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Love and Civil Rights

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Love and Civil Rights

EDIBERTO ROMAN*

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“This oft misunderstood and misinterpreted concept so readily dismissed by the Nietzsches of the world as a weak and cowardly force, has now become an absolute necessity for the survival of man. When I speak of love I am not speaking of some sentimental And weak response which is little more than emotional bosh. I am speaking of that force which all of the great religions have seen as the supreme unifying principle of life.”

Rev. Dr. Martin Luther King¹

INTRODUCTION

Despite western legal scholars’ almost universal rejection of the use of emotions in legal analysis, the unquestionable greatest social activist and grassroots legal reformer of our times, and perhaps one of the greatest in the annals of time, Rev. Dr. Martin Luther King, understood a basic yet profound fact concerning societal change—the transformative power of love. During the era where he achieved the

* Professor of Law and Director of Citizenship and Immigration Initiatives, Florida International University. Much thanks go to my colleagues Tay Ansah and Kerry Stone; their insights were invaluable and confirmed my initial belief in the value of this project. Much thanks are also owed to Librarian Marisol Floren for her consistently amazing assistance, and to Ms. Barbara Rassi for her invaluable research assistance.

1. Martin Luther King, Jr., *The Quest for Peace and Justice* (Dec. 11, 1964), *available at* http://nobelprize.org/nobel_prizes/peace/laureates/1964/king-lecture.html.

greatest influence, Dr. King knew that societal-wide change could not occur without transforming the American psyche on the basic fairness of the civil rights struggle. This civil rights struggle, which is now so closely associated with King's proper place in history, occurred through victories in both our federal courts and through federal legislation. Arguably, the most important and influential victories of the era's struggle is the nationwide legislative victory of the 1964 Civil Rights Act, and Title VII of that act, both of which were aimed to end discrimination.

The year 2014 marks the fiftieth anniversary of this most important victory, the landmark legislation that outlawed various forms of discrimination in voting, public facilities, public education, housing, credit, and employment (under Title VII).² Title VII, which is the focus of this symposium issue, declared it an "unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."³ Congress' intent was to promote equal employment opportunities by prohibiting policies and practices that are prejudicial to historically mistreated groups, especially African-Americans.⁴ Indeed, as Professor Kerri Stone eloquently observed, "federal antidiscrimination law was passed in this country against the backdrop of a compelling need for certain historically discriminated-against groups to be afforded access, entrée, and inclusion into public life, including employment."⁵

Although Title VII prohibited only racial, ethnic, and religious discrimination in its original proposed form, a late-hour amendment included the insertion of the word "sex" into the bill.⁶ Thus, Title VII,

2. 42 U.S.C. §§ 2000e to -17 (2000).

3. 42 U.S.C. §§ 2000e to -2(a)(1) (1994). Specifically, the statute defines it as an "unlawful employment practice" for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely effect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

4. Craig J. Ortner, Note, *Adapting Title VII to Modern Employment Realities: The Case for the Unpaid Intern*, 66 FORDHAM L. REV. 2613 (1998).

5. See Kerri Lynn Stone, *Taking In Strays: A Critique Of The Stray Comment Doctrine In Employment Discrimination Law*, 77 MO. L. REV. 149 (2012).

6. See CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* (1985); Suzanne Sangree, *Title VII Prohibitions*

in its current form, expressly forbids employers from discriminating on the basis of race, color, religion, sex, or national origin. Moreover, Title VII features ancillary prohibitions aimed at combating discrimination in the workplace.⁷ These rights include a prohibition on retaliating against an employee for charging an employer with discriminatory conduct,⁸ a prohibition against publishing advertisements that indicate a prohibited preference,⁹ and these protections apply to agents of an employer as well as the employer.¹⁰ The drafters of Title VII highlighted the purpose of the new law by declaring “the right of persons to be free from [improper] discrimination.”¹¹ When Congress enacted Title VII in 1964, it sought to “assure equality of employment opportunities” and undo the “stratified job environments” that arise from discrimination against minorities.¹² The Equal Employment Opportunity Commission (EEOC) is the arm of government with the power to investigate discrimination charges, to seek voluntary compliance through conciliation, and to institute civil actions to enforce Title VII’s provisions. Title VII also provides for what attorneys describe as the availability of private attorney generals—the power of individuals to seek redress for violations of their substantive rights.¹³ In other words, Title VII allows for private rights of action. For an individual to bring suit, however, he or she must first exhaust the Act’s administrative requirements. Moreover, Title VII has burden of proof requirements based upon alternative theories of “disparate impact” and “disparate treatment.” Under the disparate impact

Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight, 47 RUTGERS L. REV. 461, 481 (1995).

7. See Stone, *supra*, note 5 at 150.

8. 42 U.S.C. § 2000e-3(a); see also *Sias v. City Demonstration Agency*, 588 F.2d 692, 694-96 (9th Cir. 1978) (holding that the Title VII provision prohibiting retaliation against persons filing discrimination complaints protects employees who file a discrimination complaint against their employer, even if there is a reasonable mistake in the allegation); Robert Keith Shikiar, *Title VII Retaliation Claims*, 57 GEO. WASH. L. REV. 1168 (1989) (discussing remedies available under Title VII for persons retaliated against for reporting employment discrimination); see generally Douglas E. Ray, *Title VII Retaliation Cases: Creating a New Protected Class*, 58 U. PITT. L. REV. 405 (1997) (reviewing the retaliation provision, including scope, methods of proof, and remedies).

9. 42 U.S.C. § 2000e-3(b); see also *Hailes v. United Air Lines*, 464 F.2d 1006, 1007-08 (5th Cir. 1972) (finding that a “Help Wanted—Female” advertisement violated Title VII because Title VII expressly prohibits publication of advertisements indicating a preference based on sex); Sangree, *supra* note 70, at 522 (explaining that an advertisement for “men only” violates Title VII).

10. See *Slack v. Havens*, 1973 WL 339, 341 (S.D. Cal. 1973), *aff’d as modified*, 522 F.2d 1091, 1093 (9th Cir. 1975).

11. See H.R. Rep. No. 88-914, at 26 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2401.

12. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).

13. *Id.*

theory it is not necessary to show intent. The disparate treatment theory, on the other hand, requires proof of discriminatory intent. Courts, however, imply such intent from circumstantial evidence.¹⁴

There seems to be a broad consensus that Title VII was a “remarkable success.”¹⁵ Indeed, one scholar recently observed that Title VII’s “striking success” best exemplifies this country’s commitment to individualistic race-neutrality.¹⁶ Yet more and more scholars have been far more critical, questioning the impact of the legislation. For instance, one scholar recently observed that the passage of Title VII “represented a major victory for employee rights in the United States. Yet, what did employees really win? A legal duty upon employers to merely desist from discriminating is far less compelling than would be a requirement on them to actively accommodate. To what degree, if at all, could this . . . protection receive application in real life?”¹⁷

Indeed, a majority of legal scholars continue to question the efficacy of the 1964 Civil Rights Act in general, and Title VII in particular, with, among other arguments, some observing that Title VII represented merely a political compromise that fell short of achieving true equality,¹⁸ and others noting the various judicial pronouncements that either interpreted the legislation so narrowly, thereby effectively defeating the goals of the act,¹⁹ and other writers have noted that these judicial opinions have had the effect of whittling away the goal of the legislation.²⁰ Yet even these scholars admit that the legislation has nevertheless had an important impact, and has made the workplace, while not without bias, certainly less biased than prior to the Act’s enactment.²¹

14. *Id.*

15. Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205 (2014).

