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Biko Agozino  
*Virginia Tech*

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**‘Obama’s Presidency of the Harvard Law Review Board and his US  
Presidency’**

By  
**Biko Agozino**  
Virginia Tech

**Abstract:**

This paper attempts a discourse analysis of the 1990 issues of the *Harvard Law Review* edited by Obama as the first black President of the Law Review. Although *Politico.com*<sup>1</sup> and *The New York Times*<sup>2</sup> have reported on the significance of Obama’s previous presidency for his subsequent or current one, legal scholars are yet to explore what the discourse in Obama’s editorials says about his discourse as the first black president of the US. The task is made difficult because Obama did not sign any article for the *Harvard Law Review* during his presidency and does not dwell a lot on that period in his published memoirs. This conference presentation will therefore dwell mainly on his choice of authors for each issue of the journal, the articles that he selected along with the other editors and what they say about public issues, the article on Constitutional Physics that he was acknowledged as having helped Professor Tribe to write (Professor Tribe acknowledged his assistance and those of a few others in the paper), and possibly other unsigned articles that are attributable to him as well, starting with volume 102 when he was a freshman, continuing with volume 103 when he joined the editorial board and concluding with volume 104 which he presided over. Finally, I will try to show if there are any parallels and or contradictions between the two Obama presidencies.

**Introduction:**

‘One of the luxuries of going to Harvard Law School is it means you can take risks with your life. You can try to do things to improve society and still land on your feet. That’s what a Harvard education should buy – enough confidence and security to pursue your dreams and give something back.’<sup>3</sup>

In the above quotation, Obama indicated that he saw a link between his Harvard Law School education and his dedication to public service. This hint is not

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<sup>1</sup> See Jeffery Ressler and Ben Smith, 2008, ‘Obama Kept Law Review Balanced’ in <http://www.politico.com/news/stories/0608/11257.html> . See also <http://www.youtube.com/watch?v=s5m6YFBcixo> on his campaign for President of *Harvard Law Review*

<sup>2</sup> See Jody Kantor, 2007, ‘In Law School Obama Found His Political Voice’ in [http://www.nytimes.com/2007/01/28/us/politics/28obama.html?\\_r=1](http://www.nytimes.com/2007/01/28/us/politics/28obama.html?_r=1)

<sup>3</sup> Barack Obama, *Dreams From My Father*.

## ***Obama's Presidency of the Harvard Law Review Board and his US Presidency by Agozino***

surprising because he went to Harvard after graduating from Columbia University (where he majored in Political Science with a specialization in International Relations) and after serving as the Director of the Developing Community Project funded by eight Catholic Parishes in Chicago for two years. He also served as a consultant and instructor for the Gamaliel Foundation, a community-organizing institute in the Midwest.<sup>4</sup> Even before attending Columbia university, he made his first public policy speech in Occidental College in Los Angeles, calling for the college to divest from apartheid South Africa.<sup>5</sup> After graduating from Columbia University in 1988, he traveled a bit before entering Harvard University in the Fall of 1988 and spent his summers in Chicago working in a corporate law firms of [Sidley Austin](#) where he met his future wife in 1989 and [Hopkins & Sutter](#) in 1990 in Chicago.<sup>6</sup> After graduating from Harvard cum laude, Obama was hired by the University of Chicago as a Visiting Lecturer in 1991 and rose to Senior Lecturer in twelve years, teaching constitutional law. In 1992 he directed a voter-registration program in Chicago and in 1993 he joined Davis, Miner, Barnhill & Galland, a Civil Rights Law firm.<sup>7</sup>

The statement about using the luxury of Harvard Law School to prepare for giving something back to the society should not be dismissed as the usual optimism of young law school applicants in their application essays because Obama was a little more mature than the average law school applicant when he applied at the age of 27 and because he has gone on to attempt exactly what he said that he would do – use his education to serve the society and not just to make a lot of money as a corporate lawyer. For this reason, I believe that he presents Law and Society education researchers with an unusual opportunity to explore the influence of professional education on future public servants.

However, Obama's formulation of Harvard education as a luxury is a bit exaggerated because most people would see higher education as, if not a right or a privilege, a necessity.<sup>8</sup> But with reference to Harvard and the cost of attending the elite law school, it is understandable when Obama called it a luxury for he could have gone to a lesser-known law school for the fraction of the cost of going to Harvard and it would not have been as much a risk as attending Harvard where there is no guarantee of success after spending so much time and money. With Harvard Law School education, he was right in stating that even after trying to change society for the better with success or otherwise, he could always fall back on that elite education for a rewarding career, be it as a law professor, a legal

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<sup>4</sup> Obama, Barack (August–September 1988). "Why organize? Problems and promise in the inner city". *Illinois Issues* 14 (8–9): 40–42; reprinted in: Knoepfle, Peg, ed. (1990). *After Alinsky: community organizing in Illinois*. Springfield, IL: Sangamon State University. pp. 35–40

<sup>5</sup> Possley, Maurice (March 30, 2007). "[Activism blossomed in college](#)". *Chicago Tribune*. p. 20. Retrieved May 12, 2010.

<sup>6</sup> Aguilar, Louis (July 11, 1990). "[Survey: Law firms slow to add minority partners](#)". *Chicago Tribune*. p. 1 (Business). Retrieved June 15, 2008.

<sup>7</sup> Robinson, Mike (February 20, 2007). "[Obama got start in civil rights practice](#)". *The Boston Globe*

<sup>8</sup> In a speech during his re-election campaign in Michigan on January 12, 2012, he remarked that 'Higher education is not a luxury. It's an economic imperative that every family in America should be able to afford.' <http://barackobama.tumblr.com/post/16593627332/higher-education-is-not-a-luxury-its-an>

practitioner or even as a supreme court justice or elected politician. In this sense, going to Harvard Law School should be seen as less of a risk and more as an opportunity to better himself with the skills that would enable him to give something back to society as he rightly stated in part. He may have given the wrong impression that it was a commodity that young people could pay for in return for a boost in self-confidence to serve their community and give something back. Giving something back means that something was given to you in the first place and so he may have given too much credit to the luxury of Harvard education and too little to his prior education (including Columbia University, his education in his birth place of Hawaii, and his residence in Indonesia as a child or his work in Chicago prior to Law School) and less credit to the community for preparing him to be the leader that he became.<sup>9</sup>

In Texas, the case of ***San Antonio Independent School District v. Rodriguez***, [411 U.S. 1](#) (1973) shows how the community takes a leading role in litigating against the unequal provision of educational opportunities based on income disparities. In that case, the US Supreme Court reversed the ruling of the District Court ruled that the plaintiffs who brought their case at the height of the Civil Rights movement in 1968 had failed to prove that the US Constitution specifically stated that education is an inalienable right to be given equal protection under the 14<sup>th</sup> Amendment requiring equal protection of citizens and due process.<sup>10</sup> Of course, Obama always gave credit to his mother for giving him early home school lessons when he lived with her in Indonesia and to his grandparents for supporting his early education. He also gave credit to his absent father for that memorable visit when he was a ten year old who watched endless cartoons on television until his father said that he should turn the television off and go read a book. His grandparents tried to protect him by saying that it was the holidays and there was no homework and asked who his father thought that he was to show up after ten years and start bullying everyone about in their apartment? His father

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<sup>9</sup> Robert P. Moses of the Algebra Project supports the view here that education at all levels is a right that many fought for and that the struggle needs to continue towards a constitutional amendment to guarantee educational equality contrary to the suggestion of Obama that any education is a luxury. According to Moses, 'The basic story of fundamental change in the United States is a story of alliances between the top and the bottom. The country is surprising in its ability to come forward with individuals, buried in its constituencies, who act in pivotal ways at crucial points in the nation's history. They act in the context of larger institutions or movements to drive this country forward. What all these groups have in common is the belief that this country should close the gap between its ideals and its practices. Much of this story is hidden. We rarely talk about the Mississippi civil rights movement, its impact on the national Democratic Party, and how these events ignited the evolution of the party to the point where it could nominate Barack Obama for president in 2008. It is really important to foreground that history. R. P. Moses, 'An Earned Insurgency: Quality Education as A Constitutional Right' in *Harvard Education Review*, Vo. 79, No.2, 2009.

