2005-2006, 16.0% of law faculties were minorities. *Id.* at Table 2B 16.

¹⁸ ASSOCIATION OF AMERICAN LAW SCHOOLS STATISTICAL REPORT ON LAW FACULTY AND CANDIDATES FOR LAW FACULTY POSITIONS 15-16 (2007-2008), available at <http://www.aals.org/statistics/2008dlt/race.html> (last visited March 29, 2010) [HEREINAFTER AALS 2007-2008 REPORT]. The report for 2006-2007 indicates that of 10,709 law faculty, 750 (7%) were Black/African American, 339 (3.2%) were Hispanic/Latino, and 75.7 % (8,103) were white. ASSOCIATION OF AMERICAN LAW SCHOOLS STATISTICAL REPORT ON LAW FACULTY 24 (2006-2007), available at <http://www.aals.org/statistics/0607/0607statistics.pdf> (last visited Feb. 26, 2009) [hereinafter AALS 2006-2007 REPORT].

thered by the AALS for 2007-2008, of a total 10,673 law faculty and administration, 754 (7%) were African American and only 336 (3%) were Hispanic, while 7,991 (75%) were white.¹⁸ Of the 5,678 full professors during this time frame, 4,569 (80.5%) were white, 345 (6.1%) were black, and 172 (3%) were Hispanic.¹⁹

Whether the “Obama Effect” can positively affect these statistics depends on how his presence impacts the number of people of color who enter and complete the education required to become a law professor. Statistics available from the U.S. Census Bureau²⁰ for 2008 indicate that 87% of adults twenty-five and older had completed high school. Of those in this group, 29% had a bachelor’s degree. Of white adults, 33% had a bachelor’s degree or higher. Of black adults, 83% over the age of twenty-five had completed high school. Only 20% of those in the same age group had a bachelor’s degree or higher.²¹ In order to increase the numbers of blacks in the legal academy, these statistics must improve. To get into law school and to have the chance to become a law professor, one must have the foundation that will lead to success in college. Consequently, in order to get into the academy, a solid education from elementary school on up is essential. Thus, much depends on whether Obama’s presidency leads children to stay in school and to do well in school.

President Obama can do at least three things to have an impact on how children perform in school. First, he can begin to improve the public school system. On the Organizing for America website, President Obama states “[w]e need to stop paying lip service to public education, and start holding communities, adminis-

¹⁹ AALS 2007-2008 REPORT, *supra* note 18, at 20. Statistics for the previous year are similar. In the rank of professor, 309 (6.1%) were African American/Black, 151 (3%) were Hispanic/Latino, and 4055 (80%) were White. AALS 2006-2007 REPORT, *supra* note 18, at 24.

²⁰ Press Release, U.S. Census Bureau, Census Bureau Releases Data Showing Relationship Between Education and Earnings (April 27, 2009) (on file with author), available at <http://www.census.gov/Press-Release/www/releases/archives/education/013618.html> (last visited March 29, 2010) [hereinafter U.S. Census Bureau Releases Data].

²¹ Press Release, U.S. Census Bureau News, Facts for Features Black (African-American) History Month: February 2010 (Dec. 2, 2009), available at http://www.census.gov/PressRelease/www/releases/archives/facts_for_features_special_editions/014487.html (last visited March 29, 2010).

trators, teachers, parents and students accountable.”²² He lists a three-part solution. First, the education children receive in grades K-12 must be improved. Next, steps must be taken to ensure that every child has the opportunity for post-high school education that will equip each child for the workforce. Finally, pre-kindergarten education must be improved. If these ideas become a reality, they will affect the number of people of color participating in all professions. President Obama has “talked the talk.” Now, he must “walk the walk.”

It appears that he is making progress towards the goal of improving education. For example, the American Recovery and Reinvestment Act of 2009²³ included funding for education. In part, the Act provides:

- \$5 billion for programs that focus on early childhood learning;
- \$77 billion to reform secondary and elementary education;
- \$5 billion in competitive funds to spur innovation and close the achievement gap; and
- \$30 billion to improve access to higher education.²⁴

Three principles guide the allocation of these funds. First, the President is committed to ensuring that children have a solid education from their early years until they achieve a career. Second, the President plans to support schools that set high academic standards and that foster critical thinking. Finally, his goal

²² Organizing for America, Education: The Current Situation, *available at* <http://www.barackobama.com/issues/education/> (last visited March 29, 2010).