16. Michelle Adams, *Integration Reclaimed: A Review of Gary Peller’s Critical Race Consciousness*, 46 CONN. L. REV. 725 (2013).

17. Robert J. Friedman, *Religious Discrimination in the Workplace: The Persistent Polarized Struggle*, 11 TRANSACTIONS 143 (2010).

18. Linda Greene, *Twenty Years of Civil Rights: How Firm a Foundation?*, 37 RUTGERS L. REV. 707, 708 (1985).

19. *Id.*

20. Dean C. Berry, *The Changing Face of Disparate Impact Analysis*, 125 MIL. L. REV. 1 (1989); see also Jerome M. Culp, *A New Employment Police for the 1980’s: Learning from the Victories and Defeats of Twenty Years of Title VII*, 37 RUTGERS L. REV. 895, 899-908 (1985); Jack M. Beermann, *The Unhappy History of Civil Rights Legislation Fifty Years Later*, 34 CONN. L. REV. 981 (2002).

21. A host of legal sources acknowledge the effect that Title VII has had in reducing discrimination. Notably, one law review article contends that “Title VII has significantly reduced workplace discrimination; perhaps if the law can be made even stricter, it can eliminate even more of it.” See Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of*

I. WHAT'S LOVE GOT TO DO WITH IT?

This essay, while fully recognizing these critiques and criticisms of the effectiveness of Title VII, seeks to use a slightly different lens when examining this legislation.²² The goal here is to situate this landmark legislation within the large scope of discourse concerning social movements. Specifically, the goal here is to highlight this legislative effort as a prime example of the true power of social movements that seek institutional and widespread social and psychological change. At its core, this piece proposes what is perhaps a fairly new means to examine the end results of social movements—the passage of legislation or the outcomes of class-action lawsuits—as evidence of the transformative power of love in legal, political, social, and historical movements.²³

Examined in this light, the essay seeks to at least challenge dominant western legal discourse, which not only rejects the role of emotions in legal analysis, it actually goes much further and utterly dismisses the role of emotions in reasoned thinking. This dominant discourse misses and perhaps even confuses a critical point—the dominant discourse on legal analysis puts rationality on a pedestal, and perhaps even on a throne, and essentially equates emotions with irrational human interaction. Perhaps as a classic example of such thinking is evidence by dominant discourse scholars' examination of love, to the extent such scholars even specifically address love; proponents of the exclusivity or centrality of rationality to legal thought simply look at emotions such as love, in the romantic individualized sense of the word. As some more forward thinking theorists have explored, and which will be addressed below, the emotion of love is largely mis-

Motivation in Reducing Workplace Discrimination, 95 VA. L. REV. 1893, 1899 (2009); see also Scott A. Moss, *Women Choosing Diverse Workplaces: A Rational Preference with Disturbing Implications for Both Occupational Segregation and Economic Analysis of Law*, 27 HARV. WOMEN'S L.J. 1 (2004) (addressing the impact that it has had for women's participation in the workforce: "The Title VII era has reduced discrimination and increased female labor force participation").

22. See Greene, *supra* note 18, at 708 (finding that Title VII did not result as a "clear victory, drafted by the victors and signed by the vanquished" and instead, it represented "the result of a battle of words and votes in the Congress and the White House" along with "[a] very fierce fight, accompanied by unprecedented filibuster efforts and rare cloture votes," that "occurred before the legislation . . . became law").

23. See TIMOTHY P. JACKSON, *THE PRIORITY OF LOVE: CHRISTIAN CHARITY AND SOCIAL JUSTICE* (Princeton University Press, 2009) (While this essay is not specifically based on Christian constructs of Agape, it does recognize and agree that Agape is consistent with the social justice mission championed by the great Martin Luther King Jr., and is also consistent with the goals of the efforts herein).

placed or simply foolishly disregarded by the majority of contemporary western legal thinkers. They essentially equate love with passion-filled carnal versions of this emotion. That is not the form of love advocated here. Rather, the emotion addressed by Dr. King above, is a more global and central concept to human interaction—the ability to understand and empathize with fellow humans despite one not actually facing the same challenges of those individuals. Thus, central to this vision of love is the ability to empathize with a fellow brother and sister in the human condition even if one does not fully understand the challenges and struggles of that person or group. In other words, the goal here is to write something that many would consider more than slightly revolutionary in legal circles—to challenge traditional legal critiques of the value of emotions in the legal realm, where the dominant norm is the exclusive consideration of purported rationale thought. For too long legal discourse and its cousin legal scholarship, tends to ask all students of law to give exclusive consideration to success measured solely by fairly immediate legal outcomes. Unlike that approach, what is advocated here is to have these same students to examine the long-term impact of powerful emotions such as love, and how it can ultimately change our values and eventually our public policy. Success, in other words, should not exclusively be measured by a decision or decisions, or legislative enactments for that matter; successes stemming the use of social movements, which are often driven by both hope and despair, can at times be only seen over years if not decades—yet in the end, they are successes.

Unlike many critiques, from both the political left and right, the goal here will not be to question the success of Title VII in eradicating inequality, and the success of other similar social movements, but rather to situate the discourse of social movements, in general, and this legislative effort, in particular, within a hopefully new discourse of love efforts, for lack of a better term. By using the term love, a legal taboo of sorts, the goal here is to propose that social movements and their resulting legal reforms that arise, if such movements are in fact successful, are merely a step in the larger goal of creating mass psychological change within a society. Thus, unlike the dominant view on the role of reason and the rejection of emotions, this essay proposes that legal reform is not the final step in social movements, but merely a significant step, and perhaps not even a penultimate step, in changing societal perceptions of a group or a cause.

While law school curricula and law review articles alike are filled with references to terms like murder, theft, robbery, battery, and even fraud, it is rare the professor that dares mention love in the classroom, and it is even more unusual for articles or political efforts to be openly based on the power of love. Despite this tendency, this essay aims to do just that—to proclaim that the civil rights movement of the 1960s succeeded, and is more accurately a significant step, in the goal of achieving societal equality because of the transformative power of love. While perhaps the overall goal of equality, and Title VII's goal in particular of attaining equality in employment opportunity, is still elusive fifty years later, perhaps the focus could be shifted slightly to recognize the impact the legislation did achieve, and perhaps more importantly, to appreciate that the goal of employment equality could hardly be achieved through one legislative act no matter how broad its goal or its sweeping language. In other words, the goal of any form of equality is an ongoing one, and should appropriately be viewed as such.

