

EMOTIONAL INTELLIGENCE AND HOMOPHOBIA

*Jason S. Palmer**

Emotional intelligence dictates that individuals react in a certain way because they are wired to respond emotionally to certain triggers. These emotional triggers can be either positive or negative. Those who understand the use of negative emotional intelligence can channel manipulative behavior into concrete outcomes as a direct result of the feelings created. Negative emotional intelligence thus can be used to perpetuate groupthink, which leads to bias, prejudice, stereotypes, and stigmatization.

Bias, both deliberate and implicit, is still prevalent with regard to the lesbian, gay, bisexual, and transgender (“LGBT”) community despite the strides and advances that have occurred since the Supreme Court ruling in Obergefell v. Hodges. This proposition is demonstrated in “religious freedom” arguments presented in the Supreme Court case of Masterpiece Cakeshop v. Colorado Civil Rights Commission. It is also apparent in the Department of Defense’s “national security” approach to transgender individuals. The use of these terms—“religious freedom” and “national security”—allows people to mask their implicit bias and permits marginalization of this minority group.

This Article will demonstrate that by using the lenses of religious freedom, religious speech, and national security, anti-LGBT bias can be disguised and the dignity of LGBT individuals harmed. These lenses allows individuals to argue that it is not homophobic to refuse to bake a cake or take wedding photos, or that it is not transphobic to ban transgendered individuals from military service, but rather it is a principled stand based on religious beliefs and national

* Leroy Highbaugh Sr. Research Chair and Professor of Law, Stetson University College of Law. B.A., University of Virginia; J.D., The George Washington University Law School. Former Attorney-Adviser in the Office of the Legal Adviser, United States Department of State. Representative of the United States before the Iran-U.S. Claims Tribunal. Claims Judge for the Claims Resolution Tribunal for Dormant Accounts in Switzerland. Coordinator of Palestinian “Late Claims” against Iraq at the United Nations Compensation Commission. Special thanks to Professor Harold Lloyd at Wake Forest University School of Law and the *Wake Forest Law Review* for their kind invitation to speak at the Cognitive Emotion and the Law Symposium.

security. To counter these negative attacks, positive emotional intelligence must be reinforced through reiterating and reflecting on how values such as equality and dignity should uphold the social good and not be used to harm a disenfranchised and minority group.

TABLE OF CONTENTS

I.	INTRODUCTION.....	1136
II.	WHAT IS EMOTIONAL INTELLIGENCE?	1137
III.	WHAT IS NEGATIVE EMOTIONAL INTELLIGENCE?	1139
IV.	USING NEGATIVE EMOTIONAL INTELLIGENCE TO FOSTER BIAS AND PREJUDICE.....	1141
V.	USING POSITIVE EMOTIONAL INTELLIGENCE TO CREATE SOCIAL CHANGE	1144
VI.	DISGUISED NEGATIVE EMOTIONAL INTELLIGENCE IN PRINCIPLES OF FREEDOM OF RELIGION AND NATIONAL SECURITY	1149
VII.	CONCLUSION	1157

I. INTRODUCTION

“Emotional intelligence is the ability to monitor one’s own and others’ feelings and emotions, to discriminate among them and to use this information to guide one’s thinking and actions.”¹ This definition, as described in the seminal article on emotional intelligence by Peter Salovey and John Mayer, emphasizes the practical use of emotional intelligence; that is, an individual’s ability to apply knowledge to manage behavior.² To that end, emotional intelligence is often used to manage the self to achieve pro-social results, but it can be used to manage and manipulate others as well.³ “Emotional intelligence involves the ability to perceive accurately, appraise, and express emotion; the ability to access and/or generate feelings when they facilitate thought; and the ability to understand emotion and emotional knowledge.”⁴ Likewise, emotionally intelligent individuals can more easily perceive and respond to verbal and non-verbal messages, like gestures, eye contact, facial expressions, and body language.⁵ While the concept of emotional intelligence implies a positive purpose, its use is not always positive.

1. JUSTIN BARISO, EQ APPLIED: THE REAL-WORLD GUIDE TO EMOTIONAL INTELLIGENCE 8 (2018) (quoting Peter Salovey & John Mayer, *Emotional Intelligence*, 9 IMAGINATION, COGNITION & PERSONALITY 185, 189 (1990)).

2. Salovey & Mayer, *supra* note 1, at 189.

3. *Id.* at 198.

4. John D. Mayer & Peter Salovey, *What is Emotional Intelligence?*, in EMOTIONAL DEVELOPMENT AND EMOTIONAL INTELLIGENCE: EDUCATIONAL IMPLICATIONS 10 (Peter Salovey & David J. Sluyter eds., 1997).

5. See Blair Kidwell & Jonathan Hasford, *Emotional Ability and Nonverbal Communication*, 31 PSYCHOL. & MARKETING 526, 526 (2014).

2019] *EMOTIONAL INTELLIGENCE AND HOMOPHOBIA* 1137

Emotional intelligence can be used for manipulative, dark, and negative purposes.⁶ In other words, negative emotional intelligence “helps people disguise one set of emotions while expressing another for personal gain.”⁷

II. WHAT IS EMOTIONAL INTELLIGENCE?

Emotional intelligence is “an individual’s ability to apply” their knowledge of emotions and how they operate “to manage their own behavior or relationships with others, to attain a desired result.”⁸ Emotional intelligence is otherwise known by the more neutral term “emotional quotient” and is also characterized as the “ability to make emotions work for you, instead of against you.”⁹ An important question that must be asked when thinking about the power of emotional intelligence is: Do people recognize emotional intelligence when they see it? One aspect of recognizing emotional intelligence is to understand that part of emotional intelligence is managing others in such a way that the individual can “deliberately craft[] stimuli so that others experience desired states as a consequence” of the interaction.¹⁰ Thus, using emotional intelligence “is a matter of having effective post-emotional responses . . . [and] understanding . . . how individuals interpret stimuli.”¹¹ While individuals might recognize positive aspects of emotional intelligence, they often fail to perceive and recognize negative or manipulative uses of it. People continually make judgments, and judgments have interpersonal consequences. These consequences include who to have as a friend, who to trust, who to avoid, or importantly for this discussion, who to demonize. “Emotional intelligence places a high value on one’s ability to manipulate someone else into certain *feelings* or behaviors to serve a purpose.”¹² Emotional intelligence can be used to serve one’s own needs and desires while couched in words and deeds that appear selfless or motivated by the greater good.

6. Adam Grant, *The Dark Side of Emotional Intelligence*, ATLANTIC (Jan. 2, 2004), <https://www.theatlantic.com/health/archive/2014/01/the-dark-side-of-emotional-intelligence/282720/>.

7. *Id.*

8. BARISO, *supra* note 1, at 8.

9. *Id.*

10. See Hillary Anger Elfenbein et al., Do We Know Emotional Intelligence When We See It? The Social Perception of Emotional Abilities 6 (Dec. 11, 2008) (unpublished manuscript) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1314925).

11. *Id.*

12. *The Impact of Emotional Intelligence and Personal Relationships*, UNIVERSAL CLASS, <https://www.universalclass.com/articles/psychology/the-impact-of-emotional-intelligence-and-personal-relationships.htm> (last visited Oct. 17, 2019) (emphasis added).