²³ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

²⁴ The White House, Education: Progress, *available at* <http://www.whitehouse.gov/issues/education> (last visited Feb. 27, 2010); *see also* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, Div. A, Title VIII.

is to ensure that every child has access to at least one year of higher education.²⁵

Mr. Obama must use his “bully pulpit” to encourage children and parents to make education a priority in their lives. At the beginning of the 2009 school year, the President planned to broadcast a speech to schoolchildren across the nation. Almost as soon as the plan to give this speech was announced, objections were raised by those who feared that their children would be politically indoctrinated.²⁶ The speech instead actually encouraged children to listen to their parents, work hard, and do well in school – messages any parent should welcome.²⁷

As part of an October 2009 trip to New Orleans, President Obama spoke to the students at Martin Luther King Jr. Charter School. Among other encouraging words, President Obama said, “I want all of you to know the most important thing you can do for yourselves and for your community and for your country is to work hard in school and to treat each other with respect and to treat

²⁵ The White House, Education: Progress, *available at* <http://www.whitehouse.gov/issues/education> (last visited March 29, 2010). The White House, Education: Progress, *supra* note 24.

²⁶ See, e.g., Alan Silverleib, *Many Conservatives Enraged Over Obama School Speech*, Sept. 5, 2009, <http://www.cnn.com/2009/POLITICS/09/04/obama.schools/index.html> (last visited March 29, 2010); James C. McKinley Jr. & Sam Dillon, *Obama's Plan for School Talk Ignites a Revolt*, N.Y. TIMES, Sept. 4, 2009, at A1; David Squires, *The Mis-education of the Negro President*, DAILY PRESS (Newport News, Va.) Sept. 10, 2009, at A2.

²⁷ The White House, Remarks by the President in a National Address to America's School Children, Sept. 8, 2009, *available at* http://www.whitehouse.gov/the_press_office/remarks-by-the-president-in-a-national-address-to-americas-schoolchildren (last visited Feb. 27, 2010). An excerpt from the speech makes the President's intent clear:

But at the end of the day, we can have the most dedicated teachers, the most supportive parents, the best schools in the world - and none of it will make a difference, none of it will matter unless all of you fulfill your responsibilities, unless you show up to those schools, unless you pay attention to those teachers, unless you listen to your parents and grandparents and other adults and put in the hard work it takes to succeed. That's what I want to focus on today: the responsibility each of you has for your education. I want to start with the responsibility you have to yourself. Every single one of you has something that you're good at. Every single one of you has something to offer. And you have a responsibility to yourself to discover what that is. That's the opportunity an education can provide.

Id.

yourself with respect.”²⁸ The next month, while speaking at James C. Wright Middle School in Madison, Wisconsin, the President encouraged the students to “succeed not just in middle school, but also in high school, also in college, and for the rest of your lives.”²⁹ President Obama must continue to motivate our children despite what opponents might say.

Finally, President Obama and Mrs. Obama must use their status as role models to influence both children and parents. The Obamas’ life stories can serve as a pattern for youth to follow as they approach their education. Both are from humble beginnings.³⁰ Each graduated from high school, a prestigious college, and an elite law school. These accomplishments could not have been achieved without hard work and determination. Their family stories also provide a model for parents. Each had someone who encouraged them and expected excellence. For instance, during

²⁸ The White House, Remarks by the President to the Students at Dr. Martin Luther King Jr. Charter School, Oct. 15, 2009, *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-students-dr-martin-luther-king-jr-charter-school-new-orleans-lou-0> (last visited March 29, 2010). President Obama should also take every available opportunity to proactively deal with problems in schools that need our attention. In October, President Obama showed his support for education in another way by sending Attorney General Eric Holder to Chicago. On this occasion, Mr. Holder’s presence was in response to the killing of a high school honor student. Mr. Holder’s remarks indicated the administration’s commitment to keeping children safe in schools. He said in part:

The Department of Justice has already committed resources to helping keep our children and our schools safe. Just last week we announced \$16 million through the COPS’ Secure Our Schools program in grants to law enforcement agencies and municipalities throughout the country, including almost half a million to the city of Chicago. These grants provide funds to improve security in schools and on school grounds by helping pay for security measures like metal detectors, locks, surveillance systems and other equipment to help deter crime. These are first steps, and we will do more.