As Professor William Eskridge noted, rarely did significant changes in law in the twentieth century stem from change in text or some judge's new discovery concerning the Constitution.²⁴ Indeed, changes in significant rights occurred as a result of outsider groups calling for change to a system that treated them less than equal. Eskridge observes:

Race, sex, and sexual orientation were markers of social inferiority and legal exclusion throughout the twentieth century. People of color, women, and gay people all came to resist their social and legal disabilities in the civil rights movement seeking to end apartheid; various feminist movements seeking women's control over their own bodies and equal rights with men; and the gay rights movement, seeking equal rights for lesbian and transgendered people. All these social movements sought to change positive law and social norms.²⁵

While Professor Eskridge astutely and persuasively argues that "identity-based social movements" effectively used courts to create constitutional doctrine, the position of this essay is to examine related, but also different, issues, specifically, the passage of significant federal legislation seeking to achieve social change, namely the eradication of racial and other forms of discrimination. The focus here is not based

24. William N. Eskridge Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002).

25. *Id.* at 2065.

upon court-driven decisions that are the result of social movements, but legislative, and to a lesser extent, judicial action that stem from such movements. In other words, the goal here is to question how it is that outsider groups, which are often the subject of wide spread hate and scorn, can ultimately win the hearts and minds of judges and legislatures alike. How do these legal victories occur when these advocates are often among the most disliked groups in the United States? Indeed, they are often representative of the least among us, and as a result are not only often the most obvious prey of the bigots, but also cause few in society to even think about their plight. Yet, they seem to succeed, at least partially, and in a wide variety of legal settings, albeit at times it may take decades or even centuries to fully achieve, or even have most appreciate such victories.

Merely examine the antipathy against the LGBT community in the 1980s during the AIDS epidemic's genesis, for instance. This group was far from a popular one in the public statements by politicians and religious leaders alike. Indeed, it was not unusual to hear leaders proclaim that the dreaded disease of AIDS was some sort of moral punishment. Now, move forward and compare that to the LGBT community's success in the courts, and in the hearts of many Americans, concerning marriage equality today. Could it be that popular culture leaders like Ellen DeGeneres, with her now iconic outing of herself in her sitcom, caused such a dramatic shift? The simple answer is yes, at least in part. When members of an outsider group, such as a woman in the 1800s with respect to the suffrage movement, and gay actor in the 1990s, or a DREAMer today, is given a chance to let others view them as they are, society grows to eventually, and perhaps incredibly slowly, appreciate them as fellow brothers and sisters in that society. In other words, when outsiders demonstrate they are basically no different than the rest of us at their and our core, we begin to empathize with them and grow to appreciate that yes indeed, they are our fellow neighbors, and in fact brothers and sisters in our society.

How else can one explain these repeated victories against apparently insurmountable odds? It can hardly be argued that the above-mentioned outsider groups, just to name a few, have not succeeded in some real tangible ways within our legal structure. And perhaps a more vivid, and arguably a more current example, is how the American psyche is changing its view of immigrants as this very moment. And while no significant legislative reform has yet occurred for this

group, such as comprehensive immigration reform, it is not hard to compare the historic vitriol used against undocumented immigrants for well over a century, and compare it today with the image of young college-aged advocates, also known as DREAMers, affecting public perceptions of immigrants. Indeed, these young advocates have transformed a public debate against one of the most hated groups in society—the so-called “illegals,” a term that is not only offensive, it is also linguistically and grammatically untenable.²⁶

II. IS LOVE THE ANSWER?

Social scientists have had as much trouble defining love as philosophers and poets. We have books on love, theories on love, and research on love. Yet no one has a single, simple definition that is widely accepted by other social scientists.²⁷

As the quote above suggests, while love is a word even a preschooler purports to understand, few of those that study the concept, can adequately describe, let alone define it. What does seem to be clear is that a vast majority of modern western legal thinkers reject the role of any emotion in legal analysis, and appear to have a special disdain for the emotion of love.²⁸

What is wrong with their analysis is that they, perhaps unwittingly, seem to be focused on romantic love when they examine this emotion. And perhaps because most can appreciate the irrationality of that sort of love, i.e., the recollections all seem to have of foolish behavior associated with that form of love,²⁹ these thinkers quickly dismiss emotions in general, and love in particular, when exploring the role of reason in legal thought. Consider the how easily noted jurist and professor Richard Posner readily distinguishes emotions and reason. Posner notes four emotions as particularly interfering with the problem solving process: “anger, disgust, indignation, and love.”³⁰

26. Ediberto Roman and Bobby Joe Bracy, *Words Do Matter in the Immigration Debate*, LA PRENSA SAN DIEGO, (Apr. 26, 2013), <http://laprensa-sandiego.org/editorial-and-commentary/commentary/words-do-matter-in-the-immigration-debate>.

27. Beverley Fehr and James A. Russell, *The Concept of Love Viewed From a Prototype Perspective*, 60 J. PERSONALITY & SOC. PSYCHOL. 425, 426–27 (1991) (quoting S. S. Brehm, *Intimate Relationships* 90 (Random House 1985)).

28. See Barbara L. Atwell, *The Jurisprudence of Love*, 85 U. OF DET. MERCY L. REV. 495 (2008) (observing that love—energetic and spiritual versions of it, and not romantic versions, are central to achieving justice).

29. Example would be too ample for this author to list even if looking to his own follies in this context.

30. Richard A. Posner, *Emotion Versus Emotionalism in Law*, in *THE PASSIONS OF LAW* 309, 309 (Susan A. Bandes ed., 1999).

With little equivocation, Posner observes: "the law itself is conventionally regarded as a bastion of 'reason' conceived of as the antithesis of emotion."³¹ Similarly, Robert Solomon argues that "law is by definition dispassionate."³² In essence, there is little debate in leading legal academic circles that legal analysis should be devoid of emotions. More recently, even my friend Andrew McClurg similarly dismisses love as playing a role in the legal arena. In the context of pleas to emotion, McClurg observes:

Appeals to emotion are fallacious because emotions are irrelevant as a basis for deciding an issue. While emotions have psychological relevance in that they have a persuasive impact on the human mind, they have no logical relevance because they are incapable of establishing the truth of conclusions. Proving truth requires the mustering of convincing evidence and not simply the exploitation of emotional sensitivities. Emotions may move us to act, but reason should control the course of that action.³³

While the above quotes do not provide a wholesale devaluation of love, they do illustrate the ease with which legal scholars attempt to dissociate their analytical undertaking with emotions. The task here is an attempt to remind these scholars that not only is the effort by humans to remove emotions from decision-making by definition futile, the effort of those that claim emotions have no place in the legal arena too narrowly define or interpret the emotion of love. And to the extent they at all consider the emotion of love, they only consider that definition that more closely resembles romantic love, with all its irrational qualities.