Emotional intelligence has five components: self-awareness, self-regulation, motivation, empathy, and social skills.¹³ These components are interconnected, complement each other, and often are viewed as working to improve and promote emotional growth.¹⁴ But all of these traits also have negative uses. The charm and charisma that comes with high emotional intelligence can be used for nefarious purposes.¹⁵

The first trait, self-awareness, reflects “a deep understanding of one’s emotions, strengths, weaknesses, needs, and drives.”¹⁶ Self-awareness allows people to know how feelings affect themselves and others, as well as recognizing emotional strengths and weaknesses.¹⁷ The second component, self-regulation (also sometimes referred to as self-management), involves the “ongoing inner conversation” that people have with themselves that allows them to accomplish a task or reach a goal.¹⁸ When viewed positively, this component often allows individuals to avoid making bad decisions through impulsive behavior.¹⁹ Recognizing and triggering others’ lack of self-regulation allows for spontaneous and potentially destructive actions.²⁰ Additionally, when one understands and regulates other’s feelings, that person may gain an advantage over those individuals.²¹ The third component, motivation, is “a deeply embedded desire to achieve for the sake of achievement.”²² Motivated individuals want to “achieve beyond expectations—their own and everyone else’s,”²³ which again raises the specter of manipulative behavior in order to affect others. Empathy, or social awareness, is the fourth component, and is “the ability to accurately perceive the feelings of others and understand how those feelings influence behavior.”²⁴ While we often think of empathy as a positive force, this trait demonstrates that understanding how feelings influence behavior is rife with

13. Daniel Goleman, *What Makes a Leader?*, HARV. BUS. REV., Jan. 2004, at 82, 88.

14. See Bradley Busch & Ben Oakley, *Emotional Intelligence: Why It Matters and How to Teach It*, GUARDIAN (Nov. 3, 2017, 3:00 AM), <https://www.theguardian.com/teacher-network/2017/nov/03/emotional-intelligence-why-it-matters-and-how-to-teach-it>.

15. Grant, *supra* note 6.

16. Goleman, *supra* note 13, at 84.

17. BARISO, *supra* note 1, at 9–10; Goleman, *supra* note 13, at 84–85.

18. BARISO, *supra* note 1, at 10; Goleman, *supra* note 13, at 85.

19. Goleman, *supra* note 13, at 85.

20. See Peter Salovey & Daisy Grewal, *The Science of Emotional Intelligence*, 14 CURRENT DIRECTIONS IN PSYCHOL. SCI. 281, 282 (2005) (discussing how the emotionally intelligent person can achieve her goals through the management of others’ emotions).

21. See *id.*

22. Goleman, *supra* note 13, at 88.

23. *Id.*

24. BARISO, *supra* note 1, at 10; see also Goleman, *supra* note 13, at 88–90 (discussing the emotionally intelligent individual’s use of empathy “in the process of making intelligent decisions”).

2019] *EMOTIONAL INTELLIGENCE AND HOMOPHOBIA* 1139

possibilities for social manipulation.²⁵ The final component is social skills (or relationship management), which is the ability to influence and get people to do what you want.²⁶ Again, this component has negative implications: the wielder of this component can use persuasion to motivate others to act on what they believe is their own initiative.²⁷

III. WHAT IS NEGATIVE EMOTIONAL INTELLIGENCE?

Emotional intelligence as evidenced by these five components correlates to the regulation of other people's emotions.²⁸ Social interaction can often determine the success or failure of most personal relationships.²⁹ Individuals' background experiences and values are important in assessing and then addressing a person's emotional quotient.³⁰ While some aspects of emotional intelligence may generally be positive, these same attributes may also be used to negatively impact those who are part of the interaction.³¹ Emotional intelligence places a high value on one's ability to manipulate someone else into certain feelings or behavior.³² Those individuals with high emotional intelligence possess charm and charisma that generally equates with positive feelings in others.³³ However, this charm can be used to manipulate others into behavior that is destructive, manipulative, and dangerous.³⁴ The dark side of emotional intelligence provides its users the opportunity for "disguising and expressing emotions for personal gain, using misattribution to stir and shape emotion, and, . . . most sinister[ly], controlling the flow of emotion-laden communication."³⁵ For example, at one of Donald Trump's rallies, he exhorted his attendees to take action against protesters in the crowd through a cry of "Get 'em out. Get 'em out."³⁶ His charm and charisma allowed him to use emotions for his personal gain and use misattribution to stir his followers'

25. See Peter J. Jordan et al., *A Call to Context*, 3 *INDUS. & ORGANIZATIONAL PSYCHOL.* 145, 147 (2010).

26. BARISO, *supra* note 1, at 10; Goleman, *supra* note 13, at 90.

27. BARISO, *supra* note 1, at 11 (noting that those who use this component "use insight and persuasion to motivate . . . [others] to act on their own accord").

28. See, e.g., Salovey & Grewal, *supra* note 20, at 282.

29. See, e.g., Salovey & Mayer, *supra* note 1, at 187–89.

30. See, e.g., Megan Boler, *Emotional Quotient: The Taming of the Alien*, 21 *DISCOURSE* 84, 90 (1999).

31. See, e.g., Salovey & Mayer, *supra* note 1, at 198.

32. See Grant, *supra* note 6.

33. See, e.g., Salovey & Mayer, *supra* note 1, at 198.

34. *Id.*

35. Rebecca Alexander, *The Dark Side of Emotional Intelligence*, *MGMT. TODAY*, <https://www.managementtoday.co.uk/dark-side-emotional-intelligence/article/1061082> (last updated June 19, 2016).

36. John Bowden, *Protester Interrupts Trump at Pennsylvania Rally*, *HILL* (Aug. 2, 2018, 7:40 PM), <https://thehill.com/homenews/administration/400191-protester-interrupts-trump-at-pennsylvania-rally>.

emotions, all the while controlling the flow of his emotion-laden communication, causing his followers to act in a manner that they believed was not only permissible, but also correct, valid, and wholly justified.³⁷

What accounts for an individual's ability to use emotional intelligence to manipulate others into taking actions that seem reprehensible, but are justified both by the manipulator and also those who are being manipulated? According to University of Cambridge professor Jochen Menges, when leaders give speeches loaded with emotion, "the audience . . . [is] less likely to scrutinize the message and remember[] less of the content."³⁸ Rather, they are swept up in the emotional turbulence of the oration.³⁹ This is the dark side of emotional intelligence: using one's knowledge of emotions to strategically achieve self-serving goals, with little or no concern for others. These individuals who tend to exploit others for personal gain are often very good at reading those peoples' emotions, especially negative ones.⁴⁰

Many historians have detailed Adolf Hitler's rise to power.⁴¹ As Justin Bariso explains, Hitler offered a scapegoat in the form of hundreds of thousand Jews who lived and worked in Germany but were perceived as "outsiders."⁴² Hitler blamed the Jews, immigrants, and other marginalized populations for Germany's problems and promised to return the country to greatness.⁴³ He tapped into the negative emotions of fear, anger, and resentment and used those emotions to gain support from the general population.⁴⁴ Hitler recognized "that men are won over less by the written than by the spoken word, that every great movement on this earth owes its growth to orators and not to great writers."⁴⁵

One of the most significant aspects of Hitler's success was "his instinctive sensitivity to the mood of a crowd, a flair for divining the hidden passions, resentments, and longings in their minds."⁴⁶ Hitler was an accomplished orator who rehearsed every nuance of his speech, every hand gesture, every facial expression, and who exuded

37. See Jose A. Delreal, 'Get Him Out!' Racial Tensions Explode at Donald Trump's Rallies, SALT LAKE TRIB. (Mar. 11, 2016, 5:52 PM), <https://archive.sltrib.com/article.php?id=3649176&itype=CMSID>.