<sup>10</sup> Soltero, Carlos R. (2006). "*San Antonio ISD v. Rodriguez* (1973) and the search for equality in school funding". *Latinos and American Law: Landmark Supreme Court Cases*. Austin, TX: University of Texas Press. pp. 77–94. See also Sutton, Jeffrey S. (2008). "[San Antonio Independent School District v. Rodriguez and Its Aftermath](#)". *Virginia Law Review* **94** (8): 1963–1986

## ***Obama's Presidency of the Harvard Law Review Board and his US Presidency by Agozino***

answered that he was the father and that he thought that he had watched enough of the cartoons and ordered him to go to his room and read a book.<sup>11</sup> Obama said that he sulked off to his room and banged the door but that same message is exactly what he repeatedly emphasized to parents during his presidency – turn off the television and read a book with your children. Interestingly, more than two dozen US presidents practiced law although only six of them had law degrees and only two of them went to Harvard Law School;<sup>12</sup> so Harvard should not be made to seem as the essential institution for the training of future presidents when the community and other institutions play vital roles too especially in the case of President Obama who attended Occidental and Columbia before Harvard.

Looking over the period of Obama's active involvement with the Harvard Law Review, a few things stand out that this essay will explore in some details: 1) apart from the unsigned and unattributed essay on the rights of fetuses to sue their mothers that Politico unearthed and attributed to him during the 2008 campaign and which Obama's campaign admitted as being authored by him,<sup>13</sup> there are unsigned notes from volume 103 to 104 on international law that read a lot like what Obama could have written given his subsequent memoirs and given his background in International Relations from Columbia University; 2) There is an essay on black men as the invisible men of employment discrimination law that reads a lot like the Invisible Man of Ralph Ellison that Obama was said to have carried around with him as a student and read repeatedly as he grappled with his own biracial identity; 3) There is the essay on the curvature of the constitution in which Obama was acknowledged and into which he probably contributed the metaphor of basketball to explain the physics of law in addition to invoking Frederick Douglas; 4) The final issue of Obama's volume 104 had the audacity of using the N word in the title of a book review essay about Frederick Douglas from which the title of the unsigned review essay was quoted, making him perhaps the only editor to invoke the offensive word in a title at the elite Harvard Law Review; and 5) The unsigned and previously unattributed commentary on tort law and the rights of fetuses to sue mothers for neglect will go to show that the attribution of the unsigned commentaries reviewed in this paper to Obama is not as far-fetched as it may seem. In conclusion, the fact that Obama is the first President of the Harvard Law Review to become President of the US makes him incomparable in terms of how much the previous presidency may have affected the subsequent one and so the jury may remain out on his case indefinitely as Professors who mentor future law students to become leaders may go over these same records and draw their own conclusions.

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<sup>11</sup> Barack Obama, *Dreams From My Father: A Story of Race and Inheritance*, p. 68. Obama reports that his grandparents told him that they left Texas because of their discomfort about the prevalence of racism in the state, p.20.

<sup>12</sup> [http://wiki.answers.com/Q/How\\_many\\_us\\_presidents\\_have\\_a\\_law\\_degree](http://wiki.answers.com/Q/How_many_us_presidents_have_a_law_degree)

<sup>13</sup> See Ben Smith and Jeffrey Rensner, 2008, 'Exclusive: Obama's Lost Law Review Article Found' in <http://www.politico.com/news/stories/0808/12705.html> The admission by the Obama 2008 campaign that he authored the unsigned and unattributed commentary supports the view in this paper that he may have authored more unattributed commentaries in the Harvard Law Review or that this was probably not his 'sole' paper as some online reporters assumed.

Unsigned notes and reviews are common in *Harvard Law Review* and it is possible that such unsigned publications that are simply attributed to the *Harvard Law Review* are the collective work of members of the editorial board. I am guessing that the editors are simulating the practice in the Supreme Court where opinions of the court may be written by one justice and then supported by others except that in the case of the Supreme Court, the author of the lead opinion is usually identified while the supporting opinions are also attributed to individual justices instead of having the supreme court sign as the author. The collective by-line of the HLR is closer to the editorial practice of *The Economist* magazine which keeps the names of the authors anonymous in most of the reports and opinions it publishes perhaps because it regards its contents as reports rather than opinions of the authors.

It may be the case that editors at the *Harvard Law Review* are optimistic about their chances of becoming future nominees for Supreme Court Justices or other prominent public service positions and are therefore careful to avoid leaving a paper trail that could derail their nominations by inviting a filibuster in the Senate – an issue that Obama discussed at length in his chapter on ‘Our Constitution’ in the *Audacity of Hope*. It may be that the President of the Harvard Law Review is too busy reading all the submitted articles and moderating the debates of the 80-strong editorial board to have time to spare writing essays of his/her own for, just like Obama, most presidents of the Harvard Law Review boards left no signed articles in the issues and volumes that they edited. But in the case of Obama, his fingerprints are visible in the style and themes of some of the unsigned notes and reviews published even before he became president of the board and I will put some of these to him, as lawyers say in court.

### **International Law - War Without Hostilities:**

Article 1, Section 8, Clause 11 of the US constitution, also known as the war powers clause, vest in Congress the power to declare war. It was first invoked in the 1812 war with Canada and then secondly by President Polk who claimed that Texas was about to join the US in 1846 and that Mexico had invaded the US and shed US blood on US soil in an attempt to stop Texas from joining the Union. Congress subsequently voted to declare war against Mexico but not before some questions for the president.<sup>14</sup> The analysis of unsigned papers in the Harvard Law Review that

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<sup>14</sup> In a letter to his Law Partner, Abraham Lincoln opposed the interpretation of the War Clause to give the President the authority to individually declare war. As he put it: “The provision of the Constitution giving the war-making power to Congress, was dictated, as I understand it, by the following reasons. Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our Convention understood to be the most oppressive of all Kingly oppressions; and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us. But your view destroys the whole

## ***Obama's Presidency of the Harvard Law Review Board and his US Presidency by Agozino***

are attributable to Obama will start with the unsigned essay or review on international law that is attributable to him. 'Realism, Liberalism and the War Powers Resolution' appeared in volume 102 in 1989 during Obama's first year in Law School.<sup>15</sup> He may not have been the author but it is likely that he read it since aspects of the argument show up in his policy statements about the action that he took in Libya in 2011 in apparent contradiction of the position that he took during his 2008 presidential campaign.<sup>16</sup> If he wrote such an essay in his first year in Law School, it is not surprising given his background in International Affairs from Columbia University and he may have used such an essay to pitch the Harvard Law Review Association about his intention to apply for a coveted place on the board the next year.