Similarly, one emotion advocate recently criticized contemporary legal thinkers, observing:

Incorporating experiential understanding of persons or groups into an ideological system based on a reductionist concept of reason, system that at times seems to have a fetish for predictability and control under the Rule of Law, raises terrifying specters of destabilization, chaos, and anarchy. Accordingly, the emotional, physical, and experiential aspects of being human have by and large been banished from the better legal neighborhoods and from explicit recognition in

31. *Id.*

32. Robert Solomon, *Justice v. Vengeance*, in *THE PASSIONS OF LAW* 123, 128 (Susan A. Bandes ed., 1999).

33. See Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 AM. U. L. REV. 53, 66 (1992).

legal discourse (although they sometimes get smuggled in as “facts” in briefs and opinions).³⁴

A related argument is as follows:

A scholar or a judge may react to the pain and anguish caused actual human beings by a given law or doctrine, but she will seldom point to the painful or existential consequences of that law as reason to change it. This is because the *ideological structures of legal discourse and cognition block affective and phenomenological argument: The “normal” discourse of law disallows the language of emotion and experience. The avoidance of emotion, affect, and experiential understanding reflects an impoverished view of reason and understanding - one that focuses on cognition in its most reductionist sense. This impoverished view stems from a belief that reason and emotion are separate, that reason can and must restrain emotion, that law-as-reason can and must order, rationalize and control.*³⁵

As a result of the dominant discourse in legal analysis an important mode of understanding is simply undervalued and even dismissed. As Professor Henderson correctly observed over a decade ago, though unfortunately, her astute observations have gone largely unnoticed to the majority of legal scholars:

That mode of understanding is best captured by the word “empathy,” a word that at first seems counterintuitive in a world defined as legal. Yet empathy is a form of understanding, a phenomenon that encompasses affect as well as cognition in determining meanings; it is a rich source of knowledge and approaches to legal problems - which are, ultimately, human problems. Properly understood, empathy is not a “weird” or “mystical” phenomenon, nor is it “intuition.” Rather, it is a way of knowing that can explode received knowledge of legal problems and structures, that reveals moral problems previously sublimated by pretensions to reductionist rationality, and that provides a bridge to normatively better legal outcomes.³⁶

What is therefore missing in contemporary legal discourse is the analytical tool and force of empathy, which is an emotion that assists us in understanding our surroundings. As noted author R. Wasserstrom previously observed, “empathy enables the decision maker to have an appreciation of the human meanings of a given legal situation.

34. Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987).

35. *Id.* at 1575 (emphasis added).

36. *Id.*

Empathy aids both process of discovery- the procedure by which a judge or other legal decision maker reaches a conclusion- and process of justification- the procedure used by a judge or other decision maker to justify the conclusion- in a way that disembodied reason simply cannot. ³⁷

What is instead proposed in this essay is not a narrow reductionist means of analysis, but a more classic interpretation of analysis; one that specifically and openly embraces the analytical value of all means of human understanding, including the power of empathy, which stems from a broader, and arguably more comprehensive understanding of the term love, or to use the philosopher Hegel's term, *liebe*. The word empathy in turn should be understood to encompass several related and complementary parts. In essence, there are three basic phenomena captured by the word: (1) feeling the emotion of another; (2) understanding the experience or situation of another, both affectively and cognitively, often achieved by imagining oneself to be in the position of the other; and (3) action brought about by experiencing the distress of another.³⁸

With such an interpretation one can appreciate that within the spectrum of the term love, and its consequences of provoking, or at least engendering empathy, comes the ability to care for the needs of others even if one cannot fully understand or even have considered those needs held by others. In other words, the great power of love is the ability to have others that are totally unfamiliar with your claims for change to be able to empathize with your plight even if they do not fully understand or can appreciate the extent of your pain, or call for change and justice. This ability is exactly what contemporary legal thinkers simply fail to do too often.

It is exactly because of empathy that hated, or at least disregarded groups, like African-Americans in the 1960s, members of the LGBT community in the 1990s and early part of this century, and even today undocumented youth, can cause other members in society to listen to their claims and eventually agree with their cause. Note that in each of these three examples, the groups calling for change and initiating a social movement were the subjects of deep resentment and even hate. They had no army, nor were they popular in numbers, yet

37. R. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION 27 (1961).

38. See Henderson, *supra* note 34, at 1579.

they were able to achieve some tangible gains within the legal and political arena.

In the legislative arena, the passage of the 1964 Civil Rights Act and its Title VII are prime examples of such successes for the African-American and other racial minority communities. For the LGBT community, the U.S. Supreme Court's decision in *United States v. Windsor*,³⁹ which held that the Constitution's Due Process and Equal Protection Clauses forbid federal laws like the Defense of Marriage Act (DOMA), was a real and significant victory for that community. In the context of young immigrant advocates, the passage of laws by several states to allow for in-state college tuition for these undocumented immigrants likewise speaks to the power of empathy even for groups that were once the most disliked sub-culture in society.⁴⁰ Currently, for instance, at least 18 states have provisions allowing for in-state tuition rates for undocumented students. Sixteen states—California, Colorado, Connecticut, Florida, Illinois, Kansas, Maryland, Minnesota, Nebraska, New Jersey, New Mexico, New York, Oregon, Texas, Utah and Washington—extend in-state tuition rates to undocumented students through state legislation.⁴¹ Two states—Oklahoma and Rhode Island—allow in-state tuition rates to undocumented students through Board of Regents decisions.⁴² These victories occurred not from dispassionate analysis by the lawyers or politicians, they occurred because society eventually was able to empathize with the claims of these groups, and either judges and juries agreed with the justice of the causes, or perhaps even more telling, legislative representatives appreciated the will of their constituents, even in the face of vocal and powerful opposition.

III. HISTORY OF LOVE!

Eighteenth century philosopher, Georg Wilhelm Friedrich Hegel recognized this exact form of non-romantic transformative and extremely powerful form of Love. At the end of the eighteenth and the beginning of the nineteenth century, Hegel developed a concept of "recognition," where he also reflected back on a whole series of philo-

39. 133 S. Ct. 2675 (2013).

40. I am so proud to have played a role in fighting for such access issues in my home state of Florida, and I remain inspired by the strength and perseverance of many of my DREAMer friends.

41. Nat'l Conference of State Legislatures, *Undocumented Student Tuition: Overview*, (Feb. 10, 2015), <http://www.ncsl.org/research/education/undocumented-student-tuition-overview.aspx>.

42. *Id.*

sophical projects in which related concepts and notions had taken on leading roles in contemporary philosophical discourse.⁴³ For Hegel, central classic reference in recognition-theory, is in reading his treatment of the theme of love or *Liebe*.⁴⁴ According to Hegel, self-consciousness of human beings is dependent upon the experience of social recognition. Hegel's model of a "struggle for recognition" includes the idea that ethical progress unfolds in a series of three levels of increasingly more demanding patterns of recognition, and an "intersubjective struggle" mediates between each of these levels, a struggle that subjects conduct in order to have their identity claims confirmed.⁴⁵

Hegel's model, which is key to the thesis here is that it adds to legal (rights-based) recognition, which in turn includes two more forms of reciprocal recognition, to which particular levels of the individual relation-to-self have to correspond: in *love*, which Hegel in his early work understands in the very emphatic sense of a philosophy of unity.⁴⁶ According to this philosophy, subjects recognize each other in the unique nature of their needs, so that they can attain emotional security in the articulation of the claims raised by their drives, and finally, in the state's sphere of ethical life in turn the state thereby obtains a form of recognition that allows subjects to esteem one another in those attributes that contribute to the reproduction of the societal order.⁴⁷

While at an initial reading, Hegel's theory of recognition may give some the impression of being a tad bit dense, and arguably cumbersome to comprehend, in actuality it is fairly straight-forward. As one writer recently observed,

one attitude that is essential in how exactly the constellation of issues that Hegel calls *Liebe* instantiates the structure of 'finding oneself in one's other', an attitude that thereby forms the core of all relationships and all attitude-complexes that deserve the name *Liebe* in Hegel. This is the attitude of unconditional concern for the good, well-being or happiness of

43. John Farrell & Axel Honneth, *Recognition and Moral Obligation*, 64 Soc. Res. 16, 16 (1997).

44. Heikki Ikaheimo, *Globalising Love: On the Nature and Scope of Love as a Form of Recognition*, 18 RES PUBLICA 11 (Feb. 7, 2012).