38. Grant, *supra* note 6.

39. *See id.*

40. *Id.*

41. See, e.g., BENJAMIN CARTER HETT, THE DEATH OF DEMOCRACY: HITLER'S RISE TO POWER AND THE DOWNFALL OF THE WEIMAR REPUBLIC (2018).

42. BARISO, *supra* note 1, at 131.

43. *Id.* at 131–32.

44. *Id.* at 132.

45. ADOLF HITLER, *Preface* to MEIN KAMPF (Ralph Manheim, trans., Houghton Mifflin Co. 1998) (1925).

46. ALAN BULLOCK, HITLER, A STUDY IN TYRANNY 341 (1960).

2019] *EMOTIONAL INTELLIGENCE AND HOMOPHOBIA* 1141

confidence and charisma.⁴⁷ He spent years studying the emotional effects of his body language.⁴⁸ Through honing his emotional skills, Hitler was able to evoke, intensify, and manipulate the emotions of his followers.⁴⁹ Hitler readily understood the power of emotional intelligence, arguing, “Anyone who wants to win the broad masses must know what opens the door to their heart. Its name is not objectivity . . . but will and power.”⁵⁰ Hitler used his emotional intelligence to create a mindset in his followers that blamed Jews and immigrants for Germany’s problems.⁵¹ His ability to evoke emotion and passion played on groupthink within members of a homogeneous society such that they would “stop thinking critically and just emote.”⁵²

IV. USING NEGATIVE EMOTIONAL INTELLIGENCE TO FOSTER BIAS AND PREJUDICE

Groupthink develops when individuals live and work in groups that are genetically and culturally homogenous.⁵³ These groupings create a strong tendency to cooperate with people who we perceive to be “like us” and to be suspicious of strangers.⁵⁴ As a result, those who consider themselves similar to each other often judge and discriminate against those who are not “like them.”⁵⁵ Studies by Harvard researchers have demonstrated that individuals hold stereotypical “implicit bias” towards members of outside groups beneath the level of their conscious awareness.⁵⁶ “The tendency to be suspicious of people we perceive as strangers or ‘not like us’ probably evolved early in our ancestry, when small groups of humans competed against each other for precious resources like food and water.”⁵⁷

47. BARISO, *supra* note 1, at 132; Amanda Macias, *Why Hitler Was Such a Successful Orator*, BUS. INSIDER (May 13, 2015, 1:35 PM), <https://www.businessinsider.com/why-hitler-was-such-a-successful-orator-2015-5>.

48. *See* Macias, *supra* note 47.

49. *See* BARISO, *supra* note 1, at 132; BULLOCK, *supra* note 46, at 341–42.

50. HITLER, *supra* note 45, at 338.

51. *See* BARISO, *supra* note 1, at 131–32; Grant, *supra* note 6.

52. Grant, *supra* note 6.

53. *See* Ramon J. Aldag & Sally Riggs Fuller, *Groupthink*, in *ENCYCLOPEDIA OF APPLIED PSYCHOLOGY* 143–44 (Charles D. Spielberger ed., 2004).

54. *See id.* at 144.

55. *Id.* (“[S]ymptoms of groupthink[] includ[e] . . . a belief in the inherent morality of the group, stereotyped views of members of opposing groups, pressure on dissenters, . . . and self-appointed ‘mindguards’ acting to shield the group from adverse information.”).

56. Maddalena Marini et al., *Studying Implicit Social Cognition with Noninvasive Brain Stimulation*, 22 *TRENDS IN COGNITIVE SCI.* 1050, 1050 (2018).

57. Christopher Bergland, *The Unconscious Mind Perpetuates “Us vs. Them” Bias*, *PSYCHOL. TODAY* (Oct. 16, 2018), <https://www.psychologytoday.com/us/blog/the-athletes-way/201810/the-unconscious-mind-perpetuates-us-vs-them-bias>.

Those with emotional intelligence can use the “us vs. them” divisiveness of implicit bias but couch it in what appears to be supportive and emotional positive language like “religious freedom,” “national security,” or “military readiness” with results that stigmatize and marginalize. By using these positive emotionally resonating concepts, those who do not want to be identified as acting on bias or prejudice can feel justified in their beliefs that they are not stigmatizing “others” but rather are acting to promote group dynamics and objectives that serve the needs of society.

So, how is the use of negative emotional intelligence for personal gain (that causes individuals to act in a manner that they believe is not only permissible, but also correct) valid and wholly justified different from “mob rule” or “groupthink”? Negative emotional intelligence is a matter of deliberately constructing stimuli so that others experience desired states.⁵⁸ Individuals that use negative emotional intelligence have a focused and directed effort that is manipulative.⁵⁹ In essence, mob rule is a Molotov cocktail thrown to burn the whole place down. The use of negative emotional intelligence is surgical, strategic, and precise. Exercising negative emotional intelligence enables the individual to channel manipulative actions into concrete results as a direct result of the feelings created.⁶⁰

If emotional intelligence is simply a tool that can be either used positively or negatively, why are some individuals so susceptible to the manipulation that comes with negative emotional intelligence? Timothy Carney, in his book, *Alienated America: Why Some Places Thrive While Others Collapse*, detailed how people “enmeshed in strong communities rejected Trump in the early primaries while people alienated, abandoned, lacking social ties and community infrastructure rushed to him.”⁶¹ In an article excerpting the book, Carney detailed his visit to Chevy Chase, Maryland, which is the wealthiest municipality in the D.C. region, and where Trump only received a fraction of the vote share that then-Ohio Governor John Kasich received in the primary (sixteen percent for Trump compared to Kasich’s sixty-four percent).⁶² Carney detailed how Chevy Chase has a monthly speaker series, volunteers who throw parties for the community, and an engaged community that includes a Community Relations Committee, an Ethics Commission, a Public Safety

58. See Denise Cummins, *The Dark Side of Emotional Intelligence*, PSYCHOL. TODAY (Aug. 15, 2014), <https://www.psychologytoday.com/us/blog/good-thinking/201408/the-dark-side-emotional-intelligence>.

59. See *id.*

60. See *id.*

61. TIMOTHY CARNEY, *ALIENATED AMERICA: WHY SOME PLACES THRIVE WHILE OTHERS COLLAPSE* 1–14 (2019).

62. Timothy P. Carney, *The One Trait that Predicts Trump Fever*, POLITICO (Feb. 16, 2019), <https://www.politico.com/magazine/story/2019/02/16/donald-trump-support-2020-oostburg-wisconsin-chevy-chase-maryland-225161>.

2019] *EMOTIONAL INTELLIGENCE AND HOMOPHOBIA* 1143

Committee, and a Traffic Committee, among others.⁶³ Carney posits that Trump performed poorly in areas like Chevy Chase due to the voters' hope, confidence, and optimism⁶⁴—traits that resonate with individuals who have and understand positive emotional intelligence.