The essay stated that the War Powers Resolution which was passed by congress over the veto of Richard Nixon in 1973, 'has been spectacularly ineffective. Every President since Richard Nixon has questioned its constitutionality, and lack of sufficient political consensus for the resolution in both Congress and the public at large has enabled Presidents to defy the law with impunity'. The resolution interprets the President's constitutional powers as commander in chief to be subject to the checks and balances of congress by requiring that the president should consult with congress before deploying US troops in war and hostilities against foreign powers, requiring reports that justify such deployments. If in the case of emergencies, troops are deployed without such congressional oversight, then they must be withdrawn within sixty days unless their continued deployment has received the approval of congress. Rather than see the failure of the resolution as a symptom of the power struggles between the executive and legislative branches as is typically supposed, the unsigned essay attributed the failure to tensions between realism and liberalism in US foreign policy and called for this tension to be resolved in order to safeguard the War Powers Resolution.

The realist perspective sees war as essential in the power struggles between self-interested states in the absence of an impartial arbiter and in accordance with the theories of Thomas Hobbes and Nicolo Machiavelli who held pessimistic views of human nature. Under this perspective, states engage in war by choice to improve their resources, security or power and sometimes to pre-empt attacks from other states or to defend against such attacks. The solution to war under this perspective would necessitate realistic uses of 'threats, diplomacy, alliances, and even limited force.' Liberalism emerged in the mid 18<sup>th</sup> century from the works of the French Philosophes and Adam Smith who believed that human nature is basically good

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matter, and places our President where kings have always stood." See • *Abraham Lincoln: a Documentary Portrait Through His Speeches and Writings*. Don E. Fehrenbacher, editor., Stanford University Press, Stanford. CA (1996). See also, *Lincoln on Democracy*, Mario M. Cuomo and Harold Holzer (Fordham University Press, 2004) pp. 36-37

<sup>15</sup> Harvard Law Review Association, 'Realism, Liberalism and the War Powers Resolution', *HLR*, 102, 1989.

<sup>16</sup> *The Washington Times* stated in an editorial, July 5, 2011: 'No one believes the self-serving White House argument that U.S. involvement in Libya's civil war does not constitute "hostilities." Mr. Obama's legalistic attempt to duck his responsibilities under the War Powers Resolution has left his administration having to defend the biggest credibility gap since "the light at the end of the tunnel."

and so it is possible for states to perceive common economic interests as opposed to threats, leading to peaceful co-existence instead of perpetual war and conflict. To avoid the misunderstandings that accidentally lead to war, the liberals call for democratic accountability in each state and an end to absolute rulers who were blamed for plunging their countries into avoidable conflicts with other states.

The American founding fathers identified with the liberal view and rejected militarism, secret diplomacy, balance of powers and the aristocracy. Thus article 1 of the US constitution vested the power to declare war, not in the President but, in Congress precisely because they expected that the legislature would exercise this power less frequently than a single executive. However, US Presidents have always had no difficulty in deploying troops even without the declaration of war by Congress and after World War II, the US foreign policy shifted towards the realist perspective in the face of the perceived threat of global communism. This tendency came to a head during the undeclared war in Vietnam, forcing Congress to move against what they saw as the rise of an 'imperial presidency' and seek to return to the liberal intentions of the framers of the constitution. The tensions between realism and liberalism are usually resolved through a consensus on the ground that emergencies might necessitate the deployment of troops when the US is under attack or at risk of imminent attacks but liberalism still required that such emergency powers should be subsequently subjected to legislative authorization or ended within 60 days.

The major problem with the war powers resolution is that the definition of 'hostilities' is vague and so if significant casualties do not occur among US troops, then it would be assumed that there were no hostilities. Both President Reagan and President Carter used this argument in the conflict with Iran when they denied that there were hostilities because US casualties were not significant. President Obama used a similar argument in the attack on Libya in which no US troop suffered any casualties and so, according to the Obama administration, there were no hostilities in Libya requiring a war powers resolution. Liberals have gone to court to seek the enforcement of the war powers resolution when it is apparent that Congress does not intend to enforce it. In one case, the court took a realist view that the prerogatives of executive powers should allow the president to call the shots while in another the court took a liberal view that the supply of weapons to rebels fighting a foreign government needed to be authorized by Congress. The essay called for the definition of hostilities to be based on either the realist perspective or the liberal perspective but not on both or to define it clearly in terms of specific amounts of US casualties.

Whether or not this unsigned essay was written by Obama in his first year in Harvard, it is very likely that his international studies background from Columbia university would have made him to read the essay and discuss it with colleagues. In *The Audacity of Hope*, he dwelled on this contentious interpretation of the intentions of the framers of the constitution by arguing that it is the nature of the law that it is not always clear what was intended and so arguments and debates



## ***Obama's Presidency of the Harvard Law Review Board and his US Presidency by Agozino***

serve to clarify the intentions of the framers given new challenges. For instance, following 9/11, according to Obama, the Bush administration resisted any suggestions that the Presidency was answerable to Congress in the use of war powers and Congress tried to filibuster many of the judicial nominees of the administration even though the constitution makes no reference to filibusters. He offers the solution that the constitution should not be interpreted with the metaphor of a finished building but with the idea of a conversation among the people who necessarily compromise with one another and muddle through to avoid having the discussion break down as it did once over the question of slavery, proving that sometimes deliberation is not enough and hostilities might be inevitable sometimes to defend the nation lest pragmatism becomes moral cowardice.<sup>17</sup>

The moral courage Obama is invoking here may necessitate that his administration recognizes the scores of civilian lives lost in the bombing of Libya under the leadership of the US and NATO. Even if it is true that there were no hostilities between Libya and the US when those civilians were bombed, moral courage would call for reparations to be paid to their families or survivors in line with the liberal philosophy of international relations. In the chapter 'Beyond Our Borders' in *The Audacity of Hope*, Obama recounts the atrocities that the regime in Indonesia conducted against its own citizens during the cold war and with US support apparently as part of the fight against global communism but obviously just so US manufacturers could sell more products to the impoverished country. He contrasted that with the outpouring of humanitarian aid from American citizens following the tsunami that hit the country and observed that the two billion dollars that Americans donated and the deployment of US troops to help with the rescue efforts made many Indonesians to see America in a better light. Rather than fall back on the logic of a law school essay to insist that Libya was bombed without hostilities, Obama could show leadership to the NATO war-mongers by admitting that those killed, including Gadhafi's son and grand children, deserve an investigation and some reparations whether the theory and practice of international relations is guided by realism or liberalism.<sup>18</sup>

### **Black men as Invisible in Employment Discrimination Law**

On April 11, 2013, it was reported that an African American man in Houston, Christopher Alexander Houston, filed a law suit against his employers because he was routinely subjected to abusive racial abuse by colleagues and when he complained to the management, he was suspended while another African

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<sup>17</sup> Barack Obama, *The Audacity of Hope*.

<sup>18</sup> Louis Fisher, 'Obama, Libya, and War Powers' in R.P. Watson, et al, eds., *The Obama Administration: A Preliminary Review*, 2012: States that although Presidents have the discretion to deploy US troops prior to Congressional approval in cases of imminent danger to the US, there was no need for Obama to do so against Libya and his unilateral executive decision was condemned by both Democrats and Republicans in the Congress, prompting the administration to assert that the action in Libya did not need Congressional approval because there were no 'hostilities' and that the US was participating in a broad coalition to enforce UN resolutions against Libya.