Lynn Sweet, *Eric Holder’s Chicago Youth Violence Remarks*, Oct. 7, 2009, *available at* http://blogs.suntimes.com/sweet/2009/10/eric_holders_chicago_youth_vio.html (last visited Feb. 27, 2010). *See also* Mallory Simon, *Official: Suspect Admits Role in Beating Death of Chicago Teen*, Sept. 29, 2009, *available at* <http://www.cnn.com/2009/CRIME/09/28/chicago.teen.beating/index.html> (for information on the incident leading to the death of the student) (last visited Feb. 27, 2010).

²⁹ President Obama also told parents to continue to support their children. The White House, Remarks by the President on Strengthening America’s Education System, Nov. 4, 2009, *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-strengthening-americas-education-system> (last visited March 29, 2010).

³⁰ President and Mrs. Obama’s respective biographies are *available at* <http://www.whitehouse.gov/administration/president-obama> and <http://www.whitehouse.gov/administration/first-lady-michelle-obama> (last visited on March 29, 2010).

his presidential campaign, President Obama talked about the role his mother played in ensuring he got his homework done. Parents and children need to hear these stories and follow these examples.³¹

Should Mr. Obama's presidency result in more African Americans successfully completing high school, steps will need to be taken to ensure that a college education is available for those who desire to attend college.³² Affirmative action programs have opened doors for many people of color by making opportunities available for qualified individuals. Such programs measure qualifications by an assortment of factors recognizing that test scores and grade point averages are not the sole measures of the qualities it takes to succeed in law school and in the legal profession. As a result, affirmative action programs increase the diversity in higher education.³³

³¹ See generally DAVID OLIVE, AN AMERICAN STORY: THE SPEECHES OF BARACK OBAMA: A PRIMER (2008). Michelle Obama grew up on the south side of Chicago, a mostly African American part of the city. She attended Whitney M. Young Magnet High School, Princeton University, and Harvard Law School. Her father worked in the city's water filtration plant; her mother worked in the family home until Michelle entered high school. *Id.* at 69-71. President Obama was born in Hawaii while his mother was a college student. His father, Barack Obama Sr. left the family while his son was very young. His mother and maternal grandparents raised President Obama. Although he struggled to find his identity, he eventually attended Occidental College in California. He transferred to and graduated from Columbia University. He also attended Harvard Law School. *Id.* at 317-318. President Obama had the opportunity to become a law professor at the University of Chicago. He passed up the opportunity to teach full-time, deciding instead to teach Constitutional Law as a part-time professor from 1992-2004. *Id.* at 320.

³² See The White House, Education: Progress, *supra* note 24. This is consistent with President Obama's overall plan for education, as one of his stated goals is to ensure that all children have access to at least one year of higher education in order to be equipped for the workforce. *Id.*

³³ An in-depth discussion of affirmative action in legal education is beyond the scope of this essay. Diversity efforts in law schools, including affirmative action, are not without controversy. The American Bar Association (ABA) requires law schools to make efforts to have a diverse faculty and student body. The United States Commission on Civil Rights recommended that law schools inform prospective students of the probability that they will graduate from law school and pass the bar exam. Referring to research done by Professor Richard H. Sander, one of the commissioners expressed concerns about the use of affirmative action in law schools. Gail Heriot, *Affirmative Action in American Law Schools*, 17 J. CONTEMP. LEGAL ISSUES 237, 238 (2008). Professor Sander did extensive research on affirmative action in law schools. See Richard A. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 367 (2004). He determined that affirmative action actually hurts African American students because they end up gaining admission to law schools in which they do not fit academically. *Id.* at 371. Pressure to achieve diverse student bodies leads elite law schools to admit African

Sonia Sotomayor described herself as “the perfect affirmative action baby.”³⁴ Some commentators took this statement to mean that she was not as qualified as others for a seat on the Supreme Court because her accomplishment was due to an affirmative action program.³⁵ In fact, the program gave an opportunity to

American students who have lower academic credentials than their white classmates. As a result, a high number of African American students end up at the bottom of law school classes at elite law schools. These students possess the credentials of those admitted to lower tier schools and would likely succeed at those schools. *Id.* at 425-441. The cascade effect of this mismatch is that lower tier law schools admit African American students who do not possess the academic credentials to succeed in law school and therefore should not have been admitted. The total impact of these mismatches is that a disproportionate number of African American students drop out of law school or fail to pass the bar exam. *Id.* at 436. Professor Sander’s research appears to support the idea that African American students entering law school are not adequately prepared by their elementary, high school, and college education for the challenges of law school. If successful, President Obama’s efforts to improve education for all children should ensure that students are ready for all levels of education, including law school.