It would be easy to assume that these traits and the corresponding positive emotional quotient are linked to the wealth that exists in areas such as Chevy Chase.⁶⁵ However, Carney also visited Oostburg, Wisconsin, where the average household earns \$58,000, slightly above the national average.⁶⁶ In this town, dozens of families share lunch together at Judi's Place, a family-owned diner, after services at one of the four different churches in the village.⁶⁷ Christmas concerts at the public school are standing room only events.⁶⁸ This town has been described as one of the most conservative towns in Wisconsin.⁶⁹ But Trump only scored fifteen percentage points in the Republican primary there—only one point off from the result in Chevy Chase.⁷⁰

What is the common thread between Oostburg and Chevy Chase? According to Carney, “[b]oth villages have strong institutions of civil society—local government, churches, country clubs, garden clubs, good public schools, and in Oostburg’s case, Judi’s Place.”⁷¹ In areas such as Oostburg where Trump performed poorly in the GOP primary, there were strong social networks: churches, social clubs, and volunteerism.⁷² Again, according to Carney, “These community institutions constitute the infrastructure that is necessary to support families.”⁷³

On the other hand, Trump’s best performance came in places where hope was low and pessimism reigned.⁷⁴ “Trump’s best large county in the Iowa caucuses, Pottawattamie, had the weakest civil society—churches, neighborhood groups, volunteering, voting—of any large county in Iowa and is known for its neon-lighted casinos erected to bring in out-of-state gamblers.”⁷⁵ In contrast, Trump’s best small county is known primarily for church closures and the closing of its largest employer in 2016.⁷⁶ “It also ranks at the bottom of the state in widely used measures of civil society.”⁷⁷

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

Carney's article is significant when thinking about emotional intelligence and how negative emotional intelligence can be used to manipulate. Citing research by the Public Religion Research Institute and *The Atlantic*, Emma Green writes in *The Atlantic* that, "White working-class Americans of all ages, were much less likely than their college-educated peers to participate in sports teams, book clubs, or neighborhood associations—55 percent vs. 31 percent said they seldom or never participated in those kinds of activities."⁷⁸ The bottom line of Carney's book is that individuals "enmeshed in strong communities rejected Trump in the early primaries while people alienated, abandoned, lacking social ties and community rushed to him."⁷⁹ In other words, individuals who feel lost and abandoned and have little or no ties to community to help promote positive emotional intelligence are more susceptible to the manipulation and deception associated with negative emotional intelligence. Trump was peddling a vision of decline and desperation.⁸⁰ With no community to deter the groupthink within their homogeneous society,⁸¹ Trump's followers could stop thinking critically and accept and embrace Trump due to the sense of community his rhetoric provided. Trump performed well when there were fewer social networks and higher feelings of alienation, which enabled him to stir his followers' emotions, control the flow of the emotion-laden communication, and direct an outcome that served him. Ultimately, people who are alienated become more susceptible to manipulation by negative emotional quotient. Emotional intelligence is then used to perpetuate "groupthink," which leads to bias, prejudice, stereotypes, and stigmatization.⁸²

V. USING POSITIVE EMOTIONAL INTELLIGENCE TO CREATE SOCIAL CHANGE

It is important to recall that emotional intelligence is a tool that can be used either positively or negatively. Or, as Justin Bariso described it, "emotional intelligence can be used for good or evil."⁸³ The "dark side of emotional intelligence" embodies "one's knowledge of emotions to strategically achieve self-serving goals, with little or no concern for others."⁸⁴ This principle explains that those who exploit others for personal gain excel at reading others' emotions, especially

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. Stephen D. Reicher & S. Alexander Haslam, *Trump's Appeal: What Psychology Tells Us*, SCI. AM. (Mar. 1, 2017), <https://www.scientificamerican.com/article/trump-s-appeal-what-psychology-tells-us/>.

83. BARISO, *supra* note 1, at 145.

84. *Id.*

2019] *EMOTIONAL INTELLIGENCE AND HOMOPHOBIA* 1145

negative emotions.⁸⁵ On the other hand, with respect to positive emotional intelligence, individuals use their knowledge of emotions to inform and guide behavior in a positive and uplifting manner.⁸⁶ Such uses can engender empathy to create positive social change.⁸⁷

One example of positive emotional intelligence being used to engender empathy in order to combat homophobia and create positive social change was Edith Windsor's brief before the Supreme Court in *United States v. Windsor*.⁸⁸ In her brief, Windsor argued the equal protection component of the Fifth Amendment's due process clause was violated when the federal government imposed \$363,053 in estate taxes on the estate of Thea Spyer simply because she was married to a woman (respondent Edith S. Windsor), instead of to a man.⁸⁹ Rather than simply casting the dispute as one over an unjust and inequitable estate federal tax bill of \$363,000, the attorneys told the story of Windsor's marriage.⁹⁰ The brief expertly identified the characters that were at the heart of the dispute—Edie Windsor and Thea Spyer—and created a narrative that immediately engaged the audience and created an emotional resonance for the “heroes” of the story.⁹¹ It also skillfully wove the conflict into the story in a manner that invoked themes of injustice and inequality, which were central to the legal arguments involving the Fifth Amendment of the United States Constitution.⁹²

In drafting this brief in this fashion, the lawyers were able to effectively evoke positive emotional intelligence in their readers by engaging and appealing to the readers' emotions. The lawyers tapped into the reader's empathy from the opening passage of the Statement of the Case:

Years before the modern gay rights movement began, at a time when lesbians and gay men risked losing their families, friends and even their livelihoods if their sexual orientation became known, Plaintiff-Appellee Edith S. Windsor (“Edie”) and her late spouse Thea Spyer (“Thea”) fell in love, became engaged, and embarked upon a relationship that would last until Thea's death forty-four years later.⁹³

85. See Justin Bariso, *There's a Dark Side to Emotional Intelligence: Here's How to Protect Yourself*, TIME (June 5, 2018), <https://time.com/5300642/dark-side-emotional-intelligence/>.

86. *See id.*

87. *See id.*

88. 570 U.S. 744 (2013); see Brief on the Merits for Respondent Edith Schlain Windsor, *United States v. Windsor*, 570 U.S. 744 (2013) (No. 12–307).

89. Brief on the Merits for Respondent Edith Schlain Windsor, *supra* note 88, at 1.

90. *Id.* at 3–6.

91. *See id.*

92. *See id.*

93. *Id.*

After setting the stage with this opening passage, the lawyers continued to evoke an emotional response through a detailed description of Edie and Thea's forty-four year courtship and marriage.⁹⁴ The brief explained how Thea proposed to Edie with a diamond brooch rather than an engagement ring so that Edie would not face unwanted questions at work, especially as she rightly feared that she would lose her job if she were asked about her sexual orientation.⁹⁵ Most significantly, when it became apparent that Thea's health had so deteriorated that the couple would not be able to legally marry in the United States, they traveled to Canada to get married.⁹⁶ Two years later, Thea died, and shortly thereafter, a grief-stricken Edie suffered a severe heart attack; as recounted in the brief, she was hospitalized and "received a diagnosis of stress cardiomyopathy, or 'broken heart syndrome.'"⁹⁷ This language, expertly crafted by lawyers who recognized the value of emotional intelligence, was deliberately constructed so that its readers would experience the desired result of empathy—the quintessential purpose of positive emotional intelligence. In fact, in his opinion, Justice Kennedy wrote about how Edie and Thea had "longed to marry" and that "same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons."⁹⁸ Priming the audience emotionally allowed for a more empathetic and sympathetic engagement with the legal arguments presented and created an environment where the Supreme Court could make a historic and socially desirable change to the lives of tens of thousands same-sex couples by striking down the Defense of Marriage Act.⁹⁹

Likewise, in the Supreme Court case of *Obergefell v. Hodges*,¹⁰⁰ the plaintiffs made a conscious decision to not argue the right to same-sex marriage but rather focus on the concept of marriage equality and right to privacy.¹⁰¹ Petitioner Obergefell in his brief to the Supreme Court argued:

Ohio refuses to respect the dignity and status conferred on Petitioners' marriages by other states. From the start of the marriage to the birth of children to the death of one spouse and beyond, Ohio erases the legal relationships of Petitioners' families. Ohio treats these spouses as legal strangers to one another and recognizes only one member of each couple as the

94. *Id.*

95. *Id.* at 4–5.