American employee was told that he would never be promoted due to his race.<sup>19</sup> The unsigned commentary in the Harvard Law Review, 'Invisible Man: Black and Male under Title VII', reads a lot like something Obama could have authored while he was president of the HLR and if he did not author it, he certainly must have read it and selected it for publication reflecting the usual 'Presidential Review Critique'. This opinion may have been reflected in one of his very first achievements in office, the Equal Pay for Equal Work Act that he signed in the very first month of his administration, January 2009. The commentary reviews the court victory of a black police officer who challenged the requirement of Memphis Police Department on the ground that the requirement that all officers be clean-shaven was discriminatory against black men who suffer shaving bumps more frequently if they shave every day.<sup>20</sup> Such a court victory was note-worthy because courts and black men were less likely to identify discriminatory labor practices that are specific to black men whereas many such litigations and legal scholarships have focused on black women's unique issues that are identifiable even when an employer could claim that there was no sex discrimination because white women and black men are treated similarly, according to the commentary:

The legal system has failed to provide parallel protection against the special features of the discrimination against black men. The law has not recognized that the black male gender, rather than providing privileges in the workplace normally associated with being male, signals a unique basis of vulnerability to employment discrimination.<sup>21</sup>

The commentary is an application of intersectionality theory to black men contrary to the tendency of the courts to reduce race-and-gender discriminations of black men to only race or gender issues.<sup>22</sup> The commentary recommends extending the jurisprudence of race-plus- which has been developed in cases of black women to black men because black men suffer unemployment at rates higher than black women, both of whom suffer unemployment much more than white men and white women. According to the review commentary:

Although an unequal educational background may explain in part the status of black men in high-level professions - white men are twice as likely to graduate from college as are black men, and three black women graduate

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<sup>19</sup> 'African American Man States that Racial Discrimination Forced him to Resign', in *The Southeast Texas Record: Southeast Texas' Law Journal*: <http://setexasrecord.com/news/283959-african-american-man-states-racial-discrimination-forced-him-to-resign>

<sup>20</sup> See *Johnson v. Memphis Police Dep't*, 713 F. Supp. 244, 248 (N.D. Tenn. 1989. see also *Bradley v. Pizzaco of Nebraska, Inc.*, 51 Fair Empl. Prac. Cas. (BNA) 81x, 815 (D. Neb. 1989) which rejected the plea that a no-beard policy discriminated against black men

<sup>21</sup> Harvard Law Review Association, 'Invisible Man: Black and Male under Title VII' 104HarvLRev749

<sup>22</sup> 'See, e.g., *Pierce v. Marsh*, 859 F.2d 60i (8th Cir. 1988) (discussing only the racial component of the plaintiff's race-and-sex discrimination claim); *Haddock v. Board of Dental Examiners*, 777 F.2d 462, 463 n.i (9th Cir. 1985) (reducing a claim of multiple discrimination to one of race discrimination alone)', quoted from the review commentary.

## ***Obama's Presidency of the Harvard Law Review Board and his US Presidency by Agozino***

each year for every two black men - even black men who achieve the qualifications necessary for positions offering upward mobility are disproportionately unemployed. Statistics indicate that black men who have attended college have a higher level of unemployment - and earn less - than white high school dropouts.

This line of reasoning suggests that this concern may have influenced the decision of Obama to sign the Equal Pay for Equal Work legislation as the first major achievement of his administration.<sup>23</sup> Employers frequently use the excuse that black male employees have an attitude problem or a chip on their shoulders as defense against at-will discrimination litigation under title VII even when there is no proof that the direct verbal style attributable to many (but not all) black men in comparison with the indirect style of most white men detracts from the employee effectiveness in doing the job. Moreover, some employers have been known to use racist languages in justifying why they would not hire black men while some see black men as more threatening compared to black women who are more likely to be perceived as seeking a living wage rather than professional advancement. When hired, black men are more likely to be facing closer scrutiny compared to other workers, perhaps because white men tend to be uncomfortable with black men in positions of authority and even in subordinate positions. Moreover:

Following the adoption of title VII, employers began to supplement the statute with affirmative action measures to redress past discrimination. Affirmative action, however, has not worked sufficiently to equalize opportunities for black men, for two principal reasons. First, even while trying to meet affirmative action goals, employers choose those applicants best meeting traditional educational criteria. This practice disadvantages black men, who on average have the fewest educational qualifications. Assessing affirmative action progress by reviewing only the total number of women or black workers hired prevents employers from focusing on whether distribution among black and white women and black men is even. More important, grouping black men and women together means that if the number of black workers hired and promoted overall is satisfactory, employers need not internally address the critical question whether the educational qualifications they require are reasonably related to the job. The hiring standards in cases in which the qualifications are not closely related will continue unfairly to exclude black men.

The commentary further states that employers tend to double count black women in order to look better in Affirmative action conformity and they tend to believe

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<sup>23</sup> Saying that Equal Pay for Equal Work was a family issue rather than a women's issue, Obama said it was "[fitting that the very first bill I signed](#) -- the Lilly Ledbetter Fair Pay Restoration Act -- is upholding one of this nation's founding principles: That we are all created equal and each deserve a chance to pursue our own version of happiness" (See <http://abcnews.go.com/GMA/President44/story?id=6757817&page=1#.T8Z-2FJv5t1> ). The Act was named for a woman who sued after working in a tire company for 19 years only to realize that her male colleagues earned more than her for the same job but the supreme court reversed the lower court decision on the ground that the woman had waited too long to sue (See [Ledbetter v Goodyear Supreme Court Opinion](#) 2007).

that black women need their jobs more for the purpose of supporting their families and that black women are perceived as being more conformist to expected standards compared to black men while white women are the ones who have benefitted most from Affirmative Action. Court decisions are slowly recognizing the race-plus claims of black women in race-and-sex discrimination cases but are slow to recognize that similar arguments apply to black men as well. Scholars like Kimberley Crenshaw remain critical of the race-plus reasoning of the courts regarding the claims of black women because the methodology is additive and hierarchical rather than intersectional and inseparable:

The sex-plus type of analysis, however, is evolving in some circuits toward a genuine recognition of the unique nature of the discrimination against black women. In a 1982 case, *Payne v. Travenol Laboratories, Inc.*, n<sup>o</sup> the Fifth Circuit determined that if black women claim sex discrimination and race discrimination but additionally allege sex-and-race discrimination, they cannot adequately represent black men in a class action suit." In other words, the court recognized that resolution of the black women's sex-and-race claim would not necessarily benefit black men by implication. Thus, the court concluded that although black men have no legally legitimate interest in perpetuating sexism against black women, "both black women and black men have a right to uncompromised loyalty in their named plaintiff representation in class action suits." Although it did not use the sex-plus language, *Travenol Laboratories* recognized that discrimination against black women and men takes distinctive forms. It signifies an advance in the doctrine because it separated black men and women into groups with unique interests. *Jefferies* and earlier sex-plus cases described discrimination against black women as arising from some combination of their sex and race but did not take the additional step of viewing sex and race as inseparable components of a singular identity susceptible to a distinctive prejudice."

The commentary concludes that the courts are not completely to blame since black men who bring cases of discrimination rarely claim sex discrimination in addition to race discrimination according to the logic of race-plus and the courts will not rule on claims that are not argued before them. By signing the Equal Pay for Equal Work Act and signaling that it is not a women's issue, President Obama may have been calling attention to this Law Review commentary that he probably authored and definitely published as President of the *Harvard Law Review*.