45. See Farrell & Honneth, *supra* note 43, at 25.

46. *Id.*

47. *Id.*

the other—the very same attitude that is on Aristotle’s view the focal meaning of *philia*.⁴⁸

Therefore, Hegel’s model, to perhaps put it too simply, recognizes that individuals in a society develop forms of recognition, to use his term, which develops a form of progress that allows members of that society to recognize each other’s needs. In other words, empathy or love for fellow members of society eventually develops as the notion of recognition of those within a society evolves. And according to Hegel, love, which Hegel recognizes as essentially a form of empathy, or a form of philosophical unity, allows individuals within a society to recognize each other and the needs each other may possess. This in turn allows members of a society to attain understanding and emotional security in the articulation of the claims raised by others. Ultimately, according to Hegel’s theory, in a state’s sphere of ethical life, there is a form of recognition that allows subjects to respect, and have esteem for one another, which in turn promotes the social order of that society.

Now moving forward to the era that is the focus of this symposium issue — 1964 and the passage of the civil rights act by that name as well as Title VII, the leading civil rights figure of that era understood the need for social, legal, political, and cultural change. And he also knew of the need to use empathy and love to foster understanding of the injustices faced by racial minorities. In other words, Dr. King knew of both the importance and the power of Hegel’s notion of love. Throughout the series of speeches quoted below, it becomes fairly obvious that Dr. King was not only calling for change, he was purposefully using love as a means to reject hate and fear, and as a vehicle to promote understanding or empathy. The passages below highlight this influential effort.

King’s August 16, 1967, speech in Atlanta, Georgia, entitled “Where Do We Go From Here?” delivered at the 11th Southern Christian Leadership Conference Convention discussed how love and power are often “contrasted as polar opposites” when, in fact, they are concepts that are intertwined with each other.⁴⁹ He observed “Negro Americans” and white Americans both had it wrong in the racial struggle in America.⁵⁰ Whereas the former sought their goals “through love . . . devoid of power,” the latter pursued their goals

48. See Ikaheimo, *supra* note 44, at 26.

49. Rev. Dr. Martin Luther King, Jr., *Where Do We Go From Here?* (Aug. 16, 1967).

50. *Id.*

“through power devoid of love and conscience.”⁵¹ He concluded that he has decided to “stick with love” because love is ultimately the only answer to mankind’s problems.”⁵² The relevant passage from his speech is as follows:

And one of the great problems of history is that the concepts of love and power have usually been contrasted as opposites, polar opposites, so that love is identified with a resignation of power, and power with a denial of love. . . . Now, we got to get this thing right. What is needed is a realization that power without love is reckless and abusive, and that love without power is sentimental and anemic. (Yes) Power at its best [*applause*], power at its best is love (Yes) implementing the demands of justice, and justice at its best is love correcting everything that stands against love. (*Speak*) And this is what we must see as we move on. Now what has happened is that we’ve had it wrong and mixed up in our country, and this has led Negro Americans in the past to seek their goals through love and moral suasion devoid of power, and white Americans to seek their goals through power devoid of love and conscience. It is leading a few extremists today to advocate for Negroes the same destructive and conscienceless power that they have justly abhorred in whites. It is precisely this collision of immoral power with powerless morality which constitutes the major crisis of our times. (Yes) . . . And the other thing is, I’m concerned about a better world. I’m concerned about justice; I’m concerned about brotherhood; I’m concerned about truth. (*That’s right*) And when one is concerned about that, he can never advocate violence. For through violence you may murder a murderer, but you can’t murder murder. (Yes) Through violence you may murder a liar, but you can’t establish truth. (*That’s right*) Through violence you may murder a hater, but you can’t murder hate through violence. (*All right, That’s right*) Darkness cannot put out darkness; only light can do that. [*applause*] . . . And I say to you, I have also decided to stick with love, for I know that love is ultimately the only answer to mankind’s problems. (Yes) And I’m going to talk about it everywhere I go. I know it isn’t popular to talk about it in some circles today. (*No*) And I’m not talking about emotional bosh when I talk about love; I’m talking about a strong, demanding love. (Yes) For I have seen too much hate. (Yes) I’ve seen too much hate on the faces of sheriffs in the South. (*Yeah*) I’ve seen

51. *Id.*

52. *Id.*

hate on the faces of too many Klansmen and too many White Citizens Councilors in the South to want to hate, myself, because every time I see it, I know that it does something to their faces and their personalities, and I say to myself that hate is too great a burden to bear. (*Yes, That's right*) I have decided to love. [*applause*]⁵³

Similarly, Dr. King's address at the conclusion of the Selma to Montgomery March on March 25, 1965, posited that racial segregation was not the "natural result of hatred between the races."⁵⁴ Instead, it was a "political stratagem:"

Our whole campaign in Alabama has been centered around the right to vote. In focusing the attention of the nation and the world today on the flagrant denial of the right to vote, we are exposing the very origin, the root cause, of racial segregation in the Southland. Racial segregation as a way of life did not come about as a natural result of hatred between the races immediately after the Civil War. There were no laws segregating the races then. And as the noted historian, C. Vann Woodward, in his book, *The Strange Career of Jim Crow*, clearly points out, the segregation of the races was really a political stratagem employed by the emerging Bourbon interests in the South to keep the southern masses divided and southern labor the cheapest in the land. You see, it was a simple thing to keep the poor white masses working for near-starvation wages in the years that followed the Civil War. Why, if the poor white plantation or mill worker became dissatisfied with his low wages, the plantation or mill owner would merely threaten to fire him and hire former Negro slaves and pay him even less. Thus, the southern wage level was kept almost unbearably low.⁵⁵

Later in the movement, Dr. King's "The American Dream" speech delivered at Ebenezer Baptist Church in Atlanta, Georgia, on July 4, 1965, addressed how the civil rights movement involves meeting the hatred of the other side with love, despite what they may do because "hate is too great a burden to bear."⁵⁶ There is perhaps no greater a passage than the following in demonstrating Dr. King's and the social movement's call for greater understanding and empathy. Or to use Hegel's terminology—recognition, than these powerful and

53. *Id.*

54. Rev. Dr. Martin Luther King, Jr., Address at the Conclusion of the Selma to Montgomery March (Mar. 25, 1965).

55. *Id.*

56. Rev. Dr. Martin Luther King, Jr., *The American Dream* (July 4, 1965).

love-filled words. Indeed, much like Hegel proclaimed as necessary for societal evolution, King specifically in this passage observes that the effort undertaken is not only based on love and will benefit the subjects of hate, but King specifically recognizes that the effort is undertaken for his fellow members of society, whether victim or oppressor—recognition indeed:

We need not hate; we need not use violence. We can stand up before our most violent opponent and say: We will match your capacity to inflict suffering by our capacity to endure suffering. We will meet your physical force with soul force. (*Make it plain*) Do to us what you will and we will still love you. We cannot in all good conscience obey your unjust laws, because noncooperation with evil is as much a moral obligation as is cooperation with good, and so throw us in jail. (*Make it plain*) We will go in those jails and transform them from dungeons of shame to havens of freedom and human dignity. Send your hooded perpetrators of violence into our communities after midnight hours and drag us out on some wayside road and beat us and leave us half-dead, and as difficult as it is, we will still love you. (*Amen*) Somehow go around the country and use your propaganda agents to make it appear that we are not fit culturally, morally, or otherwise for integration, and we will still love you. (*Yes*) Threaten our children and bomb our homes, and as difficult as it is, we will still love you. (*Yeah*) . . . One day we will win our freedom, but we will not only win freedom for ourselves, we will so appeal to your heart and your conscience that we will win you in the process.” And our victory will be a double victory. Oh yes, love is the way. (*Yes*) Love is the only absolute. More and more I see this. I’ve seen too much hate to want to hate myself; hate is too great a burden to bear. (*You bet, Yes*) I’ve seen it on the faces of too many sheriffs of the South—I’ve seen hate. In the faces and even the walk of too many Klansmen of the South, I’ve seen hate. Hate distorts the personality. Hate does something to the soul that causes one to lose his objectivity. The man who hates can’t think straight; (*Amen*) the man who hates can’t reason right; the man who hates can’t see right; the man who hates can’t walk right. (*Yeah*)⁵⁷

King’s acceptance speech at the Nobel Peace Prize Ceremony on December 10, 1964, discussed how the foundation of the civil rights movement in the United States is love, and is a movement that “re-

57. *Id.*

jects revenge, aggression, and retaliation.”⁵⁸ The relevant portion of the speech is as follows:

Civilization and violence are antithetical concepts. Negroes of the United States, following the people of India, have demonstrated that nonviolence is not sterile passivity, but a powerful moral force which makes for social transformation. Sooner or later, all the peoples of the world will have to discover a way to live together in peace, and thereby transform this pending cosmic elegy into a creative psalm of brotherhood. If this is to be achieved, man must evolve for all human conflict a method which rejects revenge, aggression, and retaliation. The foundation of such a method is love. The torturous road which has led from Montgomery, Alabama, to Oslo bears witness to this truth, and this is a road over which millions of Negroes are traveling to find a new sense of dignity. This same road has opened for all Americans a new era of progress and hope. It has led to a new civil rights bill, and it will, I am convinced, be widened and lengthened into a superhighway of justice as Negro and white men in increasing numbers create alliances to overcome their common problems.⁵⁹

King’s “Levels of Love” sermon delivered at Ebenezer Baptist Church in Atlanta, Georgia, on September 16, 1962, describes the different types of love and how racism deals with utilitarian love, which involves loving another for his usefulness to the person.⁶⁰ Dr. King ends with noting that “love is the greatest power in all the world”:

First, there is what I would refer to as utilitarian love. This is love at the lowest level. Here one loves another for his usefulness to him. . . . Whenever we treat people not as thous, whenever we treat a man not as a him, a woman not as a her but as an it, we make them a thing, and this is the tragedy of this level of love. This is the tragedy of racial segregation. In the final analysis, segregation is wrong not merely because it makes for physical inconveniences, not merely because it leaves the individuals who are segregated with inferior facilities, but segregation is wrong, in the final analysis, because it substitutes an I-It relationship for the I-Thou relationship and relegates persons to the status of things. . . . I talked with a white man in Albany, Georgia, the other day, and when we got down in the conversation he said . . . “I used to love the Negro, but I don’t have the kind

58. Rev. Dr. Martin Luther King, Jr., Acceptance Speech at the Nobel Peace Prize Ceremony (Dec. 10, 1964).

59. *Id.*

60. Rev. Dr. Martin Luther King, Jr., Levels of Love (Sept. 16, 1962).

of love for them that I used to have. You know, I used to give money to Negro churches. And even the man who worked for me, I would give him something every year extra; I'd give him a suit. But I just don't feel that way now. I don't love Negroes like I used to." And I said to myself, "You never did love Negroes (That's right) because your love was a conditional love. It was conditioned upon the Negro staying in his place, and the minute he stood up as a man and as somebody, you didn't love him anymore because your love was a utilitarian love that grew up from the dark days of slavery and then almost a hundred years of segregation." This is what the system has done, you see. (Yes) It makes for the crudest level of love. . . . *Agape* is higher than all of the things I have talked about. Why is it higher? Because it is unmotivated; it is spontaneous; it is overflowing; it seeks nothing in return. It is not motivated by some quality in the object. . . . The greatness of it is that you love every man, not for your sake but for his sake. . . . And it comes to the point that you even love the enemy. (*Amen*) Christian love does something that no other love can do. It says that you love every man. You hate the deed that he does if he's your enemy and he's evil, but you love the person who does the evil deed. . . . And therefore, I'm convinced this morning that love is the greatest power in all the world. Over the centuries men have asked about the highest good; they've wanted to know. All of the great philosophers have raised the question, "What is the *summum bonum* of life? What is the highest good?" Epicureans and the Stoics sought to answer it. Plato and Aristotle sought to answer it. What is that good that is productive and that produces every other good? And I am convinced this morning that it is love.⁶¹

Finally, Dr. King's most iconic and prophetic effort, the "Letter from a Birmingham Jail," he brilliantly identifies the power and ultimate need for love in our society and in our decision-making. In this masterpiece, which should be required reading for all in the United States and elsewhere, King addresses how the movement responded to hate and oppression:

I began thinking about the fact that I stand in the middle of two opposing forces in the Negro community. One is a force of complacency, made up in part of Negroes who, as a result of long years of oppression, are so drained of self-respect and a sense of "somebodiness" that they have adjusted to segregation; and in part of a few mid-

61. *Id.*

dle class Negroes who, because of a degree of academic and economic security and because in some ways they profit by segregation, have become insensitive to the problems of the masses. The other force is one of bitterness and hatred, and it comes perilously close to advocating violence. It is expressed in the various black nationalist groups that are springing up across the nation, the largest and best-known being Elijah Muhammad's Muslim movement. Nourished by the Negro's frustration over the continued existence of racial discrimination, this movement is made up of people who have lost faith in America, who have absolutely repudiated Christianity, and who have concluded that the white man is an incorrigible "devil." . . . But though I was initially disappointed at being categorized as an extremist, as I continued to think about the matter I gradually gained a measure of satisfaction from the label. Was not Jesus an extremist for love: "Love your enemies, bless them that curse you, do good to them that hate you, and pray for them which despitefully use you, and persecute you." . . . And Abraham Lincoln: "This nation cannot survive half slave and half free." And Thomas Jefferson: "We hold these truths to be self-evident, that all men are created equal . . ." So the question is not whether we will be extremists, but what kind of extremists we will be. Will we be extremists for hate or for love? Will we be extremists for the preservation of injustice or for the extension of justice? In that dramatic scene on Calvary's hill three men were crucified. We must never forget that all three were crucified for the same crime—the crime of extremism. Two were extremists for immorality, and thus fell below their environment. The other, Jesus Christ, was an extremist for love, truth and goodness, and thereby rose above his environment. Perhaps the South, the nation and the world are in dire need of creative extremists.⁶²