96. *Id.* at 6.

97. *Id.*

98. *United States v. Windsor*, 570 U.S. 744, 764 (2013).

99. *Id.*

100. 135 S. Ct. 2584 (2015).

101. Brief for Petitioners at 20, 32–33, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14–556).

2019] *EMOTIONAL INTELLIGENCE AND HOMOPHOBIA* 1147

legal parent to their children. Ohio even cruelly refuses to recognize Petitioners' marriages on death certificates when one spouse dies. Through its marriage recognition bans, Ohio strikes out at a class of individuals whose intimate, personal relationships have been afforded a solemn and special status by other states—men and women who love and marry a person of the same sex.¹⁰²

At the time of the *Obergefell* decision, a majority of Americans were becoming ready to accept marriage equality.¹⁰³ Capitalizing on this wave of acceptance, the petitioners were able to engage their audience's emotional intelligence. By arguing for equal dignity under the law, the proponents of marriage equality allowed individuals to demonstrate their high emotional quotient.¹⁰⁴ Religious conservatives argued vociferously to prevent the possibility of such equal dignity.¹⁰⁵ However, positive emotional intelligence again resonated with the Supreme Court, with Justice Kennedy writing for the majority in the final line of the opinion that the petitioners "ask for equal dignity in the eyes of the law. The Constitution grants them that right."¹⁰⁶

Capitalizing on this momentum, the transgender community also began to challenge discrimination, especially in the school setting. In *Board of Education of the Highland Local School District v. United States Department of Education*,¹⁰⁷ Jane Doe, an eleven-year-old transgender girl who was male at birth but indicated that she was female since age four, was enrolled at Highland Elementary School.¹⁰⁸ When Jane began kindergarten, she used a traditional male name and was listed as a male in the school records.¹⁰⁹ However, at the start of first grade, Jane's parents sought to help Jane socially transition, and they began treating her as their daughter.¹¹⁰ Jane began to wear female clothing and had a legal name change.¹¹¹ Jane's

102. *Id.* at 3.

103. Justin McCarthy, *Record-High 60% of Americans Support Gay Marriage*, GALLUP (May 19, 2015), <https://news.gallup.com/poll/183272/record-high-americans-support-sex-marriage.aspx>.

104. Brief for Petitioners, *supra* note 101, at 20. The Petitioners engaged their positive emotional intelligence by supporting constitutional principles of equality and dignity enshrined and accepted by a majority of the country, thereby avoiding any discomfort in arguing about a constitutional right to same-sex marriage. *Id.*

105. Emmarie Huetteman, *Lining Up, Early, for Same-Sex Marriage Arguments at Supreme Court*, N.Y. TIMES (Apr. 28, 2015), <https://www.nytimes.com/2015/04/29/us/the-line-forms-early-at-the-supreme-court.html?ref=liveblog>.

106. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

107. 208 F. Supp. 3d 850 (S.D. Ohio 2016).

108. *Id.* at 855.

109. *Id.*

110. *Id.*

111. *Id.*

parents also requested that the school treat Jane as a female, permit her to use the girl's restroom, and ensure that the school records were updated to reflect her chosen name and gender.¹¹² The school district denied Jane Doe's request to use the girl's bathroom that year and every year thereafter.¹¹³ Faced with these denials, Jane's mother filed a complaint with the Office of Civil Rights at the United States Department of Education.¹¹⁴ On March 29, 2016, the Office of Civil Rights notified Highland that its treatment of Jane Doe violated Title IX.¹¹⁵ Subsequently, on June 10, 2016, the School District filed a lawsuit against the Department of Education, stating in its complaint that Highland had decided not to grant Jane access to sex-specific facilities consistent with her gender identity.¹¹⁶

Jane intervened in this lawsuit and filed a motion for preliminary injunction against the school district under Title IX and equal protection.¹¹⁷ The U.S. District Court for the Southern District of Ohio determined that Jane was likely to succeed on the merits of her claim and granted her motion for preliminary injunction.¹¹⁸ After reviewing the meaning of "sex" under Title IX and providing deference to the agency interpretation,¹¹⁹ the court turned to whether the discrimination harmed Jane.¹²⁰ Here, the court discussed Jane's discrimination claim using positive emotional intelligence language, ultimately reaching the conclusion that she faced significant harm due to the discrimination.¹²¹ In analyzing the facts, the court stated, "Jane feels stigmatized and isolated when she is forced to use a separate bathroom."¹²² Further, the court recognized the risk of suicide that Jane faced and that she "often goes the entire day without using the bathroom because she hates being singled out when she is forced to use a separate bathroom."¹²³

Likewise, the court determined that Jane was likely to succeed on her equal protection claim.¹²⁴ The court first recognized that "transgender people have historically been subject to discrimination including in education, employment, housing, and access to healthcare."¹²⁵ The court also recognized that transgender people "encounter obstacles when there is a mismatch between the sex

112. *Id.* at 855–56.

113. *Id.*

114. *Id.* at 856.

115. *Id.* at 858.

116. *Id.*

117. *Id.* at 859.

118. *Id.* at 865.

119. *Id.* at 865–71.

120. *Id.* at 870–71.

121. *Id.*

122. *Id.*

123. *Id.* at 871.

124. *Id.* at 871–77.

125. *Id.* at 874.

2019] *EMOTIONAL INTELLIGENCE AND HOMOPHOBIA* 1149

indicated on a birth certificate and the person's gender identity,"¹²⁶ and that "transgender people often face backlash in everyday life when their status is discovered."¹²⁷ Finally, the court stated that transgender people are a politically powerless minority group.¹²⁸ As a result of this analysis, the court determined that all of the factors weighed in favor of granting Jane's injunction against the Highland School District.¹²⁹

VI. DISGUIISING NEGATIVE EMOTIONAL INTELLIGENCE IN PRINCIPLES OF FREEDOM OF RELIGION AND NATIONAL SECURITY

The religious right and the Conservative movement learned valuable lessons from their losses at both lower federal courts and the Supreme Court. These groups decided to invoke emotional intelligence for their own purposes. Leading up to the *Windsor* decision that struck down the Defense of Marriage Act and the federal government's recognition of lawful marriages between same-sex couples, Americans' conscious and unconscious bias against lesbians and gay men had rapidly decreased across the country.¹³⁰ In a study conducted at the University of Virginia, data was collected from more than half a million people between 2006 and 2013 that showed that "implicit or 'unconscious' bias against lesbian and gay people was 13 percent lower in 2013 than in 2006" and that explicit bias decreased by twenty-six percent over the same seven-year period.¹³¹ Age, race, and political orientation were the biggest predictors, with conservatives and older people among those who showed the smallest change in implicit bias.¹³²

Recognizing this shift—and understanding that explicit and implicit bias had eroded with respect to lesbian and gay individuals and that the discriminatory arguments of the past were no longer going to succeed either in court or with the majority of Americans—a new strategy was devised. The Conservative movement learned from the success of the LGBT movement and decided to use emotional intelligence to further its own agenda. The Conservative movement devised a strategy to trigger the negative emotional quotient of its target audience by using its version of lofty constitutional principles. By invoking these principles to trigger emotional intelligence, these opponents of LGBT rights could avoid being accused of bigotry or

126. *Id.* (citing *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139–40 (S.D.N.Y. 2015)).