### **Constitutional Physics:**

In 1984, Gregory Lee 'Joey' Johnson was convicted in Dallas of violating a Texas Law against the burning of the US flag. He was sentenced to one year in prison and fined \$2,000. He appealed the conviction at the Fifth Court of Appeal of Texas but the conviction was upheld. He appealed at the highest Court of Criminal Appeals in Texas which overturned his conviction on the ground that flag burning was protected free speech according to the First Amendment. Texas appealed to the US Supreme Court which sided with Johnson in a 5-4 majority protection of free

## ***Obama's Presidency of the Harvard Law Review Board and his US Presidency by Agozino***

speech in 1989.<sup>24</sup> Professor Lawrence H. Tribe acknowledged the assistance of Barack Obama and a few others in the writing of the essay on the Curvature of the Constitution which was published in volume 103 while Obama was a member of the editorial board. The article reviewed paradigm shifts in Physics from the 12<sup>th</sup> Century to the present and argued that similar analogies could be drawn between the field of Physics and the field of Law as sets of evolving principles based on reason and open to competing interpretations, leading to changes in both the laws of physics and the laws of the constitution.<sup>25</sup> The view that the constitution was

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<sup>24</sup> *Texas v. Johnson*, 491 [U.S. 397](#) (1989). See Goldstein, Robert Justin (2000). *Flag Burning and Free Speech: The Case of Texas v. Johnson*. Lawrence, KS: University Press of Kansas. See also, Vergobbi, David J. (2003). "Texas v. Johnson". In Parker, Richard A. (ed.). *Free Speech on Trial: Communication Perspectives on Landmark Supreme Court Decisions*. Tuscaloosa, AL: University of Alabama Press. pp. 281–297. This case may help to illustrate the arguments of Professor Tribe that the laws of physics and the laws of the state are comparable given the arguments for and against the parties by the Justices: Justice Kennedy concurred with the majority and stated: 'Though symbols often are what we ourselves make of them, the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit. The case here today forces recognition of the costs to which those beliefs commit us. It is poignant but fundamental that the flag protects those who hold it in contempt', 491 U.S. at 420-21. But Justice Rehnquist dissented with the argument that, 'The American flag, then, throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another "idea" or "point of view" competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have. I cannot agree that the First Amendment invalidates the Act of [Congress](#), and the laws of 48 of the 50 States, which make criminal the public burning of the flag'. Incidentally, the same HLR issues that carried the essay by Tribe also reported the case of 'Flag-Burning as Symbolic of Speech: Texas V. Johnson' but Tribe did not explicitly comment on the case in his article.

<sup>25</sup> Tribe argues that: 'Newton's conception of space as empty, unstructured background parallels the legal paradigm in which state power, including judicial power, stands apart from the neutral, "natural" order of things. In the realm of physics, Einstein trenchantly criticized the world view in which space as such is assigned a role in the system of physics that distinguishes it from all other elements of physical description. It plays a determining role in all processes, without in its turn being influenced by them. Though such a theory is logically possible, it is on the other hand rather unsatisfactory. Newton had been fully aware of this deficiency, but he had also clearly understood that no other path was open to physics in his time. In Einstein's view, space is not the neutral "stage" upon which the play is acted, but rather is merely one actor among others, all of whom interact in the unfolding of the story. Einstein's brilliance was to recognize that in comprehending physical reality the "background" could not be abstracted from the "foreground." ... A parallel conception in the legal universe would hold that, just as space cannot extricate itself from the unfolding story of physical reality, so also the law cannot extract itself from social structures; it cannot "step back," establish an "Archimedean" reference point of detached neutrality, and

informed by legal science was held by some of the framers of the constitution, according to Tribe:

Early in our nation's history it was commonplace, for example, to say that the 1787 Constitution was Newtonian in design, with its carefully counterpoised forces and counterforces, its checks and balances, structured like a "machine that would go of itself" to meet the crises of the future. Later, as the country grew and the pace of social change quickened, and after Darwin's theory of evolution gained acceptance, many thinkers - Justice Holmes, for example, and Woodrow Wilson - saw in the Constitution organic aspects of a living, evolving thing.

The suggestion that law is like physics could be extended by arguing that indeed it is physics that mimics law because the making of laws in society definitely predated the discovery of the laws of gravity in physics, making the latter the simulacra of the former. Similarly, to say that the view that legal evolution in society was modeled after the evolutionary theory of Darwin is to obscure the fact that the theory of societal evolution predated Darwin who must have been aware of the evolutionary sociology of August Comte and Herbert Spencer if not the evolutionary dialectics of Hegel before the publication of his theory of natural selection.<sup>26</sup>

The argument that the constitution evolves just like scientific theory itself serves as a foretaste of the remark that Obama made with reference to the Supreme Court deliberations on the Affordable Healthcare Reform Act litigation. He suggested that judicial activism on the part of the court would be unprecedented if used to overturn a legislation that was designed to make healthcare more affordable to Americans in line with the Federal Government's prerogative to regulate commerce or taxation in the interest of the citizens. Requiring citizens who can afford insurance to buy one or pay a surcharge for not doing so would keep insurance premiums affordable to all those who buy insurance and also cover more Americans given that the policy would forbid insurance companies from refusing coverage to those who have what they called pre-existing conditions and also forbid them from dropping young adults from the insurance policies of their parents. During the hearing challenging the constitutionality of the individual mandate in the healthcare reform law, some of the Supreme Court Justices questioned if the government could require you to buy health insurance, could it not also require you to buy broccoli on the ground that it is good for your health or require you to buy a burial policy since everyone gets to die? Such questions serve to demonstrate

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selectively reach in, as though from the outside, to make fine-tuned adjustments to highly particularized conflicts. Each legal decision restructures the law itself, as well as the social setting in which law operates, because, like all human activity, the law is inevitably embroiled in the dialectical process whereby society is constantly recreating itself.'

<sup>26</sup> See Auguste Comte, *A General View of Positivism* (1844). See also, Herbert Spencer, *The Principles of Biology* (1864), *The Principles of Psychology* (1870) and *The Principles of Sociology* (1874) and compare with Charles Darwin *On the Origin of the Species* (1859).

## ***Obama's Presidency of the Harvard Law Review Board and his US Presidency by Agozino***

that the law and physics might be analogical but they are definitely not identical because the law belongs to the field of conversations in which disagreements are common while physics strive towards a consensus based on what are seen as exact principles of empiricism, experimentation and measurement even though physics itself is far from being perfectly exact given the ever-present issue of margins of error in scientific methodology that prompts paradigm shifts every now and then. The law differs in the sense that paradigm shifts are not as clean as is the case in physics because different paradigms are allowed to co-exist and duel with each other from case to case as is also true of partisan politics.