62. Rev. Dr. Martin Luther King, Jr., Letter from Birmingham Jail (Apr. 16, 1963). See also Rev. Dr. Martin Luther King, Jr.'s speech at the Great March on Detroit held on June 23, 1963, where he calls for a nonviolent approach to the civil rights movement and to engage in love, which he describes as a "sort of understanding, creative, redemptive goodwill for all men":

For nonviolence not only calls upon its adherents to avoid external physical violence, but it calls upon them to avoid internal violence of spirit. It calls on them to engage in that something called love. And I know it is difficult sometimes. When I say "love" at this point, I'm not talking about an affectionate emotion. (*All right*) It's nonsense to urge people, oppressed people, to love their oppressors in an affectionate sense. I'm talking about something much deeper. I'm talking about a sort of understanding, creative, redemptive goodwill for all men. [*Applause*] We are coming to see now, the psychiatrists are saying to us, that many of the strange things that happen in the subconscious, many of the inner conflicts, are rooted in hate. And so they are saying, "Love or perish." But Jesus told us this a long time ago. And I can still hear that voice crying through the vista of time, saying, "Love your enemies, bless them that curse you, pray for them that despitefully use you." And there is still a voice saying to every

Other civil rights leaders of the day accordingly followed the love-based approach in their calls for social change. For instance, In October of 1957, Roy Wilkins, the Executive Secretary of the NAACP in a speech entitled "The Clock Will Not Be Turned Back," noted that the Brown decision of the Supreme Court pushed the country into a grave situation in light of the Cold War, but that "the clock will not be turned back," in spite of the hostility toward "Negro Americans."⁶³ In this sense, he discusses how the movement would press on despite racial hatred and hostility:

It is no exaggeration, I think, to state that the situation presented by the resistance to the 1954 decision of the United States Supreme Court in the public school segregation cases is fully as grave as any which have come under the scrutiny and study of the Commonwealth Club. . . . The Negro citizens of our common country, a country they have sweated to build and died to defend, are determined that the verdict at Appomattox will not be renounced, that the clock will not be turned back, that they shall enjoy what is' justly theirsFalseTheir little children, begotten of parents of faith and courage, have shown by their fearlessness and their dignity that a people will not be denied their heritage. Complex as the problem is and hostile as the climate of opinion may be in certain areas, Negro Americans are determined to press for not only a beginning, but a middle and a final solution, in good faith and with American democratic speed.

The Negro position is clear. Three years of intimidation o the meanest and most brutal of levels have not broken the' ranks or shaken their conviction. What of the rest of our nation? It must make a decision for morality and legality and move in support of it, not merely for the good of the Negroes, but for the destiny of the nation itself. Already I have indicated that this is a new and dangerous world.

potential Peter, "Put up your sword." History is replete with the bleached bones of nations, history is cluttered with the wreckage of communities that failed to follow this command. And isn't it marvelous to have a method of struggle where it is possible to stand up against an unjust system, fight it with all of your might, never accept it, and yet not stoop to violence and hatred in the process? This is what we have. [Applause] And then we also need your support in order to get the civil rights bill that the President is offering passed. And there's a reality, let's not fool ourselves: this bill isn't going to get through if we don't put some work in it and some determined pressure. And this is why I've said that in order to get this bill through, we've got to arouse the conscience of the nation, and we ought to march to Washington more than 100,000 in order to say, [Applause] in order to say that we are determined, and in order to engage in a nonviolent protest to keep this issue before the conscience of the nation.

Martin Luther King, Jr., Speech at the Great March on Detroit (June 23, 1963).

63. Roy Wilkins, Exec. Sec'y, Nat'l Ass'n for the Advancement of Colored People, *The Clock Will Not Be Turned Back* (Oct. 1957).

This cold war is a test of survival for the West. The Soviet sputnik, now silent and barely visible, casts a shadow not lightly to be brushed aside. Can we meet the challenge Moscow in the sciences and in war with a country divided upon race and color? Can we afford to deny to any boy girl the maximum of education, that education which mean the difference between democratic life and totalitarian death? We may falter and stumble, but we cannot fail.⁶⁴

Social justice advocates and civil rights leaders like Martin Luther King, Jr., unquestionably were obviously instrumental in the passage of the 1964 Civil Rights Act and Title VII. Indeed, scholars have long recognized the role King played in its passage. As Professor Bruce Ackerman notes, "Without the rise of the popular movement led by Martin Luther King, Jr., without the decisive victory of Lyndon Johnson over Barry Goldwater in 1964, without the consolidations under Richard Nixon, Brown's promise might have been overwhelmed by a segregationist backlash at the polls and racial rioting in the streets. While the Supreme Court remained important throughout the 1960s, constitutional leadership turned to other branches, which broadened and consolidated Brown's promise in landmark statutes like the Civil Rights Act of 1964 and the Voting Rights Act of 1965."⁶⁵

Yet another scholar noted the importance of Dr. King's social struggle based on love in the passage of the Civil Rights Act:

A year before [its] passage. . . King, was arrested in Birmingham, Alabama, facing various charges for protesting segregation in a state that, along with Mississippi, had come to represent the hate of southern racism and violence of the segregating South. While in jail, he wrote a letter to a group of southern clergymen who had suggested that his protests against segregation were "unwise and untimely." His letter is a masterpiece in the history of social protest and thoughtful opposition to discrimination. It was a catalyst—one of many—that led to passage of the Civil Rights Act the next year. The letter eloquently expressed the pain and humiliation of segregation. In this letter, Dr. King described the nature of segregation and articulated why blacks could no longer wait for equality. The 1964 Civil Rights Act, which is celebrated and reconsidered in this symposium, was the most dramatic

64. *Id.*

65. Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 Nw. U. L. Rev. 63, 65 (2009).

and powerful possible answer to this letter. When Lyndon Johnson signed the law, Dr. King was standing behind him.⁶⁶

IV. THE POWER OF LOVE?

The power of social movements, like the ones of Dr. King's era, are unquestionably of great significance in efforts that eventually lead to structural legislative legal change. Social scientists have long examined the power associated with having individuals to frame goals in terms of an ecosystem (in which people focus on their connection to others) rather than in terms of an egosystem (in which people focus on their own desires or needs)' which can reduce identity threat and lead to engagement as well as more positive emotions toward others, such as feelings of love, compassion, and empathy.⁶⁷ Indeed, social movements may offer the rights claimant two other forms of emotional inducement or sustenance. First, it offers her an opportunity to ameliorate or satisfy some of her responsive emotions through the vehicle of protest itself. Different strategies of protest may draw participants by appealing to their own affective tendencies or emotion cultures, or creating new emotion cultures that support particular forms of response. Strategies of civil disobedience may appeal to the dignity and self-respect of prospective participants, or to the steadfast commitment with which they approach a challenge.⁶⁸

Social scientists have noted that another way that social movements respond to the emotions of their prospective participants is to facilitate connections with others who have experienced similar affronts or losses. Suffering an injury or a wrong, as noted above, may give rise to feelings of isolation, disaffection, and vulnerability.⁶⁹ En-

66. Paul Finkelman, *The Long Road to Dignity: The Wrong of Segregation and What the Civil Rights Act of 1964 Had to Change*, 74 LA. L. REV. 1039, 1093 (2014).