³⁴ Bill Mears, *Sotomayor Says She Was ‘Perfect Affirmative Action Baby.’* CNN Politics, available at <http://www.cnn.com/2009/POLITICS/06/11/sotomayor.affirmative.action/index.html> (last visited February 12, 2010). Speaking as part of a panel composed of three women judges, Justice Sotomayor is reported to have made the following comments:

I am a product of affirmative action . . . I am the perfect affirmative action baby. I am Puerto Rican, born and raised in the south Bronx. My test scores were not comparable to my colleagues at Princeton and Yale. Not so far off so that I wasn't able to succeed at those institutions.

Id.

She said that using “traditional numbers” from test scores, “it would have been highly questionable if I would have been accepted.” *Id.* Others on the panel politely objected to her characterizations of how she overcame such obstacles, pointing out she graduated from law school with honors and was on the prestigious law review. Sotomayor countered that those were signs test scores alone do not offer the full measure of a person’s capability. Test scores, she said, often can be the result of “cultural biases.” *Id.*

Professor Stephen Carter in his book *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* (1991) explains the term “affirmative action baby.” He uses it to identify a time frame - nothing more. It is possible that Justice Sotomayor used the term in the same way. Professor Carter takes the position that affirmative action is a racial preference. He explains that the goal of such programs was originally to give students of color an opportunity to show what they can achieve. Professor Carter argues that those, such as himself, who have benefitted from affirmative action, should acknowledge the same. Professor Carter admits that he received a racial preference in admission to Yale Law School. He writes, “I got into law school because I am black. So what?” *Id.* at 17. He asserts that the focus should be on what beneficiaries have achieved with the opportunity rather than on the fact that they received an opportunity due to a racial preference.

Many, like Professor Carter, Justice Clarence Thomas, and Justice Sotomayor, took the opportunity presented by affirmative action and achieved great things. Their accomplishments speak for themselves.

³⁵ Political commentator Patrick Buchanan took the position that the affirmative action program which led to Justice Sotomayor being admitted to Princeton and Yale unfairly

a qualified woman of color that might not have otherwise been available. This is clear from Justice Sotomayor's achievements after being admitted to Princeton. She graduated summa cum laude and Phi Beta Kappa from Princeton. At Yale Law School, she served as an editor on the *Yale Law Journal* and managing editor of *Yale Studies in World Public Order*.

Affirmative action also provided an opportunity to Justice Clarence Thomas. However, Justice Thomas does not accept that the program under which he was admitted to Yale provided an opportunity to a qualified person of color. Rather, he has chosen to believe that the reason he was unable to get a job upon graduation from Yale was because prospective employers knew of the Yale affirmative action program. Thus, his degree is not worth as much as a white graduate's degree. Justice Thomas has stated that he wishes he had never mentioned race on his law school application.³⁶ One thing is clear for both Justices - affirmative action paved the way for each to be appointed to the highest court in the land.

In 2003, the Supreme Court decided *Grutter v. Bolinger*,³⁷ a case in which Barbara Grutter challenged an affirmative action program at the University of Michigan Law School. The admissions policy required that applicants be evaluated based on their complete file - not simply Law School Admission Test (LSAT) scores and grade point averages (GPAs). The policy sought to achieve a diverse student body but did not limit diversity to racial and ethnic diversity. One of the University's stated goals was to achieve a "critical mass" of [underrepresented] minority students" so that the minority students would be able to "make unique con-

discriminated against white males who may have been better qualified in terms of test scores. Patrick J. Buchanan, *Miss Affirmative Action 2009*, Human Events, available at <http://www.humanevents.com/article.php?id=32264> &keywords=affirmative+action (last visited March 29, 2010).

³⁶ CLARENCE THOMAS, *MY GRANDFATHER'S SON 75* (Harper Collins Publishers 2007). Justice Thomas writes, "As much as it stung to be told that I'd done well in the seminary despite my race, it was far worse to feel that I was now at Yale because of it. . . . But it was futile for me to suppose that I could escape the stigmatizing effects of racial preference, and I began to fear that it would be used forever after to discount my achievements." *Id.* (emphasis added). Justice Thomas describes his efforts to find a job after graduating from Yale Law School and makes these remarks: "Now I knew what a law degree from Yale was worth when it bore the taint of racial preference. I was humiliated - and desperate." *Id.* at 87.