The essay of Tribe is illustrated with cases and analogies that challenge the exactitude of Physics indirectly by asking, for example as only a basketball lover like Obama would, how the mere looking at a basketball would cause it to move in keeping with the theory in modern quantum physics that the mere observation of reality alters the reality being observed. The essay did not answer this question but Obama was probably inferring that the spectators who are devoted to the game of basketball inevitably alter the game and might decide the outcomes of games by merely being spectators of the game, not only by cheering and waving to make players miss free shots but also by paying a lot of money to watch their favorite teams and thereby making the advertisers to pay big bucks to reach the fans, making the players association in turn to engage the team owners in labor disputes over the sharing of the profits, leading occasionally to lock-outs. This is clearly a political analogy that suggests to lawyers and judges, employers and politicians that they must take the general public seriously because the public is watching them closely and by looking at what they do, the public is able to transform public policy through vigilance in more ways than is possible in the less moralistic and less democratic field of physics. During the Supreme Court hearings on the affordable healthcare act, groups of activists camped outside with placards proclaiming their support for, or opposition to, the law. Eventually the Supreme Court came down with a narrow 5-4 majority in favor of the individual mandate as a constitutional taxation that the Federal Government is entitled to levy but it took the swing vote of Chief Justice Roberts to save the law.

Since Tribe's essay acknowledges the contribution of Obama among others, it is not necessary to argue that Obama must have co-authored the paper. What needs to be proven is whether a scientific view of the law and politics influenced the policies of Obama as President and there is no doubt that this is the case. A review of Obama's *The Audacity of Hope: Thoughts on Reclaiming the American Dream* indicates numerous references to science and technology as essential elements of public policy. Obama argues that more investment in science education would keep America competitive and his policy of Race to the Top among other educational policies like making college more affordable certainly emphasizes the crucial importance of science and technology to politics.

Furthermore, he argues that faith-based policies like the restriction of research into stem cells under the Bush administration would be counter-productive for American competitiveness. In addition, Obama emphasized the need to incentivize

the increase of fuel-efficiency as part of the policy strategies to keep the American auto industry more competitive and his support for innovation in renewable energy is an indication that he takes science and technology seriously as relevant variables in political decisions. Finally, his use of drones to target and kill suspected terrorists, including American citizens, is consistent with Tribe's essay on Constitutional Physics and each of these decisions remains controversial and open to debate as is expected in any scientific or technological research as is also the case with any political or constitutional issue before the courts and the court of public opinion, each has rooms for error just as science is error prone, but with Tribe's essay that is attributable to him, Obama was serving notice that he will be a politician who takes science and technology seriously. Obama needs to pay attention to people who insist that using science and technology to kill people in far away places in the world is wrong on ethical grounds and that given the mass resistance to the use of drones to kill innocent civilians and those labeled militants around the world, the technology might be seductive but it is making 'morality to bite the dust'.<sup>27</sup> No Institutional Review Board would approve such a project were it a scientific proposal.

Furthermore, President Obama needs to pay attention to critics such as Michelle Alexander<sup>28</sup> who wondered why Obama would say in *The Audacity of Hope* that he is in favor of the death penalty for child rapists when he knew that the Supreme Court has already ruled that the death penalty for rape is unconstitutional because of its arbitrary and racial manner of application disproportionately to black men. A clue to this belief on the part of Obama comes from the essay by Tribe where the case of child abuse was used to illustrate constitutional physics. Referring to the case of Joshua DeShaney who was physically abused by his father without the social services offering him equal protection under the law, the Supreme Court ruled that he was not entitled to civil rights damages under the 14<sup>th</sup> Amendment because due process clause of that amendment did not apply to individuals but to state rights.<sup>29</sup> Tribe's essay used the speech by Frederick Douglas denouncing the Supreme Court invalidation of the 1867 Civil Rights Act and the dissenting opinion of Justice Blackmun in the case of *DeShaney* to support a post-Newtonian reading of the constitution to allow for changing interpretations of the law in support of school desegregation and capital punishment discrimination litigation.

Another illustration in the essay by Tribe is that of a woman's right to choose abortion and whether if the government is allowed to protect that, could the government also require a woman to carry a pregnancy to full term if funding policy requires that. By refusing women the right to choose abortion even when they are paying with their own money in a public facility, Tribe argued that the

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<sup>27</sup> Medea Benjamin, 2012, *Drone Warfare: Killing By Remote Control*, New York, OR

<sup>28</sup> Michelle Alexander, *The New Jim Crow*, also argues that President Obama should legalize drugs because he himself admitted that he smoked and inhaled and had he been arrested and criminalized as a youth, his political leadership roles would have been nullified the way the lives of many young Americans are being ruined by the drug laws.

<sup>29</sup> See *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 002 (1989).



## ***Obama's Presidency of the Harvard Law Review Board and his US Presidency by Agozino***

state was making men and women unequal by making the biology of women their destiny in a way not applicable to men. This view may have been extended in Obama's commentary in the case in which the Illinois Supreme Court rejected the argument that unborn babies could sue their mother because if such an argument is allowed, government might begin to intrude into the privacy of women the way that cannot be done with respect to men. In a similar vein, Senator Obama later argued in *The Audacity of Hope* that those opposed to a woman's right to choose abortion should present a scientific argument to support their views instead of thumping the Bible with the fundamentalist belief in its inerrancy, a belief alien to the scientific principle of falsifiability. It is obvious that President Obama's policies mandate the provision of birth control coverage for all women who want it in their employer-provided health insurance coverage but some religious organizations that employ women have sued to be exempt from the requirement on First Amendment grounds.

### **Talking about Unconscionable Niggers<sup>30</sup>**

I am attributing this unsigned book review to Obama because it was published under his watch as President of the Harvard Law Review and I am almost certain that no white member of the editorial board could have chosen such a provocative title at a sensitive time when the first black president of the law review was presiding. If it was not written by Obama, he certainly approved it for publication and it is likely the only time that the Harvard Law review ever used the offensive word in a title. The essay on the invisible black man of labor discrimination reviewed above also used the N word when quoting from an employer who said that he was never going to hire any damn nigger but this time, Obama appears to be making a point by using the word in the caption in the final issue of volume 104, perhaps to highlight the persistence of racism in America.

There is no fault being attributed to the author of the review especially because the title is a direct quote from a book on Frederick Douglas by a history professor at the University of Georgia in which the author tried to prove that many of the slavery abolitionists were racist given that the quote comes from William Garrison in a letter to a white woman in which he complained that Douglas wanted to be paid a huge sum of two dollars and a half for his column in the *Liberator*. Quoting a letter from Douglas to Elizabeth Stanton in which he stated that if she could forgive him for being a negro, he would forgive her for being a woman, the book reviewer suggested that the author of the book appeared to forgive Douglas for being a Negro only on the ground that he must be celebrated as an exceptional African American.

The reviewer did not provide additional context on why Douglas would write such a letter to Stanton in the first place. The proper context is the struggle for universal suffrage during which Stanton and her colleagues started demanding for white

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<sup>30</sup> Harvard Law Review Association, Talking of Unconscionable Niggers: Frederick Douglass by William S. McFeely, *Harvard Law Review*, Vol. 104, No. 8 (Jun., 1991), pp. 1949-1954

women to be given the right to vote before black people on the ground that they were more civilized while slavery supposedly dehumanized African Americans to the extent that if black men were given the right to vote first, they might be emboldened to commit outrages against the fairer sex. The leading white male abolitionists and Douglas disagreed with her and insisted that giving the vote to African Americans without further delay was a matter of life and death because they could not confront the terror of lynching effectively without the right to vote and they would use their vote to support the rights of all, including women, to vote whereas white women could use their vote to support white supremacy against black people. As Douglas put it:

I must say I do not see how any one can pretend that there is the same urgency in giving the ballot to woman as to the negro. With us, the matter is a question of life and death, at least, in fifteen States of the Union When women, because they are women, are hunted down through the cities of New York and New Orleans; when they are dragged from their houses and hung upon lamp-posts; when their children are torn from their arms, and their brains dashed out upon the pavement; when they are objects of outrage and insult at every turn; . . . then they will have an urgency to obtain the ballot equal to our own.<sup>31</sup>

It is a coincidence that Barack Obama and Hilary Clinton were said to be echoing this debate during the 2008 Democratic Party primaries contest during which all the members of the Congressional Black Caucus initially supported Clinton against Obama, suggesting that black leaders are not opposed to white women contrary to Stanton's stereotypes. As Tracie A. Thomas put it in a commentary in a June 1, 2008, *Washington Law Review* commentary:

The struggle between Hillary Clinton and [Barack Obama](#) to make history as either the first woman or first African-American president resurrects the unfortunate historic battle between sex and race. The current debate presents striking parallels to the battle for voting rights after the Civil War when infighting between abolitionists over race and sex created deep separatism that pitted allies against each other and diluted their political strength. The potential fallout from this false dichotomy today threatens political credibility and social justice and demands a rethinking of the alleged opposition.<sup>32</sup>

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<sup>31</sup> See *Debates of the American Equal Rights Association Meeting*, May 12-14, 1869, in *The Concise History of Woman Suffrage: Selections from the Classic Work of Stanton, Anthony, Gage, and Harper* 258 (Mari Jo Buhle & Paul Buhle, eds. 1978.) See also W.E.B. Du Bois, *Suffering Suffragettes The Crisis* Vol. 4 (June 1912), pp. 76-77 in which he reviewed the opposition by the National American Women's Suffrage Association to the tabling of a resolution on black voting rights in which he concluded that there was no evidence that black men were the enemy of women's equality.

<sup>32</sup> See Tracie A. Thomas, 'Sex v. Race, Again' in [www.http://lawreview.wustl.edu/commentaries/sex-v-race-again/](http://lawreview.wustl.edu/commentaries/sex-v-race-again/)

## ***Obama's Presidency of the Harvard Law Review Board and his US Presidency by Agozino***

Back to the unsigned Harvard Law Review book review, the reviewer asserts that the author was biased against the black history of Douglas by seeking to represent him as making contributions only with white Americans and by erasing the black men and women who were close associates of Douglas. Even Douglas' first wife, who was instrumental in his successful escape from slavery, was barely mentioned while his second wife who was white was given pride of place, according to the book reviewer. The author is commended for his original research and for taking the abolitionists to task for their condescending attitudes to black people.

But the author himself is taken to tasks for speculating that Douglas must have had homosexual relations with the 'nigger breaker' and with his owner simply because Douglas stated that 'love was returned' to these individuals from him whereas he was suggesting that even though he hated slavery, he did not hate the people who enslaved him (one of them could have been his biological father who raped his mother). The author of the review could have clarified the meaning of 'love was returned' better by referring to the fact that Douglas was punished with a congregation at that time for daring to learn to read the bible where they must have come across the teaching that we should love our enemies – reflected in the well-known tradition of what Martin Luther King Jr called the *Beloved Community* or what Bob Marley meant when he said that he was chasing away the crazy baldhead from town because, 'hatred you reward for we love'; Douglas was expressing the basic reality that while Africans and their allies struggled against slavery, they did not necessarily hate white people or those Tavis Smiley and Cornel West consistently refer to as our beloved white brothers and sisters.<sup>33</sup> Douglas made this strange 'love' clear in his lecture in Dublin, Ireland, in 1846 regarding what he called the 'annexation of Texas' from Mexico by slave-holding American planters: "We are still, however, strong, for the last intelligence I had from the United States was, that 40,000 good men and true, in Massachusetts, had petitioned the Government not to allow Texas to be received as a State until she had abolished slavery. (Cheers.) What will be the immediate result, I know not, but Texas in the Union or out of it—slavery upheld or slavery abolished—one thing I do know—that the true words now spoken, in Massachusetts, will create a resistance to this damning measure, which will go on under the smiles of an approving God, augmenting in power till slavery in the United States will be abolished. (Hear.) I know not how that consummation will be achieved. It may be in a manner not altogether agreeable to my own feelings. I do not know but the spirit of rapine and plunder, so rampant in America, will hurry her on to her own destruction. I hope it will not, for although America has done all that a nation could do to crush me—although I am a stranger among you—a refugee abroad, an outlaw at home—yet, I trust in God, no ill may befall her. I hope she will yet see that it will be her duty to emancipate the slaves. The friends of emancipation are determined to do all they can—

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<sup>33</sup> Ebony News reports that Tavis Smiley and Cornel West love President Obama but want to see him do more for our poor brothers and sisters: <http://www.ebony.com/news-views/interview-tavis-smiley-and-cornel-west-867#axzz2QlhsFrFQ>

Weapons of war we have cast from the battle,—  
Truth is our armour, our watchword is love;  
Hushed be the sword and the musketry's rattle,  
All our equipments are drawn from above.”<sup>34</sup>

Jacques Derrida said that he admired something similar in Nelson Mandela – that while facing trial and possible execution for treason, he boldly expressed his love for justice – and Bill Clinton said that his jaws dropped when he asked Mandela if he did not harbor even a little hate for those who robbed him of so much of his life but Mandela answered that if he allowed them to deprive him of his ability to love, they would have deprived him of his basic humanity and advised Clinton never to allow anyone to deprive him of the ability to love all. The book review could have predicted the seriousness with which Obama addressed the race question during the 2008 presidential primaries as he did earlier in the chapter in *The Audacity of Hope*. However, his presidency is yet to see any race-specific policy initiative perhaps because he stated that universal policies are the best ways to address race-specific issues.

### **Tort and Rights of the Unborn to Sue Mothers Unintentional Harm:**

In the case of *Row v. Wade*, the US Supreme Court decided on a 7-2 majority that a Texas law that made it a crime for anyone to assist a woman to get an abortion violated the right of the woman to Due Process under the 14<sup>th</sup> Amendment.<sup>35</sup> The debates about a woman's right to choose during pregnancy versus the pro-life policies of some state governments were extended to the right of fetuses to sue their mothers for any action that leads to injury during the pregnancy. In the case of *Stallman v. Youngquist* the Supreme Court of Illinois rejected such an expansion to the rights of fetuses on the ground that such an extension would amount to sex discrimination against women given that men could not become pregnant.<sup>36</sup> This report in the HLR is attributable to Obama given his passionate passage in *Dreams From My Father* where he puzzled over how his parents managed to get married in 1960 when miscegenation was still a crime in half of the states in the US, when his father could have been strung from a tree in many of the Southern states simply for looking at his mother the wrong way and when the stares in even the most

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<sup>34</sup> Frederick Douglass, "Texas, Slavery, and American Prosperity: An Address Delivered in Belfast, Ireland, on January 2, 1846." *Belfast News Letter*, January 6, 1846. Blassingame, John (*et al*, eds.). *The Frederick Douglass Papers: Series One--Speeches, Debates, and Interviews*. New Haven: Yale University Press, 1979. Vol. I, p. 118.

<sup>35</sup> *Roe v. Wade*, 410 [U.S. 113](#) (1973). Justice Blackman stated in a footnote to his opinion that: "When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other state are all abortions prohibited. Despite broad proscription, an exception always exists...But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?"

<sup>36</sup> *Stailman v. Youngquist*, 125 Ill. 2d 267, 531 N.E.2d 355 (1988); 103 Harv. L. Rev. 806 1989-1990.