127. *Id.* (quoting *Adkins*, 143 F. Supp. 3d. at 139–40).

128. *Id.*

129. *Id.* at 877.

130. Univ. of Va., *Implicit Bias Against Lesbians, Gays Decreasing Across Demographic Group, Study Shows*, SCI. DAILY (July 23, 2015), <https://www.sciencedaily.com/releases/2015/07/150723083718.htm>.

131. *Id.*

132. *Id.*

oppressing the minority.¹³³ Rather than use emotional intelligence to promote positive social change as dictated in the *Windsor* and *Obergefell* decisions, the opponents of LGBT rights have learned to use emotional intelligence as a weapon against the LGBT community.

Terms like “religious freedom” or “national security” are now being used to discriminate against the LGBT community but provide the imprimatur of constitutional protection that allows people to mask their bias, prejudice, and homophobia. The use of these constitutional principles can appeal to the empathy of those who might be swayed that they are supporting a group that is oppressing another for its values or beliefs. This argument allows the opponents of LGBT rights to manipulate the emotions of those hearing this debate by utilizing their own emotional intelligence—that it is not homophobic to refuse to bake a cake or take wedding photos for a gay or lesbian couple, but rather it is a principled stand based on religious beliefs. Or, as stated by the Heritage Foundation, it is not about the “freedom of LGBT people to engage in certain actions, but about coercing and penalizing people who in good conscience cannot endorse those actions.”¹³⁴

Conservatives soon had an opportunity to test the newfound approach to utilizing negative emotional intelligence in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.¹³⁵ In *Masterpiece Cakeshop*, a male couple wanted the owner of Masterpiece Cakeshop, Jack Phillips, to design a cake for their upcoming wedding.¹³⁶ Mr. Phillips refused to take the couple’s order for a wedding cake because of his religious opposition to same-sex marriage.¹³⁷ He informed them, “I’ll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don’t make cakes for same sex weddings.”¹³⁸ In fact, on multiple occasions, Phillips had “turned away potential customers on the basis of their sexual orientation, stating that he could not create a cake for a same-sex wedding ceremony or reception’ because his religious beliefs prohibited it.”¹³⁹

Using negative emotional intelligence to bolster a self-serving and dilatory purpose, Phillip’s attorneys in their brief to the Supreme Court argued that Phillips was taking a principled stand for religious liberty and not refusing a gay couple service in his shop due to any

133. See *infra* notes 180–83 and accompanying text.

134. Ryan T. Anderson, *How to Think About Sexual Orientation and Gender Identity (SOGI) Policies and Religious Freedom*, HERITAGE FOUND. (Feb. 13, 2017), <https://www.heritage.org/marriage-and-family/report/how-think-about-sexual-orientation-and-gender-identity-sogi-policies-and>.

135. 138 S. Ct. 1719 (2018).

136. *Id.* at 1723.

137. *Id.* at 1724.

138. *Id.*

139. *Id.* at 1725–26.

2019] *EMOTIONAL INTELLIGENCE AND HOMOPHOBIA* 1151

explicit bias or homophobia.¹⁴⁰ Phillips argued that he “serves all people, but cannot convey all ideas or celebrate all events. He seeks to live his life, pursue his profession, and craft his art consistently with his religious identity. The First Amendment guarantees him that freedom.”¹⁴¹ Capitalizing on First Amendment principles enshrined in the Constitution and supported by a vast majority of Americans, Phillips’ attorneys demanded that Phillips’ religious beliefs not be “branded as discriminatory” and argued:

The Free Speech Clause protects more than words. Phillips’s custom wedding cakes—which he intricately and artistically forms with his own hands for the purpose of celebrating his clients’ marriages—are his protected expression. Each of them serves as “a short cut from mind to mind,” declaring to all onlookers that the couple is now joined in marriage and that this is an occasion for jubilation. His custom cakes necessarily express ideas about marriage and the couple, and as a result, they are entitled to full constitutional protection. . . .

Hanging in the balance is more than Phillips’s freedom to ply his craft without forfeiting his conscience. At stake is his and all likeminded believers’ freedom to live out their religious identity in the public square. The First Amendment promises them that basic liberty.¹⁴²

While the Supreme Court did not ultimately rule on the issue of religious freedom,¹⁴³ this evocation of negative emotional intelligence likely impacted the Court’s decision. While avoiding the ultimate determination regarding the application of religious freedom over equal protection and equal dignity, Justice Kennedy’s opinion focused on the lack of a fair hearing before the Colorado Civil Rights Commission, indicating, “The Commission’s hostility was inconsistent with the First Amendment’s guarantee that our laws be applied in a manner that is neutral toward religion. Phillips was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection”¹⁴⁴ While this statement might seem like a neutral application of a constitutional principle, it followed commentary that seemed sympathetic with Phillips’s espousal of religious doctrine that imposed bias and prejudice.¹⁴⁵ Justice Kennedy wrote that Phillips “likely found it difficult to find a line where the customers’ rights to goods and services became a

140. See Brief for Petitioners at 14, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2017) (No. 16-111).

141. *Id.*

142. *Id.* at 14–16 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943)).

143. See *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. 1723–24 (2018).

144. *Id.* at 1732.

145. See *id.* at 1728.

demand for him to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs.¹⁴⁶ Missing in this analysis is the dignity interest that exists in non-discriminatory access to public services such as ordering and receiving wedding cakes.¹⁴⁷ In her dissent, Justice Ginsburg recognized this dignity, seeing beyond the attempt to stir negative emotional intelligence and recognizing the apparent homophobia by stating quite simply, “Phillips would not provide a good or service to a same-sex couple that he would provide to a heterosexual couple.”¹⁴⁸

Despite the fact that the Supreme Court did not reach the issue regarding the question of religious freedom,¹⁴⁹ the promotion of negative emotional intelligence still won the day. Nine months after the Supreme Court held in favor of Jack Phillips regarding the actions of the Colorado Civil Rights Commission, the two sides agreed to settle their dispute.¹⁵⁰ Specifically, the Commission dismissed the proceeding against Phillips for discrimination, and Phillips ended his lawsuit for harassment against the Commission.¹⁵¹ As a result, Phillips’s discriminatory actions in refusing to bake wedding cakes for same-sex couples continues.¹⁵² His appeal to negative emotional intelligence is best summed up by Phillips himself as he refuses to “celebrate events or express messages that conflict with . . . [his] religious beliefs.”¹⁵³ His own language acts as a shield to actions that would otherwise be considered to exhibit bias or prejudice.

Even though the Supreme Court did not rule on the ultimate issue in *Masterpiece Cakeshop*, the conservative religious right might soon have the opportunity to make the religious freedom argument again before the Supreme Court.¹⁵⁴ The Court has heard arguments in an appeal from the United States Court of Appeals for the Sixth Circuit, in which the Court of Appeals rejected a funeral home owner’s argument that he was protected by the Religious Freedom

146. *Id.*

147. See William Araiza, *No Cake for You: Discrimination, Dignity, and Refusals to Serve*, 19 MARQ. BENEFITS & SOC. WELFARE L. REV. 115, 116–17 (2018).

148. *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1750 (Ginsburg, J., dissenting).

149. See *id.* at 1732 (majority opinion).

150. Elise Schmelzer, *Masterpiece Cakeshop, State of Colorado Agree to Mutual Ceasefire Over Harassment, Discrimination Claims*, DENVER POST, <https://www.denverpost.com/2019/03/05/masterpiece-cakeshop-colorado-mutual-ceasefire-over-claims/> (last updated Mar. 5, 2019, 10:31 AM).