³⁷ 539 U.S. 306 (2003).

tributions to... the Law School.”³⁸ The Court upheld this program in a 5 to 4 decision.³⁹ The author of the opinion, Justice O’Connor, opined that in twenty-five years such an admissions process might not be necessary.⁴⁰ Some might be inclined to argue that with the election of our first African American president we have taken a tremendous leap forward and it is not necessary to wait another twenty-five years to do away with affirmative action altogether. Now, they may argue, is the time for applicants to be judged solely on LSAT scores and GPAs. Any part of the applicants’ background that implicates race should not be considered because there is no longer a need for race to be considered in admissions decisions.⁴¹

An effort to defeat affirmative action programs in California was successful prior to the *Grutter* decision. Proposition 209, which in part prohibits state universities from considering the race of applicants in admission decisions, became part of the California Constitution in 1996.⁴² Washington adopted a similar provision in 1998.⁴³ After the *Grutter* decision, a similar effort in Michigan led to a comparable change to the Michigan Constitution.⁴⁴ In the November 2008 election, Nebraska voters approved a provision like those in California, Washington, and Michigan.⁴⁵ Unfortunately, in the wake of President Obama’s election, more states may begin to take such approaches. His election may signal to them that racial discrimination has been eliminated and that race should no longer be considered as a factor in admissions or faculty hiring decisions.⁴⁶ The result of Proposition 209 was the reduction of the

³⁸ *Id.* at 316.

³⁹ *Id.* at 310.

⁴⁰ *Id.* at 343.

⁴¹ Devon Carbado & Cheryl Harris, *Taking Initiative on Initiatives: Examining Proposition 209 and Beyond*, 96 CAL. L. REV. 1139, 1213 (2008). Professors Carbado and Harris explore how an admissions process that removed race totally from consideration might work. The professors conclude that requiring applicants to remove race from their personal narrative would be unfair to those for whom race is a critical part of their identity.

⁴² CAL. CONST. art. I, § 31(a).

⁴³ WASH. REV. CODE ANN. § 49-60-400 (West 2008).

⁴⁴ MICH. CONST. art. I, § 26.

⁴⁵ NEB. CONST. art. I, § 30.

⁴⁶ Laws like those in California, Washington, Michigan, and Nebraska present a unique challenge to law schools. Public law schools are subject to state laws and the ABA Standards for Approval of Law Schools Standard 212. Interpretation 212-1 makes it clear that such state laws do not exempt law such schools from the ABA requirements.

number of students of color admitted to law school.⁴⁷ The absence of affirmative action programs introduces the possibility that law school will be less available to students of color in the future. Scholarships for minorities might disappear as well.⁴⁸

Scholars continue to debate whether or not we are in a “post-racial” society making affirmative action unnecessary.⁴⁹ In my opinion, affirmative action measures will be necessary until objective statistics demonstrate that obstacles have been removed and that equality has been achieved in all aspects of American life. Statistics show that there are still disparities in crucial areas of American life.

First, African Americans are underrepresented among those with college degrees. As noted above, the percentage of African Americans who have a bachelor’s degree is less than the percentage of adults overall and of whites who have a bachelor’s degree.⁵⁰ Second, African Americans are overrepresented in prisons and jails. Although African Americans comprise just 13% of the

Schools in these states must demonstrate a commitment to diversity in ways not prohibited by state law. Those schools that are members of the American Association of Law Schools (AALS) are subject to the AALS requirement that law schools seek diversity. Association of American Law Schools By-Laws § 6-3(c).

⁴⁷ The number of students of color decreased after Proposition 209 became law and has remained low. This demonstrates that affirmative action programs increased the participation of students of color in the educational process. Ronald Caldwell Jr., *The Erosion of Affirmative Action and Its Consequences for the Black-White Educational Attainment Gap*, 57 U. KAN. L. REV. 813, 819 (2009). See also Reginald Shuford, *Why Affirmative Action Remains Essential in the Age of Obama*, 31 CAMPBELL L. REV. 503, 524 (2009).

⁴⁸ Like other students of color who graduated from Creighton University Law School during the 1980s, I was able to attend Creighton due to a generous scholarship focused on increasing the number of minority lawyers in the community. Scholarship programs like this one may begin to disappear. A similar scholarship program, The Frances M. Ryan Diversity Endowed Scholarship, exists at Creighton. The purpose of the program is to encourage those who will promote racial, ethnic, and other forms of diversity to enter the legal profession. Creighton University School of Law, available at <http://www.creighton.edu/law/admissions/financinglawschool/scholarships/listofannualscholarships/index.php> (last visited March 29, 2010).