## ***Obama's Presidency of the Harvard Law Review Board and his US Presidency by Agozino***

sophisticated northern states could have driven his mother to a back ally abortion clinic or to a convent where an adoption could have been quietly arranged for the baby.<sup>37</sup> Obama admitted that he wrote the HLR commentary supporting the decision of the Illinois Supreme Court.<sup>38</sup> The mother was five months pregnant when her car collided with another car. The daughter later brought a tort claim against her mother and the other driver and alleged that their negligent driving exposed her to harm as a fetus. The trial court dismissed the claim on the ground that her mother enjoyed the protection of parental immunity from tort. The state appeal court reversed and said that a fetus had the right to sue a mother for tort in Illinois. The state Supreme Court reversed and upheld the immunity of the mother from fetal tort claims on the ground that while it might be right to bring a tort claim against a third party on behalf of a fetus, to do so against a mother "subjects to State scrutiny all the decisions a woman must make" during pregnancy, and "infringes on her right to privacy and bodily autonomy." Obama admitted that in cases of intentional harm to the fetus, the courts are yet to decide on the liability of the mother but supported the court's view that it is dubious to extend third party tort litigations on behalf of the fetus to the mother and concluded the commentary thus:

Without the benefit of a clear constitutional pronouncement on these issues, the *Stallman* court rightly concluded that, at least in cases arising out of maternal negligence, women's interests in autonomy and privacy outweigh the dubious policy benefits of fetal-maternal tort suits. However, the more difficult cases - those involving maternal activities that might be considered intentional or reckless infliction of prenatal injuries on the fetus - remain to be decided. 31 As these cases arise, states should avoid adopting constitutionally dubious laws in pursuit of ill-conceived strategies to promote fetal health. Expanded access to prenatal education and health care facilities will far more likely serve the very real state interest in preventing increasing numbers of children from being born into lives of pain and despair.

The conclusion above reflects the legal philosophy that defers to the supremacy of the constitution on the definition of issues of rights. The use of the word 'dubious' to identify contentious issues is an indication of the fact that Obama is prepared to use a strong language to reflect his view as he did from time to time in office as the US President. His conclusion that the courts are yet to rule on intentional and reckless harm to the fetus may be questioned outside the area of tort and litigation by suggesting that such intentional harm may already be covered by criminal law and if so, they are probably also open to litigation for tort on behalf of the health of fetuses. What is at issue here is the autonomy of the mother who, for example drinks or smokes, activities that are not necessarily against the law, but which could be harmful to the health of the fetus. The question is whether the government

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<sup>37</sup> Obama, *Dreams from My Father*, p. 12

<sup>38</sup> Recent Cases, TORT LAW - PRENATAL INJURIES - SUPREME COURT OF ILLINOIS REFUSES TO RECOGNIZE CAUSE OF ACTION BROUGHT BY FETUS AGAINST ITS MOTHER FOR UNINTENTIONAL INFLECTION OF PRENATAL INJURIES. - *Stallman v. Youngquist*, 125 Ill. 2d 267, 531 N.E.2d 355 (1988). Harv. L Rev, 103: 823, 1990.

can require women who are pregnant to drink a pint of milk daily for the health of their babies without taking into consideration the taste of the women or their tolerance for lactose, not to mention the costs of buying milk daily? As the Supreme Court cross-examination indicated in the case of healthcare reform act challenge, it would be an infringement of civil liberties for the government to require people to buy broccoli whether or not they like it.<sup>39</sup> Obama appears to favor the right of women to choose with the belief that better health education will enable the women to make the best choices for themselves and their babies.

## Conclusion

Let me close with a brief look at the very first essay that Obama selected and published in the *Harvard Law Review* as President of the Board. It was a tribute by Thurgood Marshall to Justice William J. Brennan Jr. with whom he sat at the Supreme Court. By making this tribute from Marshall the very first essay he published, Obama may have been trying to pay tribute to Marshall – the first black justice of the Supreme Court - as one of his role models in jurisprudence. In the tribute, Marshall noted that Justice Brennan was first paid a tribute by the *Harvard Law Review* in 1966 when he was only 10 years in the Supreme Court and less than a third of the time he spent at court.

Apart from his warmth to his colleagues as reflected in other tributes, Marshall identified the fidelity of Brennan to the Bill of Rights as what made him a great justice. Most importantly, his interpretation of the 8<sup>th</sup> Amendment as abolitionist towards the death penalty was only shared by Marshall in the case of *Furman v. Georgia* and although the majority sided with Furman, they did not buy the argument that the death penalty was invalidated as unconstitutional, preferring instead to reform it.<sup>40</sup> The Supreme Court consolidated the case of Furman with those of ***Jackson v. Georgia*** and ***Branch v. Texas*** which involved the death penalty for rape and made history by abolishing the death penalty for rape while Furman only brought about the reform of the death penalty for homicide to eliminate arbitrariness. Angela Davis used this case to caution white feminists against weaponizing rape allegations as an ideological tool with which to terrorize black men in the interest of white men who made most of rape allegations for the purpose of controlling white women. She pointed out that evidence from the Furman hearings showed that from 1936 to 1976, nearly 90% of the men who were executed for rape were black men but there was no way black men could have been committing that many rapes in a white supremacist society where white men used

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<sup>39</sup> As Ronald Dworking opined in the *New York Review of Books* that ‘Just before the decision was announced, the betting public believed, by more than three to one, that the Court would declare the act unconstitutional. They could not have formed that expectation by reflecting on constitutional law; almost all academic constitutional lawyers were agreed that the act is plainly constitutional. The public was expecting the act’s defeat largely because it had grown used to the five conservative justices ignoring argument and overruling precedent to remake the Constitution to fit their far-right template.’ <http://www.nybooks.com/articles/archives/2012/aug/16/bigger-victory-we-knew/> August 16, 2012.

<sup>40</sup> *Furman v. Georgia*, 408 U.S. 238 (1972)

## ***Obama's Presidency of the Harvard Law Review Board and his US Presidency by Agozino***

rape as a weapon to terrorize black women with impunity.<sup>41</sup> Davis agreed with Ida B. Wells that the allegation of rape as a justification for lynching was a 'bare-faced lie' given that the vast majority of reported lynching did not include rape accusations. Marshall also identified the loophole in *Brown v. Board of Education* judgment with the phrase; 'with all deliberate speed', which can be interpreted to mean that the integration of schools was not to be immediate and complete but a goal to be pursued with deliberate speed. He recognized that Justice Brennan was instrumental in striking down the argument of school choice as the reason for continuing with segregation in Virginia 10 years after Brown. Justice Brennan recognized that outlawing a dual school system that was racialized was not enough and so he also supported judgments in support of affirmative action. Marshall concluded that these positions meant that Brennan often found himself dissenting from his Supreme Court colleagues while remaining collegial to them.

The Harvard Law Review may have prepared Obama to pursue bipartisanship in public policy and although his compromises have been questioned and rebuffed, it is likely that his presidency of the ideologically divided HLR may have prepared him to work with a team of rivals as he was said to be doing as US President. Law School law review boards as a training ground for future lawyers and public policy officials deserve to be studied more closely to see how much of the ideas of public servants derive from the essays they authored as students or the essays they read or approved for publication during their formative years in policy and legal scholarship.

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<sup>41</sup> Davis, Angela (1983) *Women, Race and Class*, New York, Penguin.