151. *Id.*

152. See *id.* (“In a statement, the baker said he still won’t make cakes that don’t align with his faith.”).

153. *Id.*

154. See R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 139 S. Ct. 1599 (2019).

2019] *EMOTIONAL INTELLIGENCE AND HOMOPHOBIA* 1153

Restoration Act when he fired an employee who announced plans to transition from male to female.¹⁵⁵

Learning quickly that the concept of religious freedom provides ample emotional cover for acts of homophobia, the Trump administration doubled down on these arguments through assaults on the Affordable Care Act.¹⁵⁶ The health care rule adopted two years ago by the Department of Health and Human Services (“HHS”) to implement Section 1557 of the Affordable Care Act banned doctors and nurses from discriminating on the basis of race, color, national origin, sex, age, or disability.¹⁵⁷ This rule also specified a ban on discrimination based on “gender identity” and “stereotypical notions” about how men or women should present themselves or behave.¹⁵⁸ Under the existing rule, health insurers could not place arbitrary limits or restrictions on health services that help a person transition from one gender to another.¹⁵⁹ These services may include counseling, psychotherapy, hormone therapy, and a variety of surgical treatments.¹⁶⁰

A lawsuit was brought in the United States District Court for the Northern District of Texas before Judge O’Connor on behalf of eight states and three private healthcare providers to enjoin application of the rule.¹⁶¹ One of the plaintiffs was a private hospital system called the Franciscan Alliance, which claimed its religious teaching mandated that “a person’s sex is ascertained biologically, and not by one’s beliefs, desires, or feelings” and treating patients who are transitioning from one gender to another would constitute “impermissible material cooperation with evil.”¹⁶² Judge O’Connor issued an injunction on the basis that the rule probably violated the Religious Freedom Restoration Act¹⁶³ because it did not include an exemption for health care providers who had religious objections to

155. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 589–90 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019). Oral argument in this case was held on October 8, 2019.

156. See Bruce Japsen, *Obamacare Regains Strength Despite Trump’s Legal Assault*, FORBES (May 19, 2019, 8:30 AM), <https://www.forbes.com/sites/brucejapsen/2019/05/19/obamacare-market-grows-stronger-despite-trumps-legal-assault/#12c0b6143cb0>.

157. *Section 1557 of the Patient Protection & Affordable Care Act*, U.S. DEPT HEALTH & HUM. SERVS., <https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html> (last visited Oct. 17, 2019).

158. *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 689 n.28 (N.D. Tex. 2016).

159. See *id.* at 692.

160. *Id.* at 672.

161. *Id.* at 677.

162. *Id.* at 675.

163. The Religious Freedom Restoration Act provides that the “[g]overnment may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person . . . is the least restrictive means of furthering [a] compelling government interest.” 42 U.S.C. § 2000bb-1(b), (b)(2) (2012).

providing gender transitions.¹⁶⁴ Once again, discrimination against transgendered individuals was justified by reference to religious protections.

In response to this lawsuit and Judge O'Connor's injunction, Trump administration officials stated that they believed they had to modify the Affordable Care Act regulations.¹⁶⁵ Roger Severino, who currently leads the Office of Civil Rights of the HHS, has a long history of pushing for religious exemptions to civil rights laws, including opposing non-discrimination protections for transgender people.¹⁶⁶ Severino has argued that non-discrimination practices give transgender people "special privileges" that disadvantage people of faith.¹⁶⁷ According to the New York Times, the HHS in a memo determined that

key government agencies needed to adopt an explicit and uniform definition of gender as determined "on a biological basis that is clear, grounded in science, objective and administrable." The agency's proposed definition would define sex as either male or female, unchangeable, and determined by the genitals that a person is born with.¹⁶⁸

Subsequent to that memo, the Trump administration prepared new rules to roll back protections for transgender patients.¹⁶⁹ The administration argued that the new rules would strengthen religious liberty protections in health care—an administration priority as evidenced by the conscience division within the HHS Civil Rights Office created last year.¹⁷⁰ The HHS finalized the rule granting doctors, nurses, emergency personnel, and hospice workers license to

164. Order, Civ. No. 7:16-cv-00108-O, 2017 WL 3616652 (N.D. Tex. July 10, 2016).

165. See Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2019, 83 Fed. Reg. 16,930 (June 18, 2018) (to be codified at 45 C.F.R. pts. 147, 153–58).

166. See, e.g., Roger Severino & Ryan Anderson, *Proposed Obamacare Gender Identity Mandate Threatens Freedom of Conscience and the Independence of Physicians*, HERITAGE FOUND. (Jan. 8, 2016), <https://www.heritage.org/health-care-reform/report/proposed-obamacare-gender-identity-mandate-threatens-freedom-conscience>.

167. *Id.*

168. Erica Green et al., *'Transgender' Could Be Defined Out of Existence Under Trump Administration*, N.Y. TIMES (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>.

169. *See id.*

170. *HHS Announces New Conscience & Religious Freedom Division*, U.S. DEPT HEALTH & HUM. SERVS. (Jan. 18, 2018), <https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html>.

2019] *EMOTIONAL INTELLIGENCE AND HOMOPHOBIA* 1155

discriminate if they cite their religious beliefs as justification.¹⁷¹ Even the title of the final rule (“Protecting Statutory Conscience Rights in Health Care”)¹⁷² is designed to tap into negative emotional intelligence. According to the final rule, individuals have the “right to be free from coercion or discrimination on account of religious beliefs or moral convictions.”¹⁷³ This lofty language flips the trope of discrimination on its head and sows confusion regarding who exactly is facing discrimination—a fundamental goal of those who use negative emotional intelligence. If these actions by the Trump administration are allowed to stand, physicians and other care providers could provide substandard care to LGBT individuals—or abstain from treating them in the first place—under the cover of religious freedom.¹⁷⁴ LGBT advocates will need to answer these attacks, using the positive emotional intelligence approach that succeeded in both *Windsor* and *Obergefell*.

In another concerted effort to limit LGBT rights, the Department of Education announced in February 2018 that it would no longer investigate complaints by transgender students prohibited from using bathrooms that match their gender identity.¹⁷⁵ The Department of Education’s position is that Title IX did not mandate that schools allow transgender students to use the bathroom of their choice, stating, “In the case of bathrooms, however, long-standing regulations provide that separating facilities on the basis of sex is not a form of discrimination prohibited by Title IX.”¹⁷⁶ Preparing to face the inevitable charges of anti-LGBT bias and continuing transphobia arising under the Trump administration, backers of this policy again used the seeds of negative emotional intelligence to prime the electorate, arguing that they were acting in society’s best interests. Conservative voices raised several areas of concern for the electorate to trigger their negative emotions regarding the bathroom issue, among them privacy, equality, and liberty.¹⁷⁷

171. Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170, 23,170 (May 21, 2018) (to be codified at 45 C.F.R pt. 88).

172. *Id.*

173. *Id.*

174. *See id.*

175. Moriah Balingit, *Education Department No Longer Investigating Transgender Bathroom Complaints*, WASH. POST (Feb. 12, 2018, 7:01 PM), https://www.washingtonpost.com/news/education/wp/2018/02/12/education-department-will-no-longer-investigate-transgender-bathroom-complaints/?utm_term=.e6f7087524ba.