⁴⁹ Gregory S. Parks, Jeffrey J. Rachlinski & Richard A. Epstein, *Debate, Implicit Race Bias and the 2008 Presidential Election: Much Ado About Nothing?*, 157 U. PA. L. REV. PENNUMBRA 210 (2009). Parks and Rachlinski argue that any announcement that we are now in a “post-racial America” is premature. Epstein takes the position that policies such as affirmative action and anti-discrimination laws should be allowed to die on the vine because of America’s great racial achievement in electing its first African American president.

⁵⁰ See U.S. Census Bureau Releases Data, *supra* note 20.

population, they comprise 40% of those in jail or prison.⁵¹ In addition, the economic status of black households is lower than that of white households. In 2007-2008 median incomes declined overall. For white households, the decline was 2.6 % to \$55,530. Median income in black households declined 2.8% to \$34,218.⁵² Finally, in 2008, there was an overall increase in the poverty rate. The rate for whites increased from 8.2% to 8.6% and for Hispanics from 21.5% to 23.2 %. The rate for blacks remained constant at 24.7%.⁵³ These numbers reflect trends in education, the criminal justice system, and the economy. They indicate that the welfare of blacks in this country is declining, rather than improving. Education is the key to turning these statistics around.⁵⁴

The argument that we are now in a “post-racial” society and that efforts at diversity are no longer necessary should have no affect on law schools’ commitment to diversity. Under current administrative regulations, law schools have the responsibility to seek diversity. Consequently, they must continue to take diversity and inclusiveness seriously. The ABA Standards for Approval of Law Schools require that law schools “demonstrate by concrete

⁵¹ Press Release, U.S. Census Bureau, Facts for Features CB10-FF.01 (Dec. 2, 2009) (on file with author). U.S. Dep’t of Justice, Fed. Bureau of Prisons, State of the Bureau 2007 at 52.

⁵² Press Release, U.S. Census Bureau, Income, Poverty, and Health Insurance Coverage in the United States: 2008 (Sept. 10, 2009) (on file with author).

⁵³ *Id.* See also Shuford, *supra* note 48, at 510-521. Mr. Shuford describes disparities in education, the criminal justice system, health, and housing. He argues that affirmative action remains necessary to address these disparities and expand opportunities. *Id.* at 523.

⁵⁴ In October 2009, I attended my father’s 50th college class reunion. He earned a Bachelor of Science in 1959 from Arkansas Agricultural and Mechanical Normal College (AM&N), a historically black college in Pine Bluff, Arkansas. (Arkansas AM&N is now the University of Arkansas at Pine Bluff.) It was amazing to see how education had impacted the lives of those gathered and of their descendants. In my family for instance, because my parents both graduated from AM&N, their children saw the value of education. My siblings and I have all attended college and all have a post-graduate education. Most in the group gathered for the reunion told similar stories. Perhaps increased funding to these important institutions will allow them to expand the opportunities available to African American youth.

Arkansas AM&N produced many outstanding graduates who went on to achieve great things. For example, Wiley Branton, Sr. completed his undergraduate education at AM&N and went on to law school in February 1950. JUDITH KILPATRICK, *THERE WHEN WE NEEDED HIM* 44 (2007). Branton was one of the first African American students to graduate from the University of Arkansas Law School. *Id.* at 49. Wiley Branton, Sr. later served in many prominent positions including Dean of Howard University Law School. *Id.* at 145-46.

action . . . a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.”⁵⁵ The same standard requires that law schools seek to have a diverse staff and faculty.⁵⁶ The Association of American Law Schools By-Laws has a similar requirement.⁵⁷

The law allows schools to strive for a “critical mass” of minority students.⁵⁸ As law schools are already required to demonstrate a commitment to diversity, they must take steps to ensure that the pool of qualified candidates for positions in the academy expands instead of contracts. President Obama can have an impact on this process by taking steps to improve our educational system, encouraging students to make the most of their educations, and increasing the availability of higher education for all students. African Americans will then have access and ability to succeed in their academic pursuits. As a result, more will become law professors. Instead of remaining at the same level, the percentage of African American law professors will begin to rise. An increase in diversity would be beneficial to the academy and to our country.

⁵⁵ ABA Standards for Approval of Law Schools, Standard 212(b).

⁵⁶ *Id.*

⁵⁷ A member school shall seek to have a faculty, staff, and student body which are diverse with respect to race, color, and sex. A member school may pursue additional affirmative action objectives.” Association of American Law Schools, By-Laws § 6-3(c).

⁵⁸ *Grutter*, 539 U.S. at 316.