67. See, e.g., Martin N. Davidson & Erika Hayes James, *The Engines of Positive Relationships Across Difference: Conflict and Learning*, in EXPLORING POSITIVE RELATIONSHIPS AT WORK: BUILDING A THEORETICAL AND RESEARCH FOUNDATION 137, 145 (Jane E. Dutton & Belle Rose Ragins eds., 2007); Sophie Trawalter, Jennifer A. Richeson & J. Nicole Shelton, *Predicting Behavior During Interracial Interactions: A Stress and Coping Approach*, 13 Personality & Soc. Psychol. Rev. 243, 252 (2009); see also Jennifer Crocker & Julia A. Garcia, Downward and Upward Spirals in Intergroup Interactions: The Role of Egosystem and Ecosystem Goals, in *Handbook of Prejudice, Stereotyping and Discrimination* 229, 234 (describing behavior in response to racial emotion as "fight-or-flight" response). There is surprisingly little research in the field of social psychology that focuses on antagonistic behavior in response to negative racial emotion, compared to research on avoidance.

68. Kathryn Abrams, *Emotions in the Mobilization of Rights*, 46 HARV. C.R.-C.L. L. REV. 551 (2011).

69. *Id.*

countering others who have experienced similar violations may provide a salve to such feelings. It mitigates the sense that one is alone and brings the resources of others to bear on the shared losses. Affection for, or trust in, others can affect the decision to raise a collective claim. These affective connections not only make it easier to see common patterns of injury or causation; they also can fuel the courage and resolve necessary to confront those who may be responsible or to persist during difficult times. During Argentina's Dirty War, mothers of the "disappeared" began holding vigils in the Plaza de Mayo in Buenos Aires, voicing the simple demand that the government tell them what had happened to their children. The bonds of shared experience, trust, and ultimately love that emerged among these women led them to turn what was initially a spontaneous gathering into an ongoing practice that became the center of a nationwide protest movement. Respect for, or trust in, a leader may fuel rights claiming within a social movement, as mobilizations led by Martin Luther King Jr., Cesar Chavez, and other strong movement leaders demonstrate.⁷⁰

But the emotional work performed by social movements is not limited to their members. Social movements accomplish much of their moral and political work through recourse to the emotions of their target audiences. Many movement strategies compel the attention of their public or institutional audiences not simply through their cognitive claims but through their expression, or performance, of particular emotions; and they produce change by eliciting particular emotions in those outside the group. Change in the emotion norms of stigmatized groups or the broader society can be a direct goal of social movements: replacing sexual shame with pride for gays and lesbians was one such goal; legitimating feelings of anger and frustration on the part of women during the second-wave feminist movement was another. More often, however, emotions are deployed as an instrument to achieve a substantive goal that is not primarily effective.

It appears such thinking is beginning to have impact on at least some legal scholars. Though still in the minority, such thinkers have grown to appreciate the power of love and its ability to engender empathy. As one recently observed:

Essentially, we develop a desire - as opposed to a capacity - to act justly, i.e., from the standpoint of justice, because we've been treated kindly in the past. We love our parents because they love us, and treat

70. *Id.*

us accordingly. We come to like, if not love, our colleagues because they like us, and treat us accordingly. And so it is with the sense of justice, properly speaking: "We develop a desire to apply and to act upon the principles of justice [i.e., a sense of justice] once we realize how social arrangements answering to them have promoted our good and that of those with whom we are affiliated," i.e., our family and our "associates."⁷¹

In his work on Justice, Markus Dubber also appreciated the importance of Hegel's writings concerning love and empathy. Dubber observes:

Hegel too can be seen as clarifying the moral significance of that point of identification which gives rise to the sense of justice as a mediated form of empathy. He also pointed out that we speak of a sense, rather than a sensation, of justice or of selfFalse Now, Hegel saw that a person evaluating an offender's moral desert or contemplating fundamental questions about the institutions of justice and their effect on herself and others cannot see herself in another's particular characteristics without first recognizing that she already shares at least one basic characteristic with that person. It is the acknowledgment of this identity, however formal, that permits the onlooker to engage in the sort of empathic thought experiment that is required for a full assessment of desert or a considered judgment on issues of institutional justice. That basic characteristic, that point of identification, was their shared personhood. This most abstract equality remains as the background condition governing all interactions between individuals in modern society. No matter what other identities they acquire, as members of families or of other substantive communities, they will always remain identical in their personhood.

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The theory of justice thus does no more than work out the place for this moral point of view, from which all persons are considered as such, in a complex society of multiple communities. And the commitment to justice is nothing more than the commitment to always also - not always only - regard everyone as a person, no matter what else she might be or try to be. . . . And here too we find the legitimacy of the process, in this case of defining rather than applying norms, derive itself from both direct participation and indirect, vicarious, self-judg-

71. Markus Dirk Dubber, *Making Sense of the Sense of Justice*, 53 *BUFF. L. REV.* 815, 836-37 (2005).

ment. The representatives re-present their constituents, they decide as if they were their constituents, through empathy from the standpoint of justice; the representatives decide as the represented would decide if they were to exercise their capacity for a sense of justice, rather than to pursue their personal advantage.⁷²

V. ALL YOU NEED IS LOVE?⁷³

In essence, to answer a question posed above, yes, love is the answer—both to the question concerning whether legal analysis should include discourse and reasoning associated with legal reasoning, and love is the answer to those well-intended critics of whether Title VII achieved its intended goals. Dr. Martin Luther King, Jr., and other social activists, then and now, surely understand, or should understand the power of engendering empathy in their causes. When legal thinkers recognize the power, effectiveness, and ongoing nature of such efforts, perhaps law and legal analysis were become a more fluid and less static arena.⁷⁴ Title VII is perhaps one of our great testaments to such powers, and is one of our ongoing steps to become a just and equality-centered land. We should all be thankful that love was and still is the answer.⁷⁵

72. *Id.* at 827–29.

73. It has indeed been fun to separate the sections of this essay with popular songs with titles concerning love, which were quite appropriate for each section. Any readers that name the performers and era for each song will surely impress this author.

74. The motivations to write this law review essay, my first in nearly a decade (in part because my writing efforts have recently focused on books and op-eds), was because of my respect for the monumental attempt to eradicate discrimination through the 1964 Civil Rights Act, my appreciation, as well as the honor I hold for Howard University and its mission, and finally, the rare opportunity for me to pay my respects to my hero and inspiration, Dr. Rev. Martin Luther King. Perhaps yet another motivation here is my effort to give support to the too often devalued aspects of the cultures of many people of color in this land. It is my view that unlike many of our Anglo brothers and sisters, we tend not to scorn or express disdain for the use of emotions. Indeed, we are often accused of showing them too often. I have often found such critiques more than a bit bewildering, for it is my emotions and passions I embrace in not only my journey in faith and my related studies in martial arts, but more importantly, I often dig deep to find my passion when I write on social justice issues in my effort to engage in a realm that too often devalues both my intellect and my considerable scholarly contributions. Such consequences do not deter me, for my intellect, pride in my culture, and my reverence for the emotions that inspire my efforts keep me strong, and dare I say, incredibly productive. So I say, up with love, and its never-ending and transformative power!

75. As I often tell my children and all those that will listen, love is the world's greatest power.