176. Dominic Holden, *The Education Department Officially Says It Will Reject Transgender Student Bathroom Complaints*, BUZZFEED (Feb. 12, 2018, 11:17 AM), <https://www.buzzfeednews.com/article/dominicholden/edu-dept-trans-student-bathrooms#.ml8o0lm2Dm>.

177. Ryan T. Anderson, *The Trump Administration and America’s Transgender Moment*, NAT’L REV. (Feb. 24, 2018, 4:00 AM),

Conservatives began to stoke fear among the majority heterosexual community by arguing privacy concerns about men who identify as women who are entering female-only spaces.¹⁷⁸ According to Ryan Anderson, the William E. Sloan Senior Research Fellow at the Heritage Foundation, “This privacy concern is particularly acute for victims of sexual assault, who testify that seeing naked male bodies can function as a trigger.”¹⁷⁹ This argument is designed to create fear among the population to which it is directed—a key characteristic of negative emotional intelligence.

Likewise, conservatives argue that LGBT activists argue principles of equality and liberty to promote gender-identity politics.¹⁸⁰ As with the arguments regarding religious freedom in denying services to LGBT individuals, conservatives have co-opted emotional intelligence and turned it on its head. In order to convince individuals that they are not transphobic but rather are protecting societal interests, some extreme conservatives argue that it is a “violation of equality when biological males compete against females in sports and other arena where sex differences are relevant.”¹⁸¹ Likewise, some argue it is a “violation of liberty to force people to speak or act in ways contrary to their best judgment and deeply held beliefs.”¹⁸² These arguments are quintessential examples of negative emotional intelligence that are designed to stir the emotions and “galvanize others to action.”¹⁸³

Another step down the dark road of negative emotional intelligence is the ever-growing discrimination against military individuals who are transgender through the use of terms like “national security” or the “the good of society.” These arguments by their very nature define societal needs to exclude this minority group. The Trump administration has argued that allowing transgender people to serve in the military poses “‘too great a risk to military effectiveness and lethality’ and that the military is at risk of being made ‘to maintain a policy that it has determined, in its professional judgment, to be contrary to the national interest.’”¹⁸⁴

In July 2017, President Trump made a blanket announcement that “the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military.”¹⁸⁵ Despite Trump’s assertion that the U.S. military “cannot

<https://www.nationalreview.com/2018/02/trump-administration-transgender-policy-title-ix-privacy/>.

178. *Id.*

179. *Id.*

180. *See, e.g., id.*

181. *Id.*

182. *Id.*

183. BARISO, *supra* note 1, at 102.

184. *Id.*

185. Helene Cooper & Thomas Gibbons-Neff, *Trump Approves New Limits on Transgender Troops in the Military*, N.Y. TIMES (Mar. 24, 2018),

2019] *EMOTIONAL INTELLIGENCE AND HOMOPHOBIA* 1157

be burdened with the tremendous medical costs and disruption that transgender in the military would entail,”¹⁸⁶ this edict, shared by President Trump on Twitter, blindsided his then-Secretary of Defense General James Mattis, members of Congress, and the U.S. military itself.¹⁸⁷ Recognizing the blatant transphobia and crass pandering to the religious right that this pronouncement represented, individuals in the Defense Department and the Trump administration quickly began to develop emotionally intelligent language that would assuage those individuals who might react negatively to this prejudice.¹⁸⁸ Instead of the explicit bias represented by this ban on patriotic U.S. citizens willing to serve their country, the policy was described by General Mattis as placing “the Department of Defense in the strongest position to protect the American people, to fight and win America’s wars, and to ensure the survival and success of our service members around the world.”¹⁸⁹ Doubling down on this rhetoric in order to appeal to the negative emotional intelligence of those Americans who might otherwise be offended by such transparent discrimination, the argument was made to the American people that allowing transgendered individuals to serve in the military “could undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality.”¹⁹⁰ Appealing to the listeners’ patriotism and need for military readiness quickly undermines the accurate perception of stigmatizing “others.” Instead, the audience can justify the result as an objective that serves the needs of society. The groupthink mentality justified by this negative emotional intelligence asserts first that society is allowing the military to avoid “social engineering” and second that transphobia is justified for “the good of society.”

VII. CONCLUSION

Over the past several years the Conservative movement has learned to use emotional intelligence as a weapon.¹⁹¹ No longer

<https://www.nytimes.com/2018/03/24/us/politics/trump-transgender-military.html?module=inline>.

186. Emily Tillett, *Controversial Trump Administration Ban on Transgender Troops Goes into Effect*, CBS NEWS (Apr. 12, 2019, 3:14 PM), <https://www.cbsnews.com/news/transgender-military-ban-trump-administration-ban-on-transgender-troops-goes-into-effect/>.

187. See Cooper & Gibbons-Neff, *supra* note 185.

188. *Id.*

189. *Id.*

190. *Id.*

191. See, e.g., Brief for Petitioners, *supra* note 140, at 14 (“Phillips . . . seeks to live his life, pursue his profession, and craft his art consistently with his religious identity. The First Amendment guarantees him that freedom.”); Editorial Board, *Trump’s Transgender Military Ban Gets a Boost*, N.Y. TIMES (Jan. 23, 2019), <https://www.nytimes.com/2019/01/23/opinion/trump-transgender-military-ban.html> (“In its legal filings, the Trump administration has argued

arguing unsympathetic positions, the proponents of anti-LGBT bias now invoke “national security,” “equality,” and “dignity.”¹⁹² Instead of accusations of bigotry or oppressing a minority, negative emotional intelligence allows its advocates to make arguments that encourage those that do not want to be accused of homophobia that they are emotionally intelligent by couching the action in the cloak of religious freedom, national security, and equality. As explained above, the Conservative movement has been relatively successful with this approach, and no indications exist that it will not pursue this agenda in the future.¹⁹³ So, how can the LGBT community and those targeted by this negative emotional intelligence respond? Fear and anger are often how manipulators attempt to motivate people into taking action.¹⁹⁴ Having the capacity to perceive accurately others’ abilities to manipulate these feelings to get one to act in a way that is not in one’s best interests is the first step to avoid attempts to be influenced through negative emotional intelligence. Individuals can reinforce positive emotional intelligence through reiterating and reflecting on how values such as equality and dignity should uphold the social good and not be used to harm a disenfranchised and minority group. Reminding others of these uplifting social justice principles can counter the appeal to the empathy of those who might be swayed that they are supporting a group who are being oppressed for their beliefs. Taking this approach will remind others that it is, in fact, homophobic to not bake a cake or take wedding photos for a same-sex couple, rather than a principled stand based on religious beliefs.

that allowing transgender people to serve poses ‘too great a risk to military effectiveness and lethality’ and that the military is at risk of being made ‘to maintain a policy that it has determined, in its professional judgment, to be contrary to the national interest.’”).

192. *See id.*

193. *See, e.g.,* Schmelzer, *supra* note 150 (quoting the owner of Masterpiece Cakeshop, Ltd. as saying, “I have and will always serve everyone who comes into my shop; I simply can’t celebrate events or express messages that conflict with my religious beliefs”).

194. Charles S. Carver & Eddie Harmon-Jones, *Anger Is an Approach-Related Affect: Evidence & Implications*, 135 *PSYCHOL. BULL.* 183, 184 (2009) (citing P. J. Lang et al., *Emotion, Motivation, and Anxiety: Brain Mechanisms and Psychophysiology*, 44 *BIOLOGICAL PSYCHIATRY* 1248, 1249 (1998